TAMILNADU NATIONAL LAW SCHOOL

TIRUCHIRAPPALLI – 620 009

FIRST YEAR – SECOND SEMESTER
B.A. LL.B. (Hons.) DEGREE COURSE
POLITICAL SCIENCE II
(Political Obligation)

Reading material

Academic year: 2020 - 2021

Course Faculty: Dr. S. Subba Rao

POLITICAL SCIENCE - II
(Political Obligations)

Unit -I

Introduction to Political obligation–Meaning, nature and scope of Political Obligation. Theories of Political Obligation: Voluntarist Theories – Political Obligation and Social Contract (Hobbes, Locke and Rousseau) – Political Obligation and Consent – Nature and Extent of Consent – Idealistic Theory of Political Obligation. Teleological Theories – Utilitarian Theory and Marxian Theory of Political Obligation. Deontological Theories – Fair-play and Political Obligation – Natural Duty and Political Obligation. Anarchist Theory of Political Obligation.

Unit-II

Kinds of Obligations. Evolution of the Concept of Political Obligation. Philosophical Foundations of Political Obligation – T.H. Green on Political Obligation – Moral or Ethical Foundations of Political Obligation – Ancient Indian Ideas and Institutions on Political Obligation.

Unit-III

Dimensions of Political obligations in a modern State– Political obligation and family– Political obligation and identity– Membership and political obligation. Legal and Political obligations – Nature and extent of the Authority in a State and Political Obligation – History and Theory of Justice –Joseph Raz.

Unit–IV

Constitution of India and the nature of Political obligation under the Constitution – Upendra Baxi on Crisis in the Indian Legal system – Dilution of Political obligation– Impact of such dilution of Political obligation. D.D. Raphael and T. H. Green on Political Obligation

Unit -V

Political obligation and the right to dissent – legal and moral issues– legal and social issues – social and political issues –Right to disobey the law – D.H. Thoreau – Gandhian Principles–Edmund Burke. Political Obligation and Revolution – Role of State in balancing political obligations– Role of international society in political obligation of a State.

Books

1. John Horton, Political Obligation, MacMillan, London, 1992.
2. Margaret Gilbert, A Theory of Political obligation; Membership, Commitment and the Bonds of Society, Clarendon Press, Oxford, London, 2006
3. D.D. Raphael and T. H. Green on Political Obligation, 2008
4. Joseph Raz – Authority of Law
5. Ernest Barker, Principles of Social and Political Theory, Surjit Publications, NewDelhi, 2005.
6. George Sabine, History of Political Theory, Oxford IBH Publishers, New Delhi, 1973
7. L.S.Rathore and Haqqui, Political Theory and Organization, EBC, Lucknow, 1988 (reprint 2006)
8. R.E.Goodin (Editor) The Oxford Hand book of Political Thought, Oxford University Press, 2008.

****

What Is Political Obligation?*

RICHARD K. DAGGER
Arizona State University

It is sometimes said that the problem of political obligation is the fundamental or central problem of political philosophy. This may or may not be true: it depends on what we take "political obligation" and "political philosophy" to mean. Questions concerning obligation are, of course, important to political philosophers and citizens alike. But beyond this we find neither a consensus on how the problem of political obligation is to be solved nor even an agreement that it can be solved.[1] Indeed, one writer has recently gone so far as to suggest that we can do without the very concept of political obligation.[2]

This proposal is certainly extreme, but such suggestions are to be expected when important problems are clouded by conceptual confusion. I hope in this essay to dispel some of this confusion. Unlike those who would dissolve the problem of political obligation by abandoning the concept, I propose to examine the concept to see if the problem is properly stated. I shall advance two theses: (1) the problem of political obligation is fundamentally misconceived when it is (taken to be) expressed by the familiar question, "Why should I obey the law?"; and (2) the problem of political obligation can be solved in principle, although this solution holds no immediate promise of eliminating our theoretical and practical difficulties.

What I shall offer, then, is less a theory of political obligation than a preface to such a theory. Since "political obligation" is a compound of two distinct concepts, I shall begin by looking at "obligation." This alone should suffice to show that the question "Why should I obey the law?" is an improper statement of the problem of political obligation; the implications of this demonstration may not be evident, however, until we examine "*political* obligation."

The Concept of Obligation

If we are to understand what "obligation" means, we must see how the word is used in ordinary language. A catalogue of uses, though, will not serve the purpose, for the propriety of certain uses is a matter of controversy. In what follows, therefore, I argue for a restricted conception of obligation on the grounds that such a conception preserves important distinctions which wider conceptions of obligation destroy. These distinctions, or conceptual relationships, provide both the foci for my explication and a pair of questions which must be answered by anyone hoping to come to terms with the concept of obligation. The questions are (1) what is the relationship between "obligation" and "ought"? and (2) how is obligation related to coercion?

(1) *"Obligation" and "ought."* There is a tendency, especially noticeable in philosophical discourse, to treat certain uses of "obligation" and "ought" as interchangeable. This is most clearly the case in statements which address moral considerations, where one may find, for example, claims that we have an obligation to contribute to charity, to aid those in distress, and so forth. "Obligation" here supplants "ought" in an attempt to strengthen the imperative—to say that "one ought to be charitable" seems to leave matters open in a way which "one has an obligation to be charitable" does not. For this reason, "obligation" has often been regarded as the principal subject of moral philosophy, much as it has been considered the central concern of political philosophy.

*I am indebted to Terence Ball and Rolf Sartorius for their encouragement and for their comments on drafts of this essay.

[1] See Margaret Macdonald, "The Language of Political Theory," in *Logic and Language*, ed. A. G. N. Flew (Garden City, N.Y.: Doubleday, 1965); Thomas McPherson, *Political Obligation* (London: Routledge & Kegan Paul, 1967); H. A. Prichard, "Green: Political Obligation," in Prichard's *Moral Obligation*, ed. J. O. Urmson (Oxford: Oxford University Press, 1968); and T. D. Weldon, *The Vocabulary of Politics* (London: Penguin, 1953) for the argument that the problem of political obligation is impossible to solve because there can be no general theory of political obligation. For a defense of the "traditional" position, see Carole Pateman, "Political Obligation and Conceptual Analysis," *Political Studies*, 21 (June, 1973), 199–218.

[2] This is McPherson's judgment. He says (*Political Obligation*, pp. 84–85) that "we may well feel justified in dispensing with the concept of political obligation" for this reason: "it is so general a notion as to do little or no useful work, and if interpreted in terms specific enough to be useful it is . . . no longer the satisfyingly general thing that [theorists] wanted in the first place."

1

3

In recent years, however, several philosophers have argued that such usage overextends "obligation" by conflating it with "ought."[3] The arguments vary, but the main objection to the extended use of "obligation" is simply that the two concepts have different functions—this, after all, is why we have two concepts rather than one. As Joel Feinberg points out, one of the tasks of "ought" is "to prescribe or give advice. When the word 'ought' occurs in a sentence which gives advice, we can call it the 'ought of final judgment, all things considered.' "[4] But "obligation," which has functions of its own, is not prescriptive in this sense: "If I tell you what your obligations are, I do not necessarily give you advice of any kind; I simply report that you stand in certain relations to other people, relations of commitment and trust."[5]

An example may help to clarify this distinction. Consider the following propositions:

(a) Jones has an obligation to pay Smith $5.
(b) Jones ought to pay Smith $5.

Let us assume that Jones is not disposed to accept these claims. In the case of (a), Jones may respond in two ways: he may deny the existence of the obligation; or he may admit to the obligation but hold that he ought not discharge it. This second response is legitimate even if one believes that *ceteris paribus* we ought to fulfill our obligations, for the ought, as Feinberg says, is "the 'ought of final judgment, all things considered.' " *Advising* Jones of his obligation does not necessarily involve *advising* him to *do* or forbear from doing anything. This is not true of (b). Jones may respond to (b) by asking, "But ought I *really* give Smith $5?", of course, but this questions the soundness of the advice (on either moral or prudential grounds), not the fact that advice has been given.

The core of the distinction between "obligation" and "ought" is to be found in the grounds for accepting or rejecting obligation and ought claims. The fact that there are different grounds for each concept underscores the importance of resisting the temptation to conflate them. In the case of obligation, two conditions must be met in order to warrant an obligation claim. First, when someone confronted with such a claim demands to know why he is obligated, we point to some "previous committing action" of his.[6] This is what happens, for instance, when we say, "You have an obligation to pay Smith $5 because you promised to do so." To show *why* or *that* someone has an obligation, we show *how* he came to have it. Not all instances of previous committing action are as unproblematical as promises, certainly, but the point remains: one becomes obligated by committing himself to pursue or to desist from pursuing a course of action. This is borne out by the way we speak about our obligations: we "undertake," "assume," "acquire," and "incur" them, on the one hand, and "meet," "fulfill," and "discharge" them, on the other.

The second condition which obligation claims must meet has to do with a second party. "Obligation" is a relational concept, and the party under the obligation is always obligated to someone or some group. Consequently, whenever we charge someone with having an obligation, we must be able to answer the question, "An obligation *to whom?*" This is clearly true of such obligating devices as contracts, promises, marriage vows, etc. One who has an obligation *owes* something or is *indebted* to another party. We justify obligation claims, then, by demonstrating that (1) x has committed himself to do or forbear from doing something and that (2) he has committed himself to y.

Ought claims, however, may be warranted without an appeal to either of these features of obligations. This is true whether the claim is moral—"You ought to be honest"—or prudential—"You ought to eat your spinach." In neither of these cases do we require either a previous committing action—"What have I done that makes you think that I ought to be honest (or eat my spinach)?"—or a second party—"With whom ought I be honest? To whom do I owe it to eat my spinach?" Instead, ought

[3] See H. L. A. Hart, "Are There any Natural Rights?", *Philosophical Review*, 64 (April, 1955), and "Legal and Moral Obligation," in *Essays in Moral Philosophy*, ed. A. I. Melden (Seattle: University of Washington Press, 1958); also Joel Feinberg, "Supererogation and Rules," *Ethics*, 71 (July, 1961), 276–288; David Gauthier, *Practical Reasoning* (Oxford: Oxford University Press, 1963), chap. 12; E. J. Lemmon, "Moral Dilemmas," *Philosophical Review*, 71 (April, 1962), 139-158; and Rolf Sartorius, "Utilitarianism and Obligation," *Journal of Philosophy*, 66 (February, 1969), 67–81. An extended use of "obligation" is defended by R. B. Brandt, "The Concepts of Obligation and Duty," *Mind*, 73 (1964), 374–393, and Kurt Baier, "Moral Obligation," *American Philosophical Quarterly*, 3 (July, 1966), 210-226.

[4] Feinberg, "Supererogation and Rules," p. 278.

[5] *Ibid.*, p. 278. This does not mean that "obligation" is in no sense prescriptive; it is consistent with the belief that *ceteris paribus* one ought to fulfill one's obligations. For an analysis of "political obligation" which regards obligation as a "conduct-guiding" concept, see Richard Flathman, *Political Obligation* (New York: Atheneum, 1972), esp. pp. 29–30 and 34.

[6] The phrase is E. J. Lemmon's in "Moral Dilemmas," p. 141.

claims are justified by an appeal to principles or desires or consequences. I ought to be honest because it is simply right to tell the truth or because better consequences follow from honesty than from dishonesty? I ought to eat my spinach because it is good for me, because it is in my interest to do so. Here again the testimony of language indicates the distinction between "obligation" and "ought": We are obligated to do *a* because we "incurred," "undertook," etc., the obligation, but we ought to do (or refrain from doing) *b* because it is "right" (or "wrong") or "good" (or "bad") to do so. To justify an obligation claim we point to a *commitment;* to justify an ought claim we refer to the *content* of the claim.[7]

This position on the relationship of "obligation" and "ought," I should note, is not uncontested. R. B. Brandt, for one, has argued that "obligation" may be used correctly even where there has been neither a previous committing action nor a second party to whom the obligation is owed.[8] Brandt distinguishes a "paradigm" from an "extended" use of "obligation." The "paradigm" use—when "there is no better word for the occasion and there are no better occasions for the word"[9]—corresponds with the account of obligation I have set out. The "extended" use, which involves what I have called the conflation of "obligation" and "ought," is exemplified in such statements as, " 'Jane Addams thought that people are *under an obligation* to affirm their own vision [sic] of truth' " and " 'students are *morally obligated* to report infractions of college rules which they observe'."[10] Since the "extended" use of "obligation" is intelligible, Brandt reasons, the question is, "What must we strike from the paradigm use of 'obligation' in order to arrive at elements common to correct uses?"[11] Brandt's answer is that the two features which I have maintained are essential to "obligation" must be eliminated: "First, we must strike out the notion that obligation is an obligation *to* someone. . . . Second, we must strike out the idea that the bond derives from some prior act or event, such as an agreement or the acceptance of a benefaction."[12]

Brandt's reasons for "striking out" these features are remarkably weak. He dismisses the requirement that obligation is an obligation *to someone* by producing the following examples where "it seems hardly sensible to attempt to identify any individual to whom obligation is owed":

> Citizens have an obligation to observe the laws of their country;
>
> Citizens in a democratic country have an obligation to vote;
>
> Mentally gifted people are under an obligation to develop their capacities.[13]

Similarly, his justification for denying the need for a previous committing action is that "the obligations to give help to one in dire need or to make some contribution to charitable enterprises are sufficient reason for elimination of this restriction."[14] But these examples are not enough to establish Brandt's position. No one disputes that these are intelligible and not altogether uncommon uses of "obligation"; the question is whether these are appropriate uses of the word. To use "obligation" when "ought" is called for is inappropriate precisely because it leads to confusion in two areas: confusion about what is being claimed, on one hand, and about what needs to be done to warrant that claim, on the other. Brandt himself acknowledges this—but fails to recognize its significance—when he says that the "extended" use of "obligation" is "harmful only in blurring our sense of how language is ordinarily used."[15]

"Obligation" and "ought" are certainly closely related concepts; but the relationship will become insignificant if their separate identities are not preserved. The fact that I am under an obligation to do *a* is a reason for saying that I ought to do *a*, but the converse is not true. The "ought of final judgment" may override an obligation, but again the converse does not hold: there is no such thing as an "obligation of final judgment." When we ask, "What am I obligated to do?" we are not also asking, "What is it that I ought to do?" The two concepts have different functions, and the "extended" use of "obligation" only confuses what is already complex.

(2) *Obligation and coercion.* In his essay on "Legal and Moral Obligation," H. L. A. Hart

[7] This distinction is drawn from Hart, "Legal and Moral Obligation," p. 100 ff. "Promises," Hart says, "have pre-eminently the feature I have called independence of content: the obligation springs not from the nature of the promised action but from the use of the procedure by the appropriate person in the appropriate circumstances" (p. 102).

[8] "The Concepts of Obligation and Duty."

[9] *Ibid.*, p. 385.

[10] *Ibid.*, p. 376 (emphasis in the original).

[11] *Ibid.*, p. 390.

[12] *Ibid.*, p. 390 (emphasis in the original).

[13] *Ibid.*, p. 379. It should be noted that even in these cases we can still point to someone or some group to whom the obligation may be owed—e.g., "Citizens are obligated to their fellow citizens to pay taxes."

[14] *Ibid.*, p. 390.

[15] *Ibid.*, p. 391.

identifies the following as features of obligation: "(1) dependence on the actual practice of a social group, (2) possible independence of content, and (3) coercion."[16] The first two features have to do with previous committing action. The second, as I have already noted, deals with the commitment/content distinction, while the first is concerned with specifying what is to count as a committing action. The third feature, however, introduces another kind of problem, that of the connection between obligation and coercion.

Hart points out that whenever we fail to meet our obligations we are subject to certain pressures or sanctions. If I fail to pay my income tax, for example, I may be fined or jailed; if I break a promise, I expose myself to a variety of moral pressures—censure, ostracism, etc. Not all cases of failed obligation result in such pressure being brought to bear, of course, but the invocation of sanctions is always possible in these circumstances.

This connection between obligation and coercion has been the source of a good deal of confusion in legal and political philosophy. "If we have an obligation to do something," as Hart says, "there is some sense in which we are bound to do it, and where we are bound there is some sense in which we are compelled to do it."[17] The question is, how, or in what sense, are we bound? Some writers—notably Hobbes and Austin (as Hart demonstrates)[18]—have failed to distinguish between different senses of being bound and have argued, as a result, that obligation originates in coercion. They have taken the relationship of obligation to coercion, in other words, to mean that we are obligated because we are bound and not that we are bound because we are obligated.

The extremity of this position is apparent when we consider that from this perspective, keeping a promise and paying ransom to a kidnapper are equally obligatory actions. What happens here, as Hart has shown, is that the notions of "having an obligation" and "being obliged" are conflated.[19] If I am accosted by a gunman, to borrow Hart's example, I may *be obliged* to hand my money over to him, but I surely do not *have an obligation* to do so. The difference between the two concepts becomes even clearer when we look at another situation. Smith, my creditor, may threaten to take legal action against me if I do not pay him promptly. In this case I may *be obliged* to pay Smith, but I am only *obliged* because I *have an obligation* to pay him: the sanction can be invoked only because the obligation exists to validate it. But when obligation is reduced to coercion, the distinction between gunmen and creditors vanishes.

The connection between obligation and coercion can best be understood by observing when the possibility of coercion can and does arise in disputes concerning our obligations. We do not attempt to coerce those who fulfill their obligations to us—there is no reason to do so. The prospect of coercion is only invoked when someone fails or gives evidence of failing to discharge, or even recognize, an obligation; and in many of these instances there is no actual coercion because excuses are offered and accepted. Coercion is justified,[20] however, when the obligated party simply refuses to acknowledge his obligation, as the following dialogue illustrates:

> Jones: Why should I give you $5?
> Smith: Why? Because you borrowed $5 from me and promised to pay me back.
> Jones: So? Why should I keep my promise?
> Smith: Because a promise is a promise! And if you don't give me my money I'll tell everybody that you can't be trusted!

Coercion, as related to obligation, is a response to one whose abuse threatens the practices through which we undertake obligations and conduct our lives. The existence of a promise is, *ceteris paribus*, sufficient reason for keeping the promise. One who does not acknowledge this and who seeks to use the institution of promising to his own advantage makes himself liable to coercion. Coercion acts to guarantee, so to speak, that those who would voluntarily fulfill their obligations are not sacrificed to those who would not.[21] Obligation is secured by coercion, but it is not rooted in it.

[16] Hart, "Legal and Moral Obligation," p. 100.

[17] *Ibid.*, p. 95.

[18] *Ibid.*, pp. 95–99. See also Hart's extended critique of the "coercive theory of law" in *The Concept of Law* (Oxford: Oxford University Press, 1961), esp. chaps. 2 and 4 and pp.79–89. I am "much obliged" to Hart for what follows.

[19] *Ibid.*, p. 96, and *The Concept of Law*, pp.79–89; also Gauthier, *Practical Reasoning*, pp. 174-176.

[20] I am not suggesting that all forms and all degrees of coercion are always justified. The sanction must fit the abuse, as it were.

[21] This borrows from Hart, who (in a slightly different context) says: " 'Sanctions' are . . . required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system." *The Concept of Law*, p. 193 (emphasis in original).

The concept of obligation, then, involves these elements: a commitment to someone (or some group) to do (or not do) something which one may justifiably be coerced into doing or punished for failing to do. "Obligation" is not coextensive with "ought"; and obligations are supported by, but not derived from, the threat of coercion. With this understanding of "obligation" it becomes evident that the question which supposedly expresses the problem of political obligation, "Why should I obey the law?", is not at all a proper statement of the problem. This is because the question is put in terms of "ought" rather than "obligation." In turn, this means that "Why should I obey the law?" fails to come to grips with obligation in two different ways. First, it may be that I am *obligated* to obey the law even though, all things considered, I *ought* to disobey it. The fact that I have in some way committed myself to obedience may not, in a particular case, constitute a (morally) sufficient reason to obey. Second, "Why should I obey the law?" may be answered with considerations of expediency or prudence. Thus some have argued that we ought to obey the law because we will benefit by doing so or we will suffer if we do not. This is an entirely reasonable answer; but this is also the reason for rejecting "Why should I obey the law?": the question can be answered in terms which fail to justify obligation claims.

What we need to do is to recognize two distinct kinds of questions: questions of political obligation, on the one hand—"Am I obligated to obey the law?"—and more general, and perhaps more important, questions of political obedience, on the other—"Why should I obey the law?"[22]

The Problem of Political Obligation

My second thesis is that the problem of political obligation can be solved—at least in principle. This has been an article of faith with many political philosophers, but in the years since World War II it has become the subject of dispute. Several commentators, in fact, have dismissed the problem of political obligation as a pseudo-problem which cannot be solved and need not be posed in the first place. Since those who hold this view explicitly deny my second thesis, it seems appropriate to turn to an examination of their position.

According to those who would dissolve the problem of political obligation, political obligation is best understood as what has come to be called an institutional obligation, i.e., an obligation which is presupposed by the rules of an institution and incurred by those who participate in its practices. Anyone, then, who participates in the practices of a political society incurs an obligation to obey the laws of that society, just as anyone who joins in a game of basketball undertakes an obligation to obey the rules of the game.

The chief significance of this institutional model for the present discussion is that it tends to moot the question of obedience. Hans Kelsen, for instance, deals with "Why should I obey the law?" in this fashion:

> We ought to obey the decisions of a judge or administrator, ultimately, because we ought to obey the constitution. If we ask why we ought to obey the norms of the existing constitution, we may be referred to an older constitution that has been replaced in a constitutional way by the existing constitution; and in this way we arrive finally at the historically first constitution. To the question why we ought to obey its provisions a science of positive law can only answer: the norm that we ought to obey the provisions of the historically first constitution *must be presupposed as a hypothesis if* the coercive order established on its basis and actually obeyed and applied by those whose behavior it regulates is to be considered as a valid order binding upon these individuals; *if* the relations among these individuals are to be interpreted as legal duties, legal rights, and legal responsibilities, and not as mere power relations; and *if* it shall be possible to distinguish between what is legally right and legally wrong and especially between legitimate and illegitimate use of force. This is the basic norm of a positive legal order, the ultimate reason for its validity. . . .[23]

Kelsen's argument amounts to something like this: "If we want a legal system, with the safeguards and advantages law provides, we must realize that we will have to pay a certain price. And that price is that we must consider ourselves obligated to obey the law." In this fashion the "basic norm" presupposes an obligation to obey the law as the *conditio sine qua non* of legal systems.

Kelsen's position is similar to that taken by T. D. Weldon in *The Vocabulary of Politics.* Weldon answers "Why should I obey the law?" in this manner:

[22]There are other objections to "Why should I obey the law?" which remain, I take it, even if we consider this to be a question of obedience rather than obligation—e.g., the single question hides a cluster of distinct questions. See Hanna Pitkin's valuable essay "Obligation and Consent–I," *American Political Science Review,* 59 (December, 1965), 990–999, esp. p. 990–991.

[23]Hans Kelsen, "Why Should the Law be Obeyed?" in his *What Is Justice?* (Berkeley and Los Angeles: University of California Press, 1960), p. 262 (emphasis added).

> Suppose . . . the objector goes on to say "Even if it is the law, I don't see why I should obey it." The only further comment possible is "Well, this is Great Britain, isn't it?"
>
> The position is exactly parallel to that of the cricketer who asks "Why should I obey the umpire? What right has he to give me out?" One can answer only by expounding the rules of cricket, the position of the M.C.C., and so on. Beyond that there is nothing to be done except to say "This is a game of cricket, isn't it?"[24]

Like the obligation to obey the rules of cricket, the obligation to obey the law is presupposed by the rules of the game. And there is some sense to this notion—after all, why play a game if one does not intend to follow the rules? Indeed, it may be said that one who fails to follow the rules does not even play the game.

The advantages of the institutional (or game) model are clear. The model allows us to trace the obligation to a committing action, i.e., the act (or acts) of participating in the practices of the institution. It also provides an answer to the question, to whom is the political obligation owed? The obligation is owed to the other players, i.e., to one's fellow citizens. Thus, as one commentator puts it, "the game philosopher has found a way of relating political obligation to the individual's role as a citizen-subject rather than leaving it hanging as an external, accidental feature, say, of his birth."[25]

But there is also a crucial disadvantage. From the point of view of the game model it is senseless to ask either "Why should I obey the law?" or "Am I obligated to obey the law?" This tendency to deny that there can be any kind of general answer to the questions of obedience and obligation is best exemplified by Margaret Macdonald. In "The Language of Political Theory" Macdonald declares that "to ask why I should obey any laws is to ask whether there might be a political society without political obligations, which is absurd. For we mean by political society, groups of people organized according to rules enforced by some of their number."[26] Macdonald, like Kelsen and Weldon, takes the obligatory nature of laws for granted. A political society consists of groups of individuals living together according to rules; this is what "political society" *means*. It is therefore absurd to ask for a general justification of the obligation to obey the law. Our attention is better directed to particular questions of obedience and obligation—"Am I obligated to obey *this* law in *these* circumstances?"—and not to general questions which cannot be answered.

But Macdonald and others who accept the institutional model dismiss the general question of political obligation too hastily. I say this for two reasons. First, contrary to what Weldon says, the position of one who questions his obligation to obey the law is not "exactly parallel" to that of one who questions his obligation to follow the rules of the game. While it is sometimes helpful to look upon political life as a game, the analogy must not be taken too far. When we play games we participate voluntarily; we accept and undertake an obligation to obey the rules. But in most cases we do not choose to participate in a political society or legal system—this is usually a matter of the accident of birth.[27] Therefore, if we do have an obligation to obey the laws of the political society into which we are born, this obligation cannot be accounted for by the game analogy alone.

The second reason is that the institutional model attaches far too much significance to the conceptual link between "obligation" and "political society." There is a bit of sleight-of-hand in the arguments of Macdonald and in those of Thomas McPherson, who claims that

> any general question of the form "Why should we accept obligations?" is misconceived. "Why should I (a member) accept the rules of the club?" is an absurd question. Accepting the rules is part of what it *means* to be a member. Similarly, "Why should I obey the government?" is an absurd question. We have not understood what it *means* to be a member of political society if we suppose that political obligation is something that we might not have had and that therefore needs to be justified.[28]

Macdonald and McPherson may well be correct in arguing that anyone who belongs to a political society is necessarily obligated to obey

[24] T. D. Weldon, *The Vocabulary of Politics*, p. 57. I owe this reference to Alan Gewirth, "Obligation: Political, Legal, Moral," in *Nomos XII: Political and Legal Obligation*, ed. J. Roland Pennock and John Chapman (New York: Atherton Press, 1970).

[25] John Ladd, "Legal and Moral Obligation," in Pennock and Chapman, pp. 21-22.

[26] Macdonald, "The Language of Political Theory," p. 192.

[27] Weldon disputes the significance of this point. "It is argued," he says, "that if I do not like my cricket club or my trade union or even my Church, I can resign from it and join a different one. But I cannot escape from my State. There seems to me to be very little in this. . . . Resigning from any institution involves some inconvenience. . . . But to say that one cannot escape from one's State is simply untrue. Normally emigration is possible, though it is sometimes so difficult as to be practically out of the question. But there is always suicide, and it is not in these days so very uncommon." *The Vocabulary of Politics*, p. 48.

[28] Thomas McPherson, *Political Obligation*, p. 64.

the laws of that society, but this begs a crucial question: what is a political society? And: how is belonging signified and membership marked? The implication of those who adopt the institutional model is that only the Crusoes are *not* members of political societies. This simply dodges one of the most troublesome issues of political philosophy, *viz.*, the problem of legitimacy. If we recognize the powers-that-be in Xenotania as the legitimate government of Xenotania, then the general questions of obedience and obligation are senseless; but how do we know that their rule is indeed legitimate? The powers-that-be may issue directives and enforce obedience, but this does not distinguish them, as St. Augustine pointed out, from a band of robbers.

Responses to these questions are unlikely to be satisfactory, for political society—like art, religion, science, and democracy—is an *essentially contested concept.*[29] That is, we can neither define the concept in terms of necessary and sufficient criteria nor stipulate a generally acceptable definition. The reason for this is that political society is a concept which *informs* and *constitutes* our action and behavior. "Political society" can be, and is, used in a descriptive sense, but since the use of the concept both affects and reflects what we believe and what we do, the criteria for its use are in dispute. I may consider Xenotania to be a political society, for example, but someone else may consider it to be an unfortunate land ruled by naked coercion; and I may consider myself obligated to obey the laws of Xenotania, while another denies that the dictates of those in power are, properly speaking, *laws* at all.

It is important to notice that the dispute here is not like that between a batter, who judges a pitch to be a ball, and an umpire, who calls it a strike. The batter and umpire accept the same criteria for distinguishing balls from strikes, but they disagree about whether this particular pitch meets the criteria for a strike. In the case of political society, the contest centers directly on the criteria: what are we to take "political society" to mean? The concept is essentially contestable because the debate about when the concept may be properly used is inescapably normative.

When we strip the apparent neutrality from "political society" (or "legal system," or "state," or even "government"), we find that we have returned, in a sense, to the problem of the relationship between obligation and coercion. There are two choices: either we distinguish political societies from societies where naked power reigns or we deny that a member of a political society is necessarily obligated to obey the laws. Otherwise, we are once again in the untenable position of deriving obligation from coercion. Whichever of the two alternatives one accepts, the ultimate question remains the same: what are the characteristics of a regime to which I may be obligated? What remains, in other words, is the general question, "Am I obligated to obey the laws of *this* regime?"

This approach to the problem of political obligation resembles what Hanna Pitkin has called "the doctrine of hypothetical consent." "For a legitimate government," as Pitkin says, "a true authority, one whose subjects are obligated to obey it, emerges as being one to which they *ought to consent*, quite apart from whether they have done so.... Legitimate government is government which *deserves* consent."[30] The mere fact that one's life is governed in important respects by others is not enough to establish an obligation to obey the governors. The government must also be worthy of obedience—it must be a just state. Anyone, therefore, who attempts to develop a theory of political obligation must at the same time present a conception of a just state, and anyone who wishes to develop a theory of justice will also present a conception of a state which ought to be obeyed. This connection between justice, obligation, and obedience is explicit in the work of John Rawls and implicit in that of Hobbes, Locke, Rousseau, Green, and others.[31]

The notion of "hypothetical consent" is not sufficient, however, as a response to the question of political obligation. It may be that we *ought* to obey any government which deserves our consent, but this is *not* to say that we are *obligated* to such a government. To "hypo-

[29]The notion of "essentially contested concepts" is developed by W. B. Gallie, *Philosophy and the Historical Understanding* (New York: Schocken, 1966), chap. 8. See also Alisdair MacIntyre, "The Essential Contestability of Some Social Concepts," *Ethics*, 84 (October, 1973), 1–9.

[30]Pitkin, "Obligation and Consent–I," p. 999 (emphasis in the original).

[31]Peter Singer seems to be working along these lines in *Democracy and Disobedience* (Oxford: Oxford University Press, 1973), where he argues that there are reasons for obeying the laws of democratic states which do not hold for nondemocracies. There are, according to Singer, two reasons for this claim to obedience: "firstly, that one ought to accept a decision-procedure which represented a fair compromise between competing claims to power. 'Accept' here involves both participating in and abiding by the results of the decision-procedure. Secondly, ... that participation in a decision-procedure, when others are participating in good faith, creates a *prima facie* obligation to accept the results of the procedure" (p. 59).

thetical consent" we must also add participation. The reason for adding this requirement is simple but significant. Political obligation and citizenship are correlative: one can only have a *political* obligation to a state of which he is a citizen. There may be numerous political societies which deserve obedience, but we are not politically obligated to all of them. It is also possible, conversely, that someone may be sufficiently displeased with even a just society to leave it; and when one ceases to be a member of a society, when he renounces his citizenship, his political obligation ends as well.[32]

By thus combining the emphasis on participation (from the institutional model) with the "nature of the government" or "hypothetical consent" doctrine, we arrive at the two conditions necessary and jointly sufficient to validate a political obligation claim. We are politically obligated to (obey the laws of) a state when (1) we are citizens of that state and (2) the state deserves our obedience. This means that the question of political obligation, "Am I obligated to obey the laws of this regime?", remains an open question: we must always determine whether the state is deserving of our obedience. There is no social contract which, once signed, obligates us for all time.

A political obligation, on this view, is a systemic obligation; that is, the obligation is not to obey any particular law of the polity, but to obey all its laws. This obligation, of course, is not absolute. It may be that in some circumstances we ought to disobey a law despite our political obligation. Nevertheless, a political obligation provides a *prima facie* reason for obedience which is absent in a state to which we have no political obligation. In this sense political obligations are like promises: if there are no overriding considerations, they ought to be honored.

But what if the situation is turned around? What if the society is not ruled justly? Do we then have no obligation to obey *any* of the commands of the rulers? Or what if the state is just, but we are simply visitors, not citizen-subjects; are we then not obligated to obey *any* laws of the state we are visiting?

This challenge to the conception of political obligation as a systemic obligation reverses the charge often brought against Locke. Locke extends the notion of tacit consent to the point where

> every man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is so far forth obliged to obedience to the laws of that government during such enjoyment as anyone under it; whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on a highway; and in effect it reaches as far as the very being of any one within the territories of that government.[33]

One of the problems with this argument is that Locke leaps from an obligation to obey particular laws to a general obligation to obey all the laws of a country—as if one could be obligated to perform *all* actions of a certain class *because* he is obligated to perform *some* actions of that class. But does this mean that, on the other hand, we can have no obligations to obey particular laws unless we have a general political obligation? Do we, as one philosopher has said,

> want to say that a system like that of Nazi Germany, since obviously immoral, was therefore not a legal system? It is hard to see any temptations in such a view. For this would entail such absurdities as that no binding contracts were ever made in Nazi Germany, that all children born under Nazi "marriages" are bastards, and so forth.[34]

A brief examination shows that this argument does not hold. If we grant that Nazi Germany was an unjust regime, then, given my conception of political obligation, the Germans under the Nazi regime had no political obligation. This does *not* entail, however, that they were never obligated to obey *any* "laws" enforced by that regime. As long as two parties willingly entered into a contract, that contract was binding. Similarly, anyone today who drives a car undertakes an obligation to obey the traffic regulations no matter what the character of the regime which enforces those regulations. The point is that there are some rules which we are obligated to obey because we have undertaken the obligation, as we do when we sign a contract. These are what Hart calls "power conferring" rules. Laws of this sort empower private persons to do certain things, but, unlike "duty imposing" laws, they do not require performance.[35] The laws governing marriage, for instance, do not require us to

[32] One remains liable, of course, for obligations incurred before he renounced his citizenship; so that if one has a political obligation to a state which requires an income tax, he may not legitimately avoid payment by renouncing his citizenship just before the tax is due.

[33] *The Second Treatise of Government*, ed. J. W. Gough (Oxford: Blackwell's, 1966), § 119, p. 61.

[34] Jeffrie Murphy, "Allegiance and Lawful Government," *Ethics*, 79 (October, 1968), 56–69, at 57. This quotation is somewhat out of context—Murphy is arguing against natural law theorists who claim that a legal system cannot be immoral—but I think it fits the present discussion well enough.

[35] *The Concept of Law*, pp. 26–48.

marry, they simply confer the power to do so. Those living in Nazi Germany, therefore, may have had neither a political obligation nor specific obligations to serve in the army or pay taxes, but there certainly were occasions on which they were obligated to obey the law. Unless there are extraordinary circumstances, the immorality of a regime does not justify, for example, reckless driving. We may be *legally* obligated, in other words, even when we are not *politically* obligated.

Conclusion

The problem of political obligation can be solved. If I am a citizen of a just state, then I have a political obligation to—and a reason for obeying the laws of—that state. But this is a modest solution, one that is hardly likely to resolve all the practical and theoretical difficulties usually associated with the notion of political obligation. To determine that one has a political obligation, in the first place, is to provide a reason for obeying the laws of the state; but it is not necessarily a conclusive reason. If I satisfy myself that I am (not) *obligated* to obey the law, I may still have to satisfy myself that I *ought* (not) to obey the law.

This solution, moreover, is purely formal. Before it can serve as a guide to action, it must be given content: conceptions of citizenship and just state must be supplied. This means, in turn, that it is necessary either to develop a full political theory or to work within the framework of an elaborated tradition of political discourse.[36] In the end, therefore, the solution does not guarantee that there is only one correct answer in any particular situation in which the question of political obligation arises.

This is not to say that the distinctions I have drawn are worthless. Much of the ambiguity in theories of political obligation can be traced to the failure to distinguish questions of obligation from questions of obedience—Hobbes is a good example. If we keep this distinction in mind, we can better understand, and avoid, the confusion which has plagued discussions of political obligation. And even if we cannot reach final agreement on troublesome questions, we may nevertheless benefit from knowing how and why we disagree.

[36] That is, different conceptions of citizenship and just state are associated with different traditions in political theory. On this point, see Michael Walzer's essay, "The Problem of Citizenship," in his *Obligations: Essays on Disobedience, War, and Citizenship* (New York: Simon & Schuster, 1971). In *The Logic of the Social Contract* (Ph.D. dissertation, University of Minnesota, 1976) I argue that the social contract can be used to provide satisfactory conceptions of citizenship and the just state.

12
Political Obligation

> We know the morality we have received from our fathers as a collection of dogmas or useful prejudices adopted by the national reason. But for this we owe nothing to the particular reason of any individual. On the contrary, whenever such reason intervenes, it perverts morality. In politics we know we must respect authority, established we know not how nor by whom. When time brings abuse capable of altering the principles of government, we know we must suppress the abuse without touching the principles of government.
>
> —Joseph de Maistre[1]

Why do men obey the State? Why should they obey authority? When and under what circumstances should they register their disobedience? These are some of the important questions hinging on the issue of relationship between a legitimate political order and an enlightened citizenship. An answer to such questions has been given by a good number of thinkers and statesmen in different ways with the result that the scope of diversity ranges from the conclusions of rank idealists who have sought its solution in the inherently good nature of man to the emphatic affirmations of the pragmatists who have found the same in the world of actual experiences whereby we may determine the worth and legitimacy of the actions of the men-in-authority roles. In particular, this problem pertains to the realm of liberal political theory where we find that a host of eminent thinkers are in a 'dilemma' of how to reconcile the area of individual liberty with the scope of state authority. The baffling problem before them is either to reject the 'possessive individualist assumptions' in which case the theory of political obligation becomes unrealistic, or to retain them in which case a valid doctrine in this regard becomes unavailable. It follows that we "cannot now expect a valid theory of obligation to a liberal-democratic state in a possessive market society."[2]

Meaning and Nature

The term 'obligation' originates from a Latin word *'obligate'* implying something that binds men to an engagement of performing what is enjoined. If so, it has its various connotations. For instance, in the realm of ethics it informs a man to fulfil or discharge a duty enjoined on him and acceptable to him by his rational understanding. In the field of jurisprudence, it requires a man to obey law by which he is tied to some 'performance'. Since law regulates the social life of men, the principle of legal

1. Cited in Benn and Peters: *Social Principles and the Democratic State* (London: George Allen and Unwin, 1975), p. 308.
2. C.B. Macpherson: *The Political Theory of Possessive Individualism: Hobbes to Locke* (London: Oxford Univ. Press, 1977), p. 275.

obligation takes the form of a bond between 'private persons' tied to one another for the performance of some act as desired by the enforcement of law. Finally, in the world of politics, it takes the form of a bond between man as a citizen and the authority under which he lives "to perform an act, or a number of acts, for the governing authority."[3] In other words, it implies that when man is a political creature, he is bound to live under some authority, it becomes his obligation to obey its commands. Hence, when "the authorising rule is a law, and the association a state, we call this political obligation".[4]

Obviously, the idea of political obligation or acceptance of the commands of the 'men-in-authority roles' is integrally connected with the pattern of man's life in an organised whole. We may say that there can be no life if there is no order; and since order implies obedience, we may also say that there can be no order if there is no acceptance of it. As people cannot play the game of cricket without obeying the rulings of an umpire, so they cannot live without accepting the commands of the persons charged with the job of maintaining peace and order in the society. Obviously, the principle of political obligation is based on the maxim of common prudence. As Benn and Peters observe: "Of course, there are plenty of good reasons for accepting authority in general (though they may not always apply in particular). We are often in situations where it is more important to accept an umpire's judgement than to insist on our own. An army will usually do better even with bad generals than with no generals at all. We accept authority because most social enterprises would be hopeless without it."[5]

It follows that the case of political obligation rests upon issues relating to the nature of authority that involves within its fold the whole word of existing rights, laws and political organisation generally. If so, a wider interpretation of the same covers the opposite situation in which people have a legitimate claim for the disobedience of authority. As a matter of fact, it "is the enterprise that counts ; the authority is conditional on the way it promotes or preserves it."[6] The people not only obey the laws of the state or 'the commands of the sovereign', they also scrutinise those orders in terms of the satisfactions they seek from life and, from time to time, they reject them on the ground that they are a denial of those satisfactions. "Obedience, that is to say, is the normal habit of mankind; but marginal cases continually recur in which the decision to disobey is painfully taken and passionately defended."[7] If so, the idea of political obligation inheres these essential characteristics:

1. Government is a difficult art and any wrong move may entail serious consequences. Therefore, it is the duty of every conscientious person to interest himself seriously in the management of public affairs, i.e. in political questions. It is required that those placed in high offices should direct their thought and action to the general good. Political obligations are not merely of an intellectual character; they also involve obligations of honesty and, what is called, public spirit or social service.

3. E. Barker: *Principles of Social and Political Theory* (London: Oxford Univ. Press, 1967), p. 184.
4. Benn and Peters, *op. cit.*, p. 298.
5. *Ibid.*, p. 329.
6. Laski: *The State in Theory and Practice* (London: George Allen and Unwin, 1960), p. 17.
7. *Ibid.*

Political Obligation

If Swaraj is not meant to civilise us, and to purify and stabilise our civilisation, it would be worth nothing. The very essence of our civilisation is that we give a paramount place to morality in all our affairs, public or private.

—M.K. Gandhi
Young India, 23 January, 1930, p. 26.

Political obligation denotes not a duty to obey a particular law but rather the citizen's duty to respect and obey the state itself. When the limits of political obligation are reached, the citizen is not merely released from a duty to obey, but in effect gains an entitlement, the right to rebel.

—Andrew Heywood
Political Theory: An Introduction, p. 202.

From the ancient world to the present day, all forms of citizenship have had certain common attributes. Citizenship has meant a certain reciprocity of rights against, and duties towards, the community.

—David Held
Political Theory and the Modern State, p. 199.

2. The concept of political obligation automatically involves the case of political legitimacy and effectiveness. While political effectiveness implies actual performance, the extent to which the political system provides for the performance of the basic functions of government as the people and powerful groups in society perceive them, the case of political legitimacy refers to the capacity of the system to engender and maintain the belief that the existing social institutions are the most appropriate for the society.
3. The idea of political obligation not only informs people to obey the authority of those in power, it also desires them to be critical about the way authority is exercised. They should scrutinise the actions of their rulers and resent in the event of an invasion on their liberties. Thus, the idea of political obligation also involves the idea of resistance to authority. As we shall see, even great liberals like Locke, Green and Laski have recognised the circumstances under which people may demonstrate their resistance and go to the extent of changing the political order.

The whole case of political obligation may be thus summed up: "There are good grounds for accepting authority in general, but there may be good grounds too for rejecting it in particular cases; if authority derives from a constitution, there would generally be good grounds for rejecting any exercise of it which is unconstitutional. Again, if its legitimacy depends on the way it is used, an invasion of a sphere where political authority is inappropriate might be grounds for disobedience or, in extreme cases, for resistance."[8]

8. Benn and Peters, *op. cit.*, p. 329.

Divine Theory: Sanction of Political Obligation in the Matters of Faith

Various theories have been enunciated on the subject of political obligation, the oldest of which finds its place in the religious doctrines whereby the source of obedience to the commands of men in authority is traced in the matters of faith. Upon this theory the necessity which "stands above and apart from the citizen and the governing authority is that of the Divine Will and ordinance. I am obliged to obey the governing authority because I am obliged to obey God and because any governing authority is essentially an emanation and delegation of divine authority."[9] The authority of the ruler "stems not simply from inheritance according to custom, or from popular acclamation; these are regarded as the consequences rather than the grounds of authority. The true source is divine, and his authority is, therefore, independent both of human choice and custom."[10]

Such a doctrine had its emphatic affirmation in the teachings of the Bible. St. Paul said that the authority of the prince 'comes from God' and St. Thomas made a slight improvement upon this rule by adding that a ruler 'who fails to act faithfully, as the office of kingship demands, in the government of a community, deserves to suffer the consequences that his subjects should refuse to keep their pact with him.' It implied that the king as the head of a body politic had a claim to the necessary obedience of each member of that body by virtue of an authority coming from God, but coming in is own course, through the body politic of which he was head.[11] Its powerful defence is contained in the *True Law of Free Monarchies* in which King James I of England claims that the ruler has derived his authority directly from God. Even if he be wicked, the subjects have no right to rebel against him. The people are thus bound by the religious injunction to obey the authority of the king. To quote his forcible words: "Kings are justly called gods; for they exercise a manner of resemblance of divine power on earth. As it is atheism and blasphemy to dispute what God can do, so it is presumption and high contempt in a subject to dispute what the king can do or say that a king cannot do this or that."

The idea of 'divine rights of kings' prevailed throughout the Middle Ages. It, however, took a different direction with the advent of new learning. With the fall of Papacy a new consciousness developed. It signified that if the king had his divine rights, the people had their divine rights too. The new awareness informed that if God had instituted government because men needed it, it also followed that divine authorisation depended on king's governing in the interest of his subjects. The appeal to divine rights as made by the rulers thus became an inconclusive affair. The theory that authority is divinely instituted became modified so as to mean that it did not exclude the possibility that under some conditions God would authorise resistance too. "Obligation may be primarily to oneself, or to another, or to one's country, or to all mankind; but it must ultimately be to God. It was inconceivable that there could be any obligation merely to man. For this reason, and for no other, it may be said that all right is divine."[12] On this understanding it may follow that

9. Barker, *op. cit.*, p. 184.
10. Benn and Peters, *op. cit.*, p. 301.
11. Barker, *op. cit.* p. 185.
12. Benn and Peters, *op. cit.*, pp. 301-02.

even "the right to rebel is a divine right, arising from a breach of obligation unless, indeed, rebellion be conceived as a positive duty . . . as it was by Knox."[13]

Since the time divine theory of political obligation found its sanction in matters of faith, it has lost its significance in the modern age. It received scathing criticism at the hands of eminent thinkers like Grotius, Hobbes and Locke who rejected its metaphysical premises and traced the source of political obligation in the consent of the people. The growing trend of secularism meant separation of the church from the state and consequently led to the supremacy of the temporal power as distinct from its spiritual counterpart. Moreover, the growth of democracy also entailed the doom of this theory. It was denounced as a convenient tool in the hands of the rulers to justify their absolute authority. Under the new conditions of the modern age, the divine theory of political obligation lost its place of honour. "If men are disposed to doubt, they want reasons related to their situation, rather than dogmatic assertions that everything is as it ought to be. Any approach to political obligation that left no room for discussion in the light of the particular situation might confirm the faith of the faithful; it could not convince the doubter."[14]

Consent Theory: Sanction of Political Obligation in the Will of the People

As pointed out above, the divine theory was replaced by the consent theory which underlined that "in its simpler form, the citizen is tied to the governing authority, first, because he in common with all other citizens, has made a contract with a person or body of persons, under which that person or body receives authority in return for the protection and service of declaring and enforcing a system of legal rules, and, secondly, because he and his fellows are bound by natural law to respect and perform the terms of that contract."[15] This theory is based on the hypothesis of a contract entered into by men living in the 'state of nature' whereby political authority came into being. Thus, the authority of the state is based on the consent of the people. The terms of that contract were morally binding on those who made the compact; now these are equally binding on their successors. Thus, political authority is based on the consent of the people.

The idea of social contract found its emphatic affirmation in the works of Hobbes and Locke of England in the seventeenth century and then in the works of Rousseau of France in the following century. Though the views of the three great social contractualists differ in matters of detail, they adopt the same framework so as to prove the contractual nature of the origin and establishment of political authority. The common point is that political authority is derived from a contract whereby the people are collectively bound to obey it so long as the government works for the general good and keeps itself within limits laid down in the compact. It has its best illustration in these words of Locke: 'No one can be subjected to the political power of another, without his own consent.'[16]

13. J.W. Allen: *A History of Political Thought in the Sixteenth Century*, pp. 122-23.
14. Benn and Peters, *op. cit.*, p. 303.
15. Barker, *op. cit.*, p. 188.
16. John Locke: *Second Treatise of Civil Government*, Sec. 95.

The idea of social contract, however, took a highly philosophical form at the hands of Rousseau who reposed the fact of political obligation in the 'general will'. He says: "The passage from the state of nature to the civil state produces a very remarkable change in man by substituting justice for instinct in his conduct, and giving his actions the morality they had formerly lacked. Then only when the voice of duty takes the place of physical impulses and right of appetite, does man, who so far had considered only himself, finds that he is forced to act on different principles, and to consult his reason before listening to his inclinations."[17] Thus, after entering into the civil society, man is no longer the slave of his mere impulses of appetite; he becomes bound to obey the law of the general good (called general will) which he prescribes to all, including himself, and that constitutes his real liberty.[18] Obviously, the authority is legitimate and it is entitled to commanding the obedience of all so long as it is based on the great moral idea—general will—in obeying which man obeys himself alone and thus remains as free in the civil society as he was in the state of nature.[19]

On the whole, the social contract theory justifies the conception that the ruling authority, if it has to be legitimate, must rest ultimately on the consent of the governed. If the government violates the terms of the contract, the people have a right to resist. If the authorities fail, 'the people have with them the reserved ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, by a law antecedent and paramount to all positive laws of men, whether they have just cause to make their appeal to Heaven.'[20] In other words, "all men must reserve the right as moral persons to decide for themselves when all else fails then whether their duty is to accept the command of the sovereign, or challenge them. In this way, this theory admits the legitimacy of authority, then, only when it satisfies certain moral criteria."[21]

Though the consent theory had its field day in the seventeenth and eighteenth centuries and even now has its own significance on account of constituting the moral basis of a democratic order, it suffers from certain grave weaknesses. For instance, it makes state an artificial organisation and thereby puts a heavy premium on the reverence that it is entitled to by virtue of being a natural association. It may also be said that the element of consent as enshrined in some contract made in a hypothetical state of nature is nothing else than a fiction not at all legally binding on the existing generations. Thus, the people may go to the extent of staging a rebellion on the plea that they withdraw their consent inasmuch as the government has committed such an action in violation of the 'general will'. The result is that a theory of political obligation is converted into a theory of rebellion. However, the weight of the influence of this theory, in general, "has been in the direction of safeguarding the rights and liberties of the people and of checking the arbitrariness of rulers. It has also engendered a general irreverence towards the State because of its assumption that the state is an artificial creation and the governmental authority is a restraint upon man's natural freedom."[22]

17. Rousseau: *Social Contract*, Book I, Sec. 8.
18. *Ibid.*
19. *Ibid.*
20. Locke, *op. cit.*
21. Benn and Peters, *op. cit.*, p. 328.

Prescriptive Theory: Sanction of Political Obligation in Reverence to the Established Conventions

According to this theory, both political authority and reverence to it are based on the principle of 'customary rights'. It is the fact of long possession that ripens into an institution wherein lie the source of its 'legitimacy'. As the authority of the ruler has its source in the fact of prescriptive possession, so the fact of popular obedience has its sanction in reverence to the institutions of the past. On the basis of an analogy between the family and the state, Jean Bodin says that as the authority of the patriarch (head of the family) is based on the fact of historical-prescription, so the authority of the king (head of the state) finds its source in the fact of long possession. An established practice has a significance of its own in view of the fact that it embodies the 'wisdom' of the past. The people obey their rulers because the fact of obedience has become like a well-established convention. It may also be called 'traditionalist theory' inasmuch as, according to it, "all authority is legitimate if it is sanctioned by custom; no further question need be asked."[23]

The conservative theory of political obligation, as it may be called, has its affirmation in the writings of Hegel who ascribed to it a metaphysical dimension. His *Philosophy of Right* has an importance of its own in this direction. Here he says that the idea of morality "evolves concretely in the customs and institutions of nation-states ; the established order is justified as the latest stage in this historical process. The individual as a particular manifestation of the social whole has carried out the whole of his duty when he has done what society expects one in his station. The only valid standards are those conventionally accepted from which, therefore, criticism must necessarily begin, if indeed it can begin at all."[24] Paraphrasing the idea of this great German idealist, Prof. Bradley in England said: "We should consider whether the encouraging oneself in having opinions of one's own, in the sense of thinking differently from the world on moral subjects, be not, in any person other than a heaven-born prophet, sheer self-conceit."[25]

It is, however, Edmund Burke in whom the theory of 'self-concious conservatism' assumes the concrete form of 'cult of the past'. As a matter of fact, his *Reflections on the Revolution in France* are not as much a proof of his attack on the advocates of a new social and political order emulating the case of French Revolution as a powerful defence of every well-established system. According to this view, we revere tradition and every tradition has a 'divine' character on account of being a long-established possession. The fact of political obligation is contained in paying unflinching respect to tradition that is a sacrosanct affair. In simple terms, it seeks to conserve whatever there is in existence by virtue of a very long prescription. Thus, the followers of Burke "may defend this or that institution from time to time; here

22. E. Asirvatham: *Political Theory* (Lucknow: Upper India Publishing House, 1961), p. 48:
23. Benn and Peters, *op. cit.*, p. 307.
24. *Ibid.*, p. 311.
25. F.H. Bradley: *Ethical Studies* (London: Oxford University Press, 1927), p. 200.

monarchy, there property-owning democracy, here an established religion, there an ancient constitution."[26]

Mention, in this direction, may be made of Prof. Michael Oakeshott who traces the source of political obligation in the weight of tradition.[27] We are all creatures of an age and environment in which we live and, for this reason, if we are able to engage ourselves in a political activity at all, we must take for granted at least some of the rules and traditions which delimit it as a specific activity. Political reflection, then, cannot exist in advance of political activity, and a political ideology must be understood 'not as an independently premeditated beginning for political activity but as a knowledge in 'an abstract and generalised form' elsewhere styled by him as "abridgement of a traditional manner of attending to the arrangements of a society'. Thus, politics is'a pursuit of intimations'. If all political action consists in working out the intimations of a tradition, the source of political obligation should be discovered in people's habit of revering their traditions. If so, to this arch-philosopher of conservatism, there "is nothing outside tradition, nothing it seems can ever be lost to it, nor anything really added. Tradition has everything—all its parts and all its details—and everything continues."[28]

Like other theories on this subject, the prescriptive theory has its own weaknesses. We may say that the source of political obligation lies not only in paying reverence to the well-established practices of the realm but also in doing away with them. People desire change and in case there is frustration of their hopes, they take to the path of revolution. However, the peculiar thing about the advocates of this theory, particularly Oakeshott, is that they treat even revolution as an experience connected with the past and thereby make it a purely conservative affair. The exponents of this theory, for instance, would advise the Negroes of the African countries to accept racial segregation laws as 'legitimate', for they are based on the 'well-established traditions of the realm'. In practice, it would never happen. People observe their traditions so long as they have their utility, they resort to break them down when their usefulness is no longer existent. What a critic like Randhir Singh has written about the fallacies of the traditionalism of Oakeshott is applicable to this theory as well that such utterances "not only emphasise the very futility of their argument but, in fact, question the very assumption of human capacity to solve problems of human existence."[29]

Idealistic Theory: Sanction of Political Obligation in Innate Rationality of Man

The idealists trace the source of political obligation in the innate rationality of man. It can be visualised in their tendency to regard man as a 'political and rational creature' and the state as 'a self-sufficing community' identical with the whole society. As such, there can be no antithesis between the individual and the state. Right from Plato and Aristotle to Green and Bosanquet, the same line of argument runs through. The life of the individual isolated from his fellow beings is like a life against nature. In

26. H.M. Drucker: *The Political Uses of Ideology* (London: Macmillan, 1974), p. 117.
27. See Oakeshott: *Rationalism in Politics and Other Essays* (London: Methuen, 1962).
28. See Randhir Singh: *Reason, Revolution and Political Theory* (Delhi: People's Pub., 1976), p. 137.
29. *Ibid.*, p. 134.

consequence, an individual can seek his best possible development in society alone. That is, it is by living in society and by obeying the commands of the state that he can realise all that he has in him to be, only by an intercourse with his fellows. It is by the realisation of social duties and the fulfilment of public obligations that he can develop his full life. "Since the state is regarded as representing and containing within itself all the individual's social aspirations, and at the same time fulfilling all his social needs, whatever claims the state may make upon the individual are held to be based upon absolute authority."[30]

In other words, the source of political obligation is contained in obedience to the state which is not an alien entity. So closely man's life is identified with his state that the two become one. Hence, obedience to one's will and the same to an act of the state become alike. Both Plato and Aristotle affirmed that the state and the individuals composing it "form an organic whole, for the state is as natural to man as the family or the clan; it is as natural as water to a fish, the medium without which human faculties can never come to their full compass." Hence, there may arise no situation of conflict between the individual and the state. Paraphrasing the same idea, Rousseau says that the state is like a form of association which defends and protects the person and property of each member with the whole force of the community and in which each while joining hands with all, still obeys none but himself and thereby remains as free as he was before the creation of the 'community'.[31]

Such an affirmation finds its best manifestation at the hands of Hegel who identifies the 'liberty' of the individual with his perfect obedience to the state. As he says: "Nothing short of the state is the actualisation of freedom. If the individual has a real will and a personality of his own, it is because of his membership of the state. The relations which determine his social life make him an integral part of the society and thereby inform him to render complete obedience to the state. The state represents the totality of the wills of its citizens in the form of its General Will in which the will and personality of each member are made to transcend themselves. Naturally, when the individual receives his rights from the state, he can have no rights which conflict with those of the state. It, therefore, follows that the actions of the State in so far as they proceed from the General Will, must always be irreproachably right in the sense that they represent what is best in individual wills. . . . The state can never act unrepresentatively."[32]

In spite of the fact that Green follows the line of English liberalism, he follows into the footsteps of Hegel when he says that laws and political institutions are the constituent elements of conventional morality, the external embodiment of the moral idea. The idea of political obligation is, for this reason, connected with the case of moral obligation. Green suggests that only those actions should be made obligations which are made to serve a certain moral end. This then is the ground and principle of legal obligations and forms its content.[33] It is, however, a different matter that Green fails to shake off the weight of English liberalism when he comes to recognise

30. Joad, *op.cit.*, p. 10.
31. Rousseau: *Social Contract*, Book I, Chapter VI.
32. Joad, *op. cit.* p. 13.
33. Frank Thakurdas. *The English Utilitarians and the Idealists* (Delhi: Vishal Pub., 1978), p. 254.

14

5

the right of resistance to political authority in a certain exceptional situation. The yardstick, however, remains the same. It is the 'General Will' that informs individual to obey the state ; it is the same that sanctions resistance to its authority.

Bernard Bosanquet, however, takes a line close to Hegel's than that of Green. As he says: "Any system of institutions which represent to us on the whole the condition essential to affirming such a will, in objects of action such as to constitute to tolerably complete life, has an imperative claim upon our loyalty and obedience as the embodiment of our liberty."[34] And yet the influence of the liberal tradition has its indelible impact on his mind when he seeks to discover some limitations on the principle of political obligation. The only question is whether a particular system is what it pretends to be, viz. does it adequately guarantee the conditions under which our rational will finds full affirmation. For it is not, our obedience becomes conditional; obligation to political authority may be converted into its opposite ; the moral obligation as Green had shown to resist. Like Green, Bosanquet "places the imperative claim of our real will above the claim to obedience of any particular political system, which fails to give adequate expression to it, or lay down conditions for its affirmation."[35]

The idealistic theory of political obligation, as we may easily visualise, is too abstract. It looks like placing ordinary things in a highly philosophical, even metaphysical, form that cannot be understood by a man of average understanding. Thus, William James comments that it all looks like a rationalistic philosophy that keeps itself out of all definite touch with 'concrete facts and joys and sorrow'. The idea of political obligation is not only concerned with man's obedience to the state, it is also integrally connected with his right to resist the abuse of political authority. The Idealists do not like to accommodate the right to resistance in their doctrine of political obligation and if Green and Bosanquet try to do it, their treatment is all the more vague and uncertain. The essence of this theory lies in imparting the lesson of blind adulation of the state. Let us fall down and worship the state. (Trietschke) The idea of political obligation is thus converted into the injunction of the blind worship of authority.[36]

Marxian Theory: Eventual Conversion of Political Obligation into Social Obligation

Basically different from all the theories on the subject of political obligation, as discussed in the preceding sections, is the Marxian theory. It sanctions the case of political non-obligation in the pre-revolutionary stage, total political obligation in the revolutionary stage and its eventual conversion into social obligation in the post-revolutionary stage of social development. In other words, the case of political obligation is integrally connected with the character of authority. In the Marxian theory of politics, the state is described as a 'bourgeois institution' in the capitalist society; it is described as an instrument of power in the hands of the working class after the successful revolution to consolidate the socialist order in a way preparing its

34. Bosanquet: *Philosophical Theory of State* (London: Macmillan, 1923), p. 140.
35. Frank Thakurdas, *op. cit.*, p. 423.
36. See L.T. Hobhouse: *Metaphysical Theory of State* (London: George Allen and Unwin, 1918).

own 'withering away' to happen in the final stage of socialism. In a technical sense, it may be said that the idea of political obligation, according to Marxism, covers the cases of 'discredited state' in the era of capitalism, 'new state' in the period of the 'dictatorship of the proletariat' and 'state proper' when the 'classless' society finds its culmination in the 'stateless' pattern of social existence.

The starting point of the Marxist theory of politics and with it of political obligation "is its categorical rejection of this view of the state as the trustee, instrument, or agent of society as a whole."[37] If so,the oppressed and the exploited masses have no obligation to the existing bourgeois political order. They must develop class consciousness so as to overthrow the oppressive systems. The case of political obligation arises when the 'new state' comes into being after the revolution. As the leading Italian Marxist Gramsci says: "The dictatorship of the proletariat is the installation of a new state, typically proletarian, into which flow the institutional experiences of the oppressed class, in which the social life of the worker and peasant class becomes a system, universal and strongly organised."[38]

The noticeable point in the Marxian theory of political obligation is that what is forbidden in the capitalist society is ordained in the socialist order. Not merely this, a fundamental change takes place that prohibits any opposition to the state at all. There is no freedom of dissent and the people are virtually commanded to 'worship' the state. The dissenters are dubbed as 'reactionary' and 'counter-revolutionary' elements who would be purged, exterminated, exiled or condemned to severe tortures. The leaders of the working class desire nothing else than a state which is strong enough to impose law and order, to suppress challenge, and to ensure stability. However, as the state is now an institution of the 'whole people', no question of civil disobedience arises, or can arise, no matter it is in the hands of the leaders of the Communist Party who, in Lenin's words, are the 'vanguards of the working class'. In a way, the trend of revolution would continue until all the enemies of the new order are fully liquidated. This is called the idea of 'permanent revolution'. The task of the Marxists is, therefore, to subordinate the idea of political obligation to the dictates of a 'permanent revolution'.[39]

Whereas the idea of political obligation is subordinated to the dictates of permanent revolution in the transitional period, it is eventually converted into the norm of social obligation after the transformation of the 'new state' into the 'state proper'. In other words, the idea of political obligation ceases to exist with the 'withering away' of the state in the last stage of socialism (called Communism) and it finds its final conversion into the injunction of social obligation. Since all public affairs would be managed by the free and voluntary associations of the people in the era of human emancipation, naturally everyone would be obliged to obey unflinchingly the 'authority' of social institutions. There will be no state in this era of 'state proper'. Society will be composed of the associations of free and equal producers consciously acting upon a common and rational plan. Engels has made the point clear by adding that even in this era of social organisation "the free choices of the individuals must

37. Ralph Miliband: *Marxism and Politics* (London: Oxford Univ. Press, 1977), p. 66.
38. *Ibid*, p. 181.
39. Marx-Engels: *Collected Works*, Vol. 7, pp. 246-48.

remain circumscribed by the needs of the community and the technical exigencies of production. Marx envisaged the fully socialised man as one who would see no distinction between private and public interest and whose activity would be attuned to the latter."[40] If so, as Marx says, whether decisions are taken by the delegates or by the majority vote, the will of the individual will always have to subordinate itself.[41]

A critical study of the Marxian theory, in this direction, shows that it treats the question of political obligation in a way far away from the real perspective. What is emphatically advocated in the phase of capitalism is firmly denied in the next stage of social development. People who are exhorted to disobey the 'bourgeois state' in all respects are commanded not to disobey the state at all after the inauguration of the new social system. One may, therefore, accuse the Marxists of building up a theory of political obligation on the basis of expediency alone. Such an ambivalent attitude of the Marxists "reduces the question of political obligation to a question of political expediency, and ignores the independent individual whose experience alone counts in the determination of his obedience to the laws of the state."[42]

But the weakest point of the Marxist theory of political obligation is that it is based on, what Karl Popper says, 'historicism'. To say that history moves according to certain inexorable laws and to integrate the question of political obligation with that is to fall prey to the 'poverty of historicism'. There is not all bad in the capitalist system making it unworthy of political obligation at all, nor is there all good in the socialist system making it worthy of people's allegiance forever. The whole interpretation assumes the character of an ideology, or a dogma defying all canons of a scientific insight. It is, therefore, well observed: "To the extent, therefore, that Communist or other claims to authority are based on the historic mission of a leader, a class, or a party, they receive no support from science. They are of the same religious or metaphysical order as claims to Divine Right."[43]

It follows that in no social order all people can be expected to behave in a strictly uniform manner. All people would not like to revolt against the state in the era of capitalism, nor would all like to acquiesce in the transitional stage, what to say of reaching the stage of total agreement in the hypothetical stage of Communism. As Michael Evans says: "It remains difficult for us to conceive of a society of free opinion in which individual motives do not clash either with each other or with the public interest; or in which there would not be different conceptions of what constitutes the public interest. Marx's analogy is in any case a strained one. Assuming agreement on what to play, there are often considerable disagreements between the coductor and the members of the orchestra about the interpretation of the music. And in no society of any complexity has it ever been the case that everyone has wanted to play the same tune."[44]

40 Michael Evans: *Karl Marx* (London: George Allen and Unwin, 1975), p. 162.
41. *Ibid.*
42. Ray and Bhattacharya: *Political Theory: Ideas and Institutions* (Calcutta: World Press, 1968), p. 150.
43. Benn and Peters, *op. cit.*, p. 305.
44. Michael Evans, *op. cit.*, p. 163.

Theories of Political Obligation

Divine Theory	: Political obligation is a matter of faith, hence no resistance to the authority of the state as it has a divine sanction
Prescriptive Theory	: Political authority and reverence to it are based on the principle of established customary injunctions.
Idealistic Theory	: All obedience to state is enjoined as it is a moralising agency, 'a partnership in virtue,' the highest institution ensuring 'good life' to its people.
Consent Theory	: Political authority is based on the consent of the people; it is an artificial contrivance; people may disobey the state if it forfeits their trust.
Marxian Theory	: No obedience to a bourgeois state as it is based on the exploitation and oppression of the proletariat, but all obedience to a socialist state created after revolution ensuring social and economic democracy.

One may ask as to which theory of political obligation should be treated as the most plausible of all. An answer to such a query should be that while the matter has been studied differently by men of different schools, we may appreciate one that stands the test of experience. In other words, we should look into the case of political obligation from a pragmatic point of view that desires "to contend for truth as tested by reality and its fruits."[45] Keeping this in view, we may admire the approach of Laski who says that men "obey the state not merely for the sake of order, but also on account of what they deem that order to make possible. They are, in fact, judging the state from the angle of satisfactions, they think it should provide. Their judgements, no doubt, vary with time and place. Expectations of what is legitimate are always born of experiences, and the demands of one society at one period will differ from those of another society at another period. But the implication is the clear one that the exercise of political authority in a society is never unconditional."[46]

Limits of Political Obligation: Problem of Right to Resistance

What we have said above informs us to look into the case of contingent political obligation as well. Men are not only obliged to obey the state, they have a right to disobey it as well under certain conditions. Even if we depend upon the criterion of 'satisfaction' or 'experience', we are compelled to look into the conditions under which people have a valid right to withdraw their obedience. Once again we find the situation fluid. While the advocates of 'divine' and 'prescriptive' theories do not allow the right to resist political authority under any condition whatsoever,

45. Charles E. Merriam: *A History of Political Theories: Recent Times* (Allahabad: Central Book Depot, 1969), p. 15.
46. Harold J. Laski: *The State in Theory and Practice* (London: George Allen and Unwin, 1960), p. 17. It is well opined: "After all, disobedience of state rules must be in the interest of the state itself, viz., to make it correspond to the ideal. Disobedience does not serve its purpose, if it ushers in uncontrollable chaos and anarchy." A.H. Doctor: *Issues in Political Theory* (New Delhi: Sterling Publishers, 1985), p. 123.

16

others subscribing to 'consent' and 'pragmatic' theories discover the case of political disobedience in certain exceptional situations. As we have already seen, the case of those subscribing to the Marxist theory is basically different from all, who advocate the idea of insurrection to overthrow the 'bourgeois state', while paying total obedience to the 'socialist' state that is to be eventually converted into man's full, final and unflinching allegiance to a thoroughly popular authority in the final stage of social development.

The case of contingent political obligation has been well studied by the English liberal thinkers of the early and later modern periods who have justified the case of 'rebellion' as a'cruel necessity'in certain exceptional situations. One is astonished to take note of the fact that though a staunch advocate of the idea of absolute and unlimited legal sovereignty, Hobbes recognises the right to resistance in case the Leviathan endangers the life of the people. First he endorses: "Once a man has transferred his right to another, then is he said to be obliged, or bound not to hinder those to whom such right is granted . . . from the benefit of it: and that he ought, and it is his duty, not to make void that voluntary act of his own."[47] And then he sanctions that everyone has a right to disobey the sovereign if "he is commanded to kill, wound or maim himself, or not to resist those that assault him; or to abstain from the use of food, air, medicine, or any other thing, without which he cannot live."[48]

However, a clear and powerful justification of the 'right to rebellion'is contained in the political philosophy of John Locke who is described as the greatest English liberal thinker of the early modern period. He has no reservations in arming the people with the 'right to revolt', what he calls making an 'appeal to the Heaven' in case the sovereign violates the terms of the contract and thereby forfeits the trust of the community. While explaining the implications of the term 'violation of the trust', Laski says: "The substitution of arbitrary will for law, the corruption of Parliament by packing it with the prince's instruments, betrayed to a foreign prince, prevention of the due assemblage of Parliament—all these are perversions of the trust imposed and operate to effect the dissolution of the contract. The state of nature again supervenes and a new contract may be made with one more fitted to observe it."[49]

In the nineteenth century, the right to resistance is sanctioned by Thomas Hill Green who, within the framework of his liberalistic idealism, examines the case of political obligation in the context of relationship between the implementation of law, on the one hand, and preservation of the common good on the other. There should be no revolt for protecting the interest of a particular individual or a class, or a section of the society. What is required is that resistance must take place when the cause of 'common good' so ardently desires. The peculiar thing to be noted here, however, is that instead of designating it as a 'right to resist', he calls it as a 'duty to disobey'. The state is based on the 'will of the people'. Naturally, the people have a 'duty' to disobey when they find that any action of the sovereign is detrimental to, what Rousseau calls, the 'general will'. In the event of a 'dilemma' between the interest of a particular individual or a class on the one hand and that of the community as a whole on the other, the citizen "should be guided by the general rule of looking

47. Hobbes: *Leviathan*, Ch. 14.
48. *Ibid.*
49. Laski: *Political Thought in England (Locke to Bentham)*, p. 37.

Limits of Political Obligation

And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even if their legislators whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subjects.

—John Locke,
Second Treatise of Civil Government (1690), Ch. 13.

We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundations on such principles, and organising its powers in such form, as to them shall seem most likely to affect their safety and happiness.

—Thomas Jefferson
Declaration of American Independence (1776)

We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life so that they may have full opportunities of growth. We believe also that if any Government deprives the people of these rights and oppresses them, the people have a further right to alter it or to abolish it.

—Jawaharlal Nehru
Pledge of Complete Independence (1930)

to the moral good of mankind to which a necessary means is the organistation of the state, which requires the unity of supreme control in the common interest over the outward actions of men."[50]

In present times, Laski discovers the source of political obligation in the factor of 'moral adequacy' to which the state must ever adhere while exercising its authority. He admits that antagonism to the demands of authority "will always be the exception in history; but these demands will win their way from inert acceptance rather than active consent unless . . . they offer service to the theoretic purpose of the state. For any social order which fails consistently to recognise the claims of personality is built upon a foundation of sand . . . For to deny the claims of right is to sacrifice the claim to allegiance. The state can exercise moral authority upon no other basis."[51] Like Green, Laski says that 'right to resistance' should be substituted by 'duty to disobey'. From one angle it "is a claim to a right which a citizen cannot surrender without denying himself the full meaning of his citizenship, and, from the other, it is an obligation arising out of the acceptance of, and loyalty to, the idea of common good. There are then circumstances in which resistance to the state becomes an obligation if claims to rights are to be given validity, though no general rule of either time or situation can be laid down as a guide to such an action."[52]

50. Green: *Lectures on the Principles of Political Obligation*, p. 115.
51. Laski : *A Grammar of Politics*, p. 97.
52. *Ibid.*, p. 96.

Following impressions can be gathered from what we have seen above in regard o the right of resistance to political authority as advocated by leading English liberal hinkers:

- The people have a right to resist political authority in case they, or a majority of them, for all practical purposes, are satisfied that the action of the sovereign is detrimental to the overall interest of the community. Not the interest of a particular individual or a class but of the society as a whole should be kept in view while looking into the problem of political obligation *vis-a-vis* the necessity of civil disobedience.
2. The case of political disobedience is a conditional affair. It is not something absolute. It is due under certain relevant conditions only. It is, however, for the people by and large to decide when the conditions so warrant. No uniform rule of universal applicability can be laid down in this connection. For instance, while the Roman Catholics may stage a revolt in case the rulers make a historic declaration in favour of the Protestant creed, the Protestants may do the same in case their rulers take to the course of Roman Catholicism in the like manner.
3. The idea of political obligation *vis-a-vis* right to resistance is also integrally connected with the norm of, what Barker calls, 'super-political obligation'. In simple terms, it implies that resistance to political authority should not be given the form of a 'political mischief. People may resist the bad action of their rulers, but they are not justified in taking matters to the extent that the general social order is damaged to an irreparable extent. As he says: "But a new and super-political obligation enters as soon as we take into our view the socially created and socially developed idea of social justice: an obligation which we may call 'social', in the sense that it springs from Society and from the product of thought."[53]
4. There are at least three different positions which might be taken concerning the character of the obligation to obey the law or the rightness of obedience to the law. These are: (1) One has an absolute obligation to obey the law; disobedience is never justified. (2) One has an obligation to obey the law, but this obligation can be overridden by conflicting obligations; disobedience can be justified, but only by the presence of outweighing circumstances. (3) One does not have a special obligation to obey the law, but it is, in fact, usually obligatory on the grounds to do so disobedience to law often does turn out to be unjustified.[54]
5. The notions of promise, consent, or voluntary participation do not, however, exhaust the possible sources of the obligation to obey the laws of a democracy. In particular, there is another set of arguments which remains to be considered. It is that which locates the rightness of obedience in the way in which any act of disobedience improperly distributes certain burdens and benefits among the citizenry. For example, Wechsler sees any act of disobedience to the laws of his country (USA) as the 'ultimate negation of all modern principles' to take the benefits accorded by the constitutional system, including the national market and

53. Barker, *op. cit.*, p 222.
54. R. A. Wasserstrom: "The Obligation to Obey the Law" in A de Crespigny and A Wertheimer (ed.s): *Contemporary Political Theory* (London: Nelson, 1970), p. 272.

common defence, while denying it allegiance when a special burden is imposed. That certainly is the antithesis of law."[55] It implies that to disobey any law after having voluntarily received some benefits would be so unjust that there could never be overriding considerations. This surely is both to claim too much for the benefits of personal and commercial security and to say too little for the character of all types of obedience."[56]

Critical Appreciation

What we have said about the concept of political obligation in the preceding sections leaves an unmistakable impression that it is, indeed, a very delicate affair. The views of eminent authorities on this subject are divergent ranging from those of the advocates of the 'divine' and 'prescriptive' theories who lay emphasis on the duty of political obligation to the extent of derecognising the right to resistance to those of the 'consent' theory who justify popular rebellion in the event the sovereign forfeits the trust of the people by violating the terms of the 'contract'. Basically different from both is the position of the Marxists who make the concept of political obligation subservient to the pattern of the existing social order and thereby suggest the withdrawal of obligation to a 'capitalist' state and total obedience to a 'socialist' one that has to be eventually converted into social obligation in the ideal pattern of human existence.

We may easily understand that the idea of political obligation is not only a delicate affair, it is very difficult to determine its precise nature. None can lay down rules of universal applicability in this regard. In a strict sense, the idea of political obligation is not a political but a moral affair. However, as the norms of morality differ from time to time, from place to place, and from people to people, naturally the dimensions of political obligation or, conversely speaking, the injunctions of popular resistance also vary in the like manner. For instance, while the people of a tradition-ridden country like England would prefer to wait till the next general election to change their rulers who have forfeited their trust, the progressive or radical people of a country like France would prefer the return of Bonapartism rather than wait for the next polls as the only way out to save the country from imminent chaos. It is also possible that while a sizeable section of the people may have reservations about the need for staging a popular revolt, another section may cry for the same and then manage to change the existing state of affairs. In such a situation the propriety of the action of any section of the people may remain a matter of debate. Barker thus rightly holds: "There is no simple rule for the weighing of the mischiefs of obedience against the mischiefs of resistance."[57]

It is generally believed that the existence of a constitutional government secures the case of political obligation. People must obey the order of the state in case it conforms to the provisions of the fundamental law of the land—constitution. In case the government violates the constitution, it should be criticised, even overthrown.

55. Wechsler: "Towards Neutral Principles of Constitutional Law" in *Harvard Law Review*, Vol. 73 (1969), no. 1, p. 35.
56. Wasserstrom, *op. cit.*, p. 286.
57. Barker, *op. cit.* p. 224.

The difficulty, however, continues to persist inasmuch as even the enforcement of a particular law may, or may not, be treated as constitutional according to the divergent interpretations of the people. For instance, in India the invocation of emergency provisions and the subsequent actions of the government of Mrs. Indira Gandhi in 1975-76 were described as purely constitutional affairs by the men in power, while they were denounced as 'fascist measures' by the opponents. The only satisfaction in such a situation is that the people have a yardstick (contained in the provisions of the constitution) to judge the nature and character of political authority and accordingly laud or denounce the measure in question.

In this way, we are bound to agree with the view of Margaret MacDonald that "necessary and sufficient grounds for political obligation are not to be found."[58] Even the most widely accepted 'consent' theory has its own weaknesses. "As rational and responsible citizens we can never hope to know once and for all what our political duties are. And so we can never go to sleep."[59] The sanctity of the celebrated maxim stands out : 'Eternal vigilance is the price of freedom.' It may be suggested that the people should never suspend their judgement by cultivating a blind faith in the purity of their administration or in the sincerity of their great democratic leaders to whom Harold Lasswell would happily describe as 'Master Propagandists'. In other words, as suggested by Benn and Peters, while agreeing with the keynote of the 'consent' theory, which is supposed to be the basis of a democratic order, "we can never put our conscience in the keeping of other men, even of a majority of them. And we can, therefore, never go to sleep."[60]

19

58. Cited in Benn and Peters, *op. cit.*, p. 331.

59. *Ibid.*

60. *Ibid.* Michael Walzer makes an interesting point when he says: "All this is not to suggest that there is anything unreal about individual responsibility. But there is always responsibility *to someone else* and it is always learned with *someone else*. An individual whose moral experiences never reached beyond 'monologue' would know nothing at all about responsibility and would have none. Such a man might well have rights, including the right to rebel, but his possession of the right to rebel would be purely theoretical; he would never become a rebel. No political theory which does not move beyond rights to duties, beyond monologue to fraternal discussion, debate and resolution, can ever explain what men actually do when they disobey or rebel, or why they do so. Nor can it help us very much to weigh the rightness or wrongness of what they do." Refer to his paper titled "The Obligation to Disobey" in Crespigny and Wertheimer, *op. cit.*, p. 311.

Contemporary Theories of Political Obligation

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

Consent

Most people who believe they have an obligation to obey the law probably think that this putative obligation is grounded in their consent. Political philosophers are less inclined to think this way, however, in light of the withering criticism to which Hume and more recent writers — notably Simmons — have subjected consent theory. The critics' claim is not that consent cannot be a source of obligations, for they typically believe it can. Their claim, instead, is that too few people have either expressly or tacitly given the kind of actual consent that can ground a general obligation to obey the law, and hypothetical consent cannot supply the defect, for reasons already noted.

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

The second line of response to criticisms of consent theory is to argue in one way or another that the critics construe "consent" too narrowly. Thus John Plamenatz and Peter Steinberger have maintained that voting or otherwise participating in elections should count as consent; and Steinberger produces a lengthy list of fairly ordinary activities — calling the police or fire department for help, sending children to a public school, using a public library, and more — that constitute "active participation in the institutions of the state". Mark Murphy and Margaret Gilbert have sounded variations on this theme by arguing, in Murphy's case, that "surrender of judgment is a kind of consent", or, in Gilbert's, that "joint commitment" is an important source of obligations, including political obligations. For Murphy, surrender of judgment is consent in the usual sense of voluntary agreement or acceptance. As he says, "One consents to another in a certain sphere of conduct in the acceptance sense of consent when one allows the other's practical judgments to take the place of his or her own with regard to that sphere of conduct. (This consent may be either to a person or to a

set of rules: both of these can be authoritative)". As the earlier discussion of her views indicates, Gilbert differs from Murphy, and others, in taking a joint commitment to be something that need not arise voluntarily. According to her theory, "an understanding of joint commitment and a readiness to be jointly committed are necessary if one is to accrue political obligations, as is common knowledge of these in the population in question. One can, however, fulfil these conditions without prior deliberation or decision, and if one has deliberated, one may have had little choice but to incur them". Indeed, membership in a "plural subject" formed through non-voluntary joint commitments plays such a large part in Gilbert's theory that it may be better to place her with those who advocate an associative or membership theory of political obligation than with the adherents of consent theory.

David Estlund has recently offered a new twist on consent theory. Most theorists, he observes, maintain that putative acts of consent are void if it would be wrong to consent to someone's authority. For example, consent to be another person's slave generates no obligation even if it genuinely expresses a person's will. Estlund argues on grounds of symmetry that we ought to draw the same conclusion in cases where it would be wrong *not to consent* to another person's authority. Such failures are void, and so a person who morally ought to have consented to another's authority has a duty to obey her. If subjects of a given state ought to consent to obey its laws, say because the state performs morally necessary tasks, then their failure to do so is void and no barrier to concluding that they are under a political obligation to that state. Estlund's defence of what he labels *normative consent* is subtle and sophisticated in ways we cannot indicate here. Still, in cases where non-consent is void, one might wonder whether the duty to submit to another's authority follows directly from the consideration in virtue of which it is wrong for someone not to consent. It is also unclear whether there is enough of a connection between the agent's will and her coming to be subject to another's authority to warrant classifying Estlund's account as an example of consent theory.

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

Gratitude

Appeals to gratitude in debates about political obligation are as old as Plato's *Crito*, as we have seen, and they remain popular today. They are rarely, though, the sole or even primary basis for an attempt to justify the obligation to obey the law. Plato's account of Socrates' reasoning is typical in this regard, with gratitude being but one of at least four considerations Socrates relies on in explaining why he will not disobey the ruling of the jury that sentenced him to death. When Simmons included a chapter on the weakness of gratitude as a foundation for political obligation in his influential *Moral Principles and Political Obligations* (1979), in fact, there was no gratitude *theory* on which to concentrate his criticism.

That situation changed within a decade when A. D. M. Walker sketched such a theory in "Political Obligation and the Argument from Gratitude." Walker's argument takes the following form:

1. The person who benefits from *X* has an obligation of gratitude not to act contrary to *X*'s interests.
2. Every citizen has received benefits from the state.
3. Every citizen has an obligation of gratitude not to act in ways that are contrary to the state's interests.
4. Noncompliance with the law is contrary to the state's interests.
5. Every citizen has an obligation of gratitude to comply with the law.

Whether this argument does indeed provide the basis for a satisfactory theory of political obligation seems to turn on two points. First, are obligations of gratitude at all pertinent where political *institutions* are concerned? Walker holds that one may have an obligation of gratitude not only to other persons but also to institutions, including the state or polity; but critics such as Simmons disagree. Gratitude is owed only to those who intentionally and at significant cost to themselves provide us with benefits, according to Simmons, and institutions cannot satisfy these conditions. The second point concerns the strength of obligations of gratitude. That is, one may grant that we can have obligations to institutions, including the state, yet hold that these obligations are "too weak to function as prima facie political obligations in the usual sense," for they "would be overridden frequently, not just in unusual circumstances". Walker, in response, points to Socrates as someone who obviously thought his obligation of gratitude was very strong indeed, and concludes that we "can afford to acknowledge that the extent of our indebtedness to the state is less than his, while still insisting that it grounds a strong, though not absolute, obligation of gratitude to comply with the law".

Fair Play

Although earlier philosophers, including Socrates, appealed to something resembling the principle of fairness (or fair play), the classic formulation of the principle is the one H. L. A. Hart gave it in "Are There Any Natural Rights?" As Hart there says, "When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission". John Rawls subsequently adopted this principle in an influential essay of his own, referring to the duty derived from the principle as the "duty of fair play" (1964). What the principle of fair play holds, then, is that everyone who participates in a reasonably just, mutually beneficial cooperative practice — Hart's "joint enterprise according to rules" — has an obligation to bear a fair share of the burdens of the practice. This obligation is owed to the others who cooperate in the enterprise, for cooperation is what makes it possible for any individual to enjoy the benefits of the practice. Anyone who acts as a free rider is acting wrongly, then, even if his or her shirking does not directly threaten the existence or success of the endeavour. Those

who participate in the practice thus have rights against as well as obligations to one another: a right to require others to bear their share of the burdens and an obligation to bear one's share in turn.

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

The argument from fair play has met with serious criticism, however, including that of Rawls, who abandoned fair play as an account of political obligation for citizens generally in *A Theory of Justice*. The most sweeping criticism is that of Robert Nozick, who objects that the principle of fair play would allow others to place us under an obligation to them simply by conferring benefits on us. To make his point, Nozick imagines a group of neighbours creating a public entertainment system and assigning every adult in the neighbourhood a day on which he or she is responsible for planning and broadcasting the program. As a resident of the neighbourhood, you occasionally hear and enjoy the programs, but you never consent to take part in this scheme. When your assigned day arrives, are you obligated to take a turn? The principle of fair play says yes, according to Nozick, but the correct answer is "surely not."

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

According to a third objection, fair play considerations apply only to cooperative schemes that produce benefits one may refuse. If it produces *non-excludable* goods, which everyone receives regardless of whether she contributed to their production or even wants them, then there can be no fair-play obligation to bear a share of the burdens of the enterprise. But this is typically the case in political societies, which produce goods such as public order and national defence that one cannot meaningfully refuse to accept. As Simmons puts it, there is a difference between *receiving* and *accepting* benefits, and merely receiving them is not enough to place someone under an obligation. If there is a political obligation, therefore, it does not follow directly from the existence of the kind of non-excludable goods that states

provide. To be sure, Simmons does acknowledge that some people may acquire fair-play obligations by enjoying non-excludable benefits that they take to be "worth the price [they] pay for them" if they do so in full awareness that "the benefits *are* provided by a cooperative scheme". But he also maintains that few people will satisfy both of these conditions, with the second proving especially troublesome for advocates of fair–play theory; for "even in democratic political communities, these benefits are commonly regarded as purchased (with taxes) from a central authority rather than as accepted from the cooperative efforts of our fellow citizens".

As one might expect, advocates of the fair-play account have not remained silent in the face of these criticisms. The leading advocate, George Klosko, has written two books elaborating and defending the principle of fairness as the foundation of political obligation, and it sometimes seems that every fresh attack on fair play provokes a swift response. And the attacks have certainly continued, as we shall indicate shortly. First, though, it is necessary to see how fair-play advocates have responded to the three criticisms sketched above.

With regard to Nozick's objection, the response is usually to hold that his example of the neighbourhood entertainment system is beside the point. That is, Nozick is probably right to say that one would have no obligation to operate the system on his or her assigned day, but he is wrong to think fair play would require one to do so. There is no fair play obligation in cases such as this, either because the passive receipt of benefits is not enough to show that one is a *participant* in a cooperative practice or because the benefits are "of relatively little value". To Smith's objection, the response is that fairness is not a consideration only when harm or benefit to some person or practice is involved. To fail to do one's part in a cooperative enterprise is to *wrong* those who cooperate even when it does not clearly harm either them or the enterprise as such.

Responses to Simmons' objection have taken two directions. One is to say that Simmons has drawn too sharp a distinction between the acceptance and receipt of benefits. Between the person who passively receives the benefits of a cooperative practice and the one who knowingly and willingly accepts them is the person — very many people, in fact — who actively participates in the practice without being fully aware, in the ordinary course of life, that he or she is undertaking an obligation to do his or her part by participating in a cooperative practice. Like Michael Hardimon and other proponents of the associative theory of political obligation, in other words, those who take this position believe that there is no straightforward dichotomy between what is fully voluntary and what is altogether involuntary. In the middle ground, they hold, there is room for the voluntary — but not deliberate or completely conscious — acceptance of obligations. Others respond to Simmons' criticism by denying that fair-play obligations must be incurred voluntarily. What matters is not that one accepts the benefits of the practice, according to Klosko's influential account, but that three conditions are met: "Goods supplied must be (i) worth the recipients' effort in providing them; (ii) 'presumptively beneficial'; and (iii) have benefits and burdens that are fairly distributed". If, in sum, a state qualifies as a cooperative enterprise, and if it provides its members with goods that are presumptively beneficial — or

"indispensable for satisfactory lives" — then its members have an obligation grounded in fairness to obey its laws.

Whether these responses have swayed philosophical opinion in the direction of fair–play theory is difficult to say, but they clearly have not settled the debate in its favour. Simmons, for one, continues to hold that modern political societies are too large and impersonal to count as cooperative enterprises. He also contends that Klosko's theory is "not really a *fairness* theory at all," but a "disguised Natural Duty theory, resting on an unstated moral duty to help supply essential goods locally ...". Others complain that fair-play theory is not suitably sensitive to the possible alternatives there may have been to the cooperative practices that have emerged. We may admit, on this view, that people receive benefits from a cooperative practice, and even net benefits, but we should also notice that they might have benefited more from the establishment of a different practice. To say, in these circumstances, that those who are engaged in a cooperative practice have an obligation to do their part is to accept the principle of fairness as "a powerfully conservative principle". In the political context, according to another critic, the proper comparison is between a state of affairs in which benefits follow from other people's obeying the laws in the sense of mere compliance, on the one hand, and a situation in which benefits follow from others' obeying specifically "*because* the law says to do it". If the benefits are the same in both cases, then there is no reason to think that true cooperation, rather than mere compliance, is producing the benefits, and hence no reason to think that those who receive the benefits have a fair-play obligation to obey the laws.

Arguments such as these seem more likely to prolong than to settle the debate over the principle of fair play. For conservatives, in fact, the claim that fair play is "a powerfully conservative principle" is hardly a reason to reject the principle. Others may note that having a fair–play obligation to the members of an ongoing enterprise does not bar anyone from trying to transform that enterprise, perhaps even by means of civil disobedience. As for the argument that compliance rather than cooperation is all that is necessary to provide the benefits ordinarily associated with political societies, it seems likely to do no more than renew controversies about the nature of such societies and the viability of philosophical anarchism. The question, in other words, is whether we can expect a polity to survive if its "members" regard one another not as co-operators in a common enterprise but exclusively as purchasers of governmental services who comply with the law under the threat of coercion. For these reasons, fair-play theory is likely to remain alive but much disputed option for those who believe in political obligation.

The Social Contract

Although the idea of the social contract long antedates the modern era, its full development occurred in the seventeenth century, when Thomas Hobbes and John Locke used the theory to rather different ends. Jean-Jacques Rousseau, Immanuel Kant, and other philosophers have also relied on social contract theory, but the classic expressions of the contract theory of political obligation remain Hobbes's *Leviathan* (1651) and Locke's *Second Treatise of Government* (1690).

For Hobbes, social contract theory established the authority of anyone who was able to wield and hold power. If we imagine ourselves in a state of nature, he argued, with no government and no law to guide us but the law of nature, we will recognize that everyone is naturally equal and independent. But we should also recognize that this state of nature will also be a state of war, for the "restless desire for Power after power" that drives all of us will lead to "a war of every man against every man". To escape so dreadful a condition, people surrender their independence by entering into a covenant to obey a sovereign power that will have the authority to make, enforce, and interpret laws. This form of the social contract Hobbes called "sovereignty by institution." But he also insisted that conquerors acquire authority over those they subject to their rule — "sovereignty by acquisition" — when they allow those subjects to go about their business. In either case, Hobbes said, the subjects consent to obey those who have effective power over them, whether the subject has a choice in who holds power or not. Because they consent, they therefore have an obligation to obey the sovereign, whether sovereignty be instituted or acquired.

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

Locke does agree with Hobbes, of course, in deriving obligations to obey the law from the consent of the governed. In developing his argument, however, he reveals three problems that have bedevilled social contract theory. One problem has to do with the nature of the contract: is it historical or hypothetical? If the former, then the problem is to show that most people truly have entered into such a contract. If the contract is meant to be a device that illustrates how people *would have* given their consent, on the other hand, then the difficulty is that a hypothetical contract "is no contract at all". The second problem has to do with the way Hobbes and Locke rely on *tacit* consent. If only express or explicit statements of agreement or commitment count as genuine consent, then it appears that relatively few people have consented to obey the laws of their country; but if tacit or implied consent is allowed, the concept of consent may be stretched too far. Hobbes does this when he counts submission to a conqueror as

consent, but Locke also runs this risk when he states, in §119 of the *Second Treatise*, that the "very being of anyone within the territories" of a government amounts to tacit consent. Finally, it is not clear that consent is really the key to political obligation in these theories. The upshot of Hobbes's theory seems to be that we have an obligation to obey anyone who can maintain order, and in Locke's it seems that there are some things to which we cannot consent. In particular, we cannot consent to place ourselves under an absolute ruler, for doing so would defeat the very purposes for which we enter the social contract — to protect our lives, liberty, and property.

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

Utility and Obligation

For all its influence in other areas of legal, moral, and political philosophy, utilitarianism has found few adherents among those who believe that there is a general obligation to obey the laws of one's country. Part of the reason for this situation may be the fact that Jeremy Bentham, John Stuart Mill, and others who followed Hume's path had little to say about political obligation. A more powerful reason, though, is that utilitarians have trouble accounting for obligations of any kind. If one's guiding principle is always to act to maximize expected utility, or promote the greatest happiness of the greatest number, then obligations seem to have little or no binding force. After all, if I can do more good by giving the money in my possession to charity than by paying my debts, then that is what I should do, notwithstanding my obligations to my creditors. By the same reasoning, whether I should obey or disobey the law is a matter to be settled by considering which will do more good, not by determining whether I have an obligation to obey.

Some utilitarian philosophers have struggled to overcome this problem, either by pointing to reasons to believe that respecting obligations serves to promote utility or by restricting calculations of utility to rules or norms rather than to individual acts. Whether their efforts have been successful remains a matter of debate. There seems to be a consensus, however, that the most sophisticated attempts to provide a utilitarian grounding for political obligation, such as those of Rolf Sartorius and R. M. Hare (1976), have proved unsuccessful. As a result, utilitarianism seldom figures in the debates of those contemporary political philosophers who continue to believe that there is, in some political societies, a general obligation to obey the law.

Natural Duty

The final contenders in the political obligation debates are natural duty accounts. In this context, natural duties are understood to be ones people have simply in virtue of their status as moral agents; they need do nothing to acquire them, nor does their bearing such duties depend on their occupying some role in a socially salient relationship. Natural duties are also universal in scope; they are owed to all members of a class defined in terms of possession of some feature, such as sentience or rationality. John Rawls first broached such an argument for political obligation when he asserted in *A Theory of Justice* that everyone is subject to a natural duty of justice that "requires us to support and to comply with just institutions that exist and apply to us". More recently, Jeremy Waldron (1993, 1999), Thomas Christiano (2008), Christopher Heath Wellman (2005), Anna Stilz (2009), and, arguably, David Estlund (2008) have refined and expanded upon Rawls's somewhat vague contention, some of them in ways reminiscent of or even explicitly modelled on Kant's defence of political obligation.

Contemporary natural duty theorists differ over the natural duty that provides the basis for political obligation. Christiano grounds his account in a fundamental principle of justice requiring the equal advancement of people's interests, Wellman in a Samaritan duty of easy rescue, and Stilz in a Kantian duty of respect for other's freedom-as-independence, understood as a secure sphere of self-determination defined by a person's rights. These theorists agree, however, that moral agents can discharge their natural duty to others only through submission to the authority of a common legal order. This is so for several reasons: the demands of justice are sometimes underdetermined; its achievement requires the resolution of coordination problems; and most important, people reasonably disagree over the demands of justice. Christiano traces this disagreement to what he calls the facts of judgment: diversity in people's natural talents and cultural surroundings, cognitive biases in their interpretation of people's interests and the value assigned to their own interests relative to the value assigned to the interests of others, and fallibility in both moral and non-moral judgment. In light of these facts, even those who make a good faith effort to discern what justice requires of them in their interaction with others will fail to reach a consensus. Agents who act on their own, private, judgment of justice will be perceived by others to be acting unjustly. If some are able to unilaterally impose their conception of justice on others, the latter will not enjoy freedom-as-independence, or will suffer the violation of their fundamental interests in being at home in the world, in correcting for others' cognitive biases, and in being treated by one's fellows as a person with equal moral standing (Christiano). Only submission to a common legal order can provide a solution to this problem of domination and conflict, argue the natural duty proponents of political obligation. "There is no way other than general compliance with a single authoritative set of rules to secure peace and protect basic moral rights"; law "settle[s] for practical purposes what justice consists in by promulgating public rules for the guidance of individual behaviour"; or in Stilz's Kantian terms, law replaces the unilateral imposition of obligations on others with the omnilateral imposition of obligations on all.

Not just any legal order will do, though. Rather, many natural duty theorists of political obligation argue either that the law must crafted according to democratic procedures or that it must not violate certain individual rights, or both, if those it addresses are to have a duty to obey it. Christiano, for instance, argues that against a background constituted by diversity, cognitive bias, and fallibility, agents can be sure that their fundamental interest in judgment will not be unjustifiably set back only if political power is exercised within institutions that publicly realize equality, i.e., democratic ones. Likewise, Waldron defends the authority of a majority-rule decision procedure on the basis of its "commitment to equality — a determination that when we, who need to settle on a single course of action, disagree about what to do, there is no reasonable basis for us in designing our decision-procedures to accord greater weight to one side than to the other in the disagreement". Even if a person does not believe that the particular scheme of distributive justice realized in the law treats her justly, she can recognize that the process whereby that scheme was created, and can be modified or eliminated, does treat her as an equal. Stilz argues that law omnilaterally imposes obligations on all only if it expresses a general will. It does the latter if and only if it "first, defines rights (protected interests) that apply equally to all; second, it defines these rights via a procedure that considers everyone's interests equally; and third, everyone who is coerced to obey the law has a voice in the procedure". The latter two conditions, she maintains, can only be met by a democratic procedure.

Whatever its details, many natural duty theorists also argue that the conception of the person that grounds their accounts of political obligation also limits the scope of legitimate law. Reasonable disagreement over freedom-as-independence does not extend to torture, for example, and at some perhaps indeterminate point the denial of freedom of conscience clearly conflicts with a person's fundamental interests in correcting for cognitive bias and being at home in the world. Most natural duty theorists conclude that subjects of a legal order that recognizes no rights on the part of some or all of its subjects against such treatment lacks legitimate authority, even if it is democratic.

Recall that natural duty accounts of political obligation begin with duties that all moral agents owe to all other moral persons as such. Simmons argues that this commitment renders natural duty accounts unable to justify the particularity of political obligations; that is, the fact that people have political obligations in virtue of their citizenship or residence in particular states, and that they owe those obligations to that particular state (or to their fellow citizens). Even if we have a natural duty "to support and comply with just institutions," as Rawls claims, why must we discharge that duty by supporting and complying with the just institutions that comprise the state in which we are citizens or residents? True, those are the institutions that "apply to us," in the sense that they claim jurisdiction over us. But why think that this social fact has any moral import, particularly if we think the political institutions of other states more worthy of our support because they better promote justice, or are in greater need of support?

Some natural duty theorists point to the intensity and frequency of interaction among those who live in close proximity to one another as a justification for the duty to obey the laws of the particular jurisdiction in which one resides. Others emphasize that a

person who free-rides on his fellow citizens' support for and compliance with the law to act on his own judgment of how he can best discharge his natural duty of justice unfairly takes advantage of them. Absent their good-faith sacrifice of the liberty to act on their private judgments regarding what justice requires, the free-rider would likely be unable to act as he does. Finally, some natural duty theorists argue that Simmons misconstrues the natural duty of justice. Justice is not an outcome or state of affairs that agents have a duty to promote via whatever means they judge to be most effective or efficient, be it the political institutions of their state or those of another. Rather, justice characterizes a particular manner of interacting with others, such as with respect for their freedom-as-independence or their fundamental interests, including but not limited to their interests in judgment. At least for a citizen of a liberal democratic state, the latter construal of justice entails that she can only treat her fellow citizens justly if she guides her conduct according to its law.

Simmons has recently rebutted this second line of argument. The argument entails, he claims, that citizens of one liberal-democratic state who are forcibly subjected to the rule of another liberal-democratic state immediately acquire political obligations to the second state as long as they are accorded full citizenship rights. Simmons treats this implication as a *reductio ad absurdum* of the democratic Kantian justification for political obligation, a demonstration that it cannot properly account for the particularity of such obligations. In part, this latest rejoinder by Simmons evidences and gives further impetus to a shift in the debate over political obligation from the question of what gives states a right to rule particular people, to which correlates their duty to obey the law, to the question of what gives states a right to rule over a particular territory. But it also points to the need for natural duty theorists to elaborate upon their so far brief discussions of the contribution that a legitimate international legal order makes to the legitimacy of domestic legal orders.

Anarchist Challenges to Political Obligation

According to the foregoing analysis, a political obligation, if it exists at all, is at least a systemic, *prima facie* or *pro tanto* moral duty to obey the laws of one's polity. But does such an obligation exist or obtain in any general or widespread sense? Most political philosophers have assumed that the answer is yes. In the middle years of the twentieth century some philosophers even asserted, on conceptual grounds, that political obligation needs no justification. As one of them put the point, "to ask why I should obey any laws is to ask whether there might be a political society without political obligations, which is absurd. For we mean by political society, groups of people organized according to rules enforced by some of their number". This view did not long prevail, but it testifies to the strength of the tendency to believe that citizens surely have an obligation to obey the laws of their country, at least if it is reasonably just.

There have been dissenters, however, and in recent years they have come to occupy a prominent place among political philosophers. As they see it, there is no general obligation to obey the law, not even on the part of the citizens of a reasonably just polity. The most thorough-going of these dissenters have been anarchists proper — that is, those persons who insist that states and governments are wickedly coercive institutions that ought to be abolished. Yet other sceptics or dissenters have concluded that the anarchist proper is wrong about the need for the state but right about the obligation to obey the law. Like the anarchist proper, these "philosophical anarchists" hold that the state is illegitimate, but they deny that its illegitimacy entails "a strong moral imperative to oppose or eliminate states; rather they typically take state illegitimacy simply to remove any strong moral presumption in favour of obedience to, compliance with, or support for our own or other existing states".

Philosophical Anarchism

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

This primary obligation dooms any attempt to develop a theory of political obligation, Wolff argues, except in the highly unlikely case of a direct democracy in which every law has the unanimous approval of the citizenry. Under any other form of government, autonomy and authority are simply incompatible. Authority is "the right to command, and correlatively, the right to be obeyed", which entails that anyone subject to authority has an obligation to obey those who have the right to be obeyed. But if we acknowledge such an authority, we allow someone else to rule us, thereby violating our fundamental obligation to act autonomously. We must therefore reject

the claim that we have an obligation to obey the orders of those who purport to hold authority over us and conclude that there can be no general obligation to obey the laws of any polity that falls short of a unanimous direct democracy.

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

Against Philosophical Anarchism

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

Some of these attempts apply specifically to Wolff's a priori attack on political authority and obligation, while others apply to philosophical anarchism in general. The arguments against Wolff usually concentrate on his conception of autonomy and its relation to authority. In brief, Wolff's critics argue that he is wrong to insist that moral autonomy is our "primary" or "fundamental obligation," for it "is, in fact, highly implausible to think that autonomy should invariably override all other values" (Horton 2010, p. 129). Moreover, there is no reason to accept Wolff's claim that autonomy and authority are necessarily incompatible. Insofar as autonomy is a capacity, as Wolff says, it will need to be developed before it can be exercised, and various kinds of authority — including political authority — will foster its development and make its continued exercise possible. Nor is it clear how Wolff can reject political authority without also rejecting promises and contracts as illegitimate constraints on one's autonomy — a problem that leads even Simmons to judge Wolff's a priori philosophical anarchism a "failed attempt".

In the face of these problems, Matthew Noah Smith has recently tried to rescue the a priori scepticism of Wolff's theory by substituting the overriding importance of "the moral status of the subject's self" for Wolff's reliance on the fundamental duty of autonomy. According to Smith, preserving the status of the self is incompatible with the law's claim to authority, because "the obligation to obey the law would morally require otherwise morally upstanding subjects to undergo a radical form of self-effacement in favour of recreating themselves in the image of foreign values". Whether the law is properly understood as an "alien force" that threatens "to fix who

one is " (p. 14), however, is a point that critics of a priori anarchism are not likely to concede. Indeed, the radically individualistic conception of the self that underpins Smith's argument is one that proponents of the membership or associative theory of political obligation will dismiss from the outset. It seems unlikely, then, that Smith's adaptation will develop the "traction" that, on his account, Wolff's has failed to gain.

With regard to philosophical anarchism in general, critics have responded in various ways, including the disparate complaints that it is a kind of false or hypocritical radicalism (Gans) and that it is all too genuine a threat to political order (Senor). The latter complaint has both an ontological and a conceptual aspect. That is, the critics argue that philosophical anarchists fail to appreciate the social or embedded nature of human beings, which leads the anarchists to conceive of obligation in excessively individualistic or voluntaristic terms — which leads, in turn, to their denial of a general obligation to obey the law. The problem, however, is that it is a mistake to think "that political life is left more or less unchanged by dispensing with some conception of political obligation and adopting the perspective of philosophical anarchism. Unless it can be shown that we can continue to talk intelligibly and credibly of *our* government or *our* state, then a radical rethinking of our political relations is an unavoidable consequence" (Horton 2010, p. 133). Whether the philosophical anarchists are willing to accept that consequence — and perhaps to become anarchists proper — or whether they can find a way to stop short of it thus becomes a major point of contention.

In the end, of course, the best response to philosophical anarchists, especially those of the a posteriori kind, will be to produce or defend a theory of political obligation that proves to be immune to their objections. At present, though, no single theory has the support of all of those who continue to believe in political obligation, let alone the assent of philosophical anarchists. Several theories remain in contention, however, as the following section will attest.

2 Voluntarist Theories

This chapter offers a critical assessment of one class of accounts of political obligation. These accounts, following terminology which has become current in this context, are labelled 'voluntarist' (Pateman, 1985; Riley, 1973). Such theories have proved consistently appealing in the long history of discussions of political obligation, but especially so in the modern world to theorists of a broadly liberal persuasion. Central to these theories is the role they attribute to individual choice or decision, to some specific act of voluntary commitment, in explaining or justifying political obligation. Their essential and common feature is simply that they seek to explain political obligation in terms of some freely chosen undertaking through which persons morally bind themselves to their polity. It is through this act or undertaking that people are thought to acquire their political obligations. The precise form of this act or undertaking; the conditions which render it freely chosen; the nature of the relationship implied; the extent of the obligation incurred; and to whom or what the obligation is owed, are all variously articulated within differing voluntarist accounts. Often these differences are important and for some purposes may be more significant than the features that these accounts share. However, without denying or underestimating those differences, the discussion that follows is premised on the assumption that it is legitimate and instructive to treat such differences for the most part as variations within one broad class or category of argument.

Thus in general the ensuing discussion will be concerned with what is common to these accounts – the features they share – rather than with what differentiates them from one another. One advantage of this strategy is that it enables us to focus upon one logically distinct type of argument without becoming diverted by peripheral or secondary detail. Another advantage in considering one broad type of argument, rather than the complex ideas of particular political theorists, is that the latter often contain several logically distinct arguments which coexist in uneasy, ambiguous and some-

[illegible] other. Locke would be a good

BB 36

example of a political philosopher who employs the notion of consent in his account of political obligation yet leaves it unclear precisely how much weight it is supposed to bear within the overall theory he articulates (Locke, 1967). However, this approach also has some limitations, principal among which is that it is inclined to drain the actual accounts offered by individual political theorists of their richness and imaginative complexity. Some simplification, though, if not desirable, is probably unavoidable. Thus the discussion here is directed towards one type of argument and its central features, and the ideas of particular political theorists only in so far as they employ this type of argument.

Voluntarism and political obligation

Voluntarist accounts, it has been suggested, explain or justify political obligation in terms of some freely chosen act or undertaking which morally binds a person to his or her polity. Most commonly the claim has been that the majority, if not all, individuals have political obligations in at least some polities, and that these are to be explained by reference to an individual's voluntary act of commitment. However, some political philosophers have used voluntarist arguments in a more radical way to subvert the claim that most people, either now or in the past, have or have had, any obligations to their polity. They argue that voluntarist theories give a basically correct account of political obligation, but they conclude from this that the vast majority of people, both now and in the past, have no such obligations. Political obligation exists only when people have freely chosen membership of their polity, but since most people do not freely choose, they are not obligated (e.g. Pateman, 1985). Somewhat crudely, the distinction is between voluntarist accounts which purport to explain or justify a relationship which has actually obtained between many people and their polity, and those which claim that the requisite conditions for the proper ascription of political obligation have, as a matter of fact, at best only rarely existed. In short, both are voluntarist in that they agree that some voluntary undertaking must provide the justification for political obligation, but they disagree as to whether or not most people have made such an undertaking. This disagreement results from a dispute either about

what the conditions are that have to be met for an undertaking to be genuinely voluntary, or about whether or not in fact the appropriate conditions of a voluntary undertaking have been met.

This distinction is not a sharp one at the margins, but it does reveal a real and significant gulf between differing voluntarist accounts of political obligation: a gulf which is often reflected, for example, in different judgements about whether or not people have political obligations in liberal democratic states. It also means that, to some extent, distinct criticisms are appropriate to voluntarist accounts divided on this basis. Though later in this chapter I will address specifically those theories which endorse voluntarism but which claim that the conditions for political obligation have rarely if ever been met, most of the discussion here is concerned with what those conditions are or should be, and whether they have obtained (at least in some polities for most people). With respect to this last point, I shall be particularly concerned to assess the claim that liberal democratic polities have so successfully incorporated the requirements of voluntarism that the ascription of political obligation to their citizens is justified within the terms of a voluntarist theory. My conclusion about this, and about voluntarist theories of political obligation more generally, will be sceptical.

First, however, more needs to be said about the structure and content of voluntarist accounts of political obligation. The most familiar of these accounts are those which deploy concepts such as a social contract, or express or tacit consent. The role of these concepts in voluntarist accounts is to provide the relevant connection between the individual and the polity which explains or justifies the claim that people have a political obligation to their particular polity. What makes these accounts voluntarist is that they all regard the political relations constituted by membership of a polity as in some way the result of voluntary, freely chosen undertakings by those so related. Where they differ, however, is in the specific accounts they give of how such relations are instituted. Thus political obligation is variously understood to arise from, for example, a contract between many individuals to establish a political community, or a contract between individuals and their government, or the express or tacit consent of individuals to the government or the constitution. While these do not exhaust the possibilities, they are indicative of the range of claims that are characteristically made by voluntarist theories. In brief, what they

assert is that no person has any political obligation unless he or s
has voluntarily bound him or her self to a particular polit
Furthermore, in explaining how individuals come to acquire th
obligation, voluntarist theorists also attempt to explain the preci
substance of the obligation, its extent and to whom or what it
owed. However, the answers given to these questions inevitably va
with the specific details of different voluntarist accounts.

Thus, for example, Thomas Hobbes famously argued in
Leviathan 'that life in a state of nature (i.e. without politic
authority) would be solitary, poor, nasty, brutish and sho
(Hobbes, 1968, Ch. 13). In order to escape from this condition,
claimed, we covenant (i.e. contract) with each other to give up
natural right to whatever we want in return for the protection of
all-powerful sovereign. We agree to obey the sovereign, who is n
himself a party to the contract, whatever he commands; subject o
to the residual right we each have to protect our own life when it
directly threatened, whether that threat is from the sovereign
some other person or persons from whom the sovereign is unable
unwilling to protect us. In this way we both establish the author
of the sovereign and simultaneously acquire the obligation to ob
him. However, not surprisingly, many subsequent thinkers ha
doubted whether Hobbes' cure, the absolute authority of t
sovereign and the (almost) unlimited obligation of the subject, w
any better than the disease of the state of nature which it w
supposed to remedy. Thus later in the seventeenth century, in
Second Treatise on Government, John Locke, though also maki
the social contract central to his theory, argued for a more limit
political authority (Locke, 1967). He also afforded a promin
place in his account of political obligation to the notion of consc

Locke, like Hobbes before him, explained the origin of politi
obligation in a contract made in a pre-political state of natu
However, Locke's conception of the state of nature is considerab
more benign than that of Hobbes, and the process by which politi
authority is instituted is more complicated. According to Lock
political authority arose in two stages: first through a unanimo
contract to form political society, and then by a majority decision
entrust a government with legislative, executive and judicial powe
Throughout this process people retain their natural rights to li
liberty and property; the purpose of forming a political society w
a government is to provide for the better protection and impart

enforcement of these rights than is possible in the state of nature.
There, in the absence of any authoritative interpretation of these
rights and any impartial body charged with their protection, there is
inevitably some arbitrariness of judgement and erratic unpredict-
ability of enforcement. Subsequent generations, not party to the
original contract, acquire their political obligations through their
consent: either in the form of an explicit oath of allegiance or
through what Locke calls their 'tacit' consent. Locke is rather
unclear about what is necessary for tacit consent, but it includes
enjoying or making use of any property under the jurisdiction and
protection of the state. The problems involved in the idea of
consent, whether express or tacit, will provide a major focus of
discussion later in this chapter and, therefore, will not be pursued
further at this point.

The most important feature of Locke's account of political
obligation, in contrast to that of Hobbes, is that it allowed for a
right of resistance to an incompetent or tyrannical government;
though how and by whom this was to be judged was again left
somewhat unclear. It also gives rise to doubts about the real
importance of consent within Locke's theory, for it sometimes
seems that the significant question for political obligation becomes
not whether a person consents, but whether the government is
acting justly (Dunn, 1967). Indeed we can see Locke as embracing
two different kinds of justification of political obligation: those
which focus on the activities or moral qualities of the state and those
which look to some voluntary act of commitment on the part of the
citizen. It is only the latter which will be considered in this chapter.

Hobbes and Locke are undoubtedly two of the most important
voluntarist theorists, but voluntarist theories of one kind or another
have a long and complex history with roots dating back at least as
far as classical Athens. In the *Crito*, Socrates considers escaping
from his imprisonment and avoiding the death penalty but argues
that the Laws (the embodiment of political authority in Athens)
could legitimately ask of him: 'Are we or are we not speaking the
truth when we say that you have undertaken, in deed if not in word,
to live your life as a citizen in obedience to us? . . . It is a fact then
that you are breaking covenants and undertakings made with us,
although you made them under no compulsion or misunderstand-
ing' (Plato, 1969, p. 93). Here is clearly expressed the thought that
Socrates has, through his voluntary actions, entered into a covenant

or agreement with the Laws of Athens, and has thereby acquired
obligation to obey them. Though this is not the only, or the mo
important, line of argument advanced in the *Crito*, it is a significa
voluntarist strand in the broader position Socrates elaborates (
Woozley, 1979). Furthermore, elements of voluntarist theories ha
been detected in other Greek thinkers and in Roman Law as well
in Hooker, Grotius and Milton, before what is generally consider
to be their full flowering in the work of Hobbes and Locke in t
seventeenth century.

It would be implausible, therefore, to claim that voluntar
theories of political obligation are only articulated within a ve
historically specific set of socio-economic conditions. This is not
deny, however, that particular historical circumstances may favo
or be especially conducive to, their development. For example,
seems likely that the prominence of voluntarist theories in t
seventeenth century owes a good deal to the peculiar soci
economic and ideological changes that Europe was then und
going; in particular, those consequent on the Reformation, the r
of Protestantism, and the emergence of market capitalism (Ma
Pherson, 1962). These circumstances did much to undermine t
theory of the divine right of kings which had helped to justify t
political authority of secular rulers during the period of t
increasing separation of church and state. This theory, whi
perhaps receives its most articulate statement in the writings of S
Robert Filmer, maintained that the authority of secular rulers h
been directly ordained by God, and that therefore their subjec
were morally obligated to obey the ruler's commands (Filme
1991). The theories of Hobbes and Locke, in their different way
were both conscious attempts to develop a justification of politic
authority more suited to the changing historical conditions. Indee
though I shall not attempt it here, an exploration of the historic
context of seventeenth-century contract and consent theories can
especially illuminating about some of the merits and limitations
such theorising (Herzog, 1989). It is also possible to conjecture mo
generally that voluntarism is likely to prove particularly attracti
when established authority is under attack, or where there is
settled moral consensus to which appeal can be made. Howeve
whatever the merits of such a speculation, there can be no dou
that voluntarist theories have a venerable history (Gough, 196
Lessnoff, 1986). Moreover, in one form or another, they continue

have a considerable attraction for political theorists: an appeal
undiminished in our own time, as is illustrated in the work of
several liberal political philosophers (Beran, 1977, 1987; Plamenatz,
1968; Tussman, 1960).

It is appropriate, therefore, briefly to consider what it is about
voluntarist theories of political obligation which accounts for their
persistent and continuing attractiveness. Why have political philo-
sophers shown such remarkable tenacity and ingenuity in trying to
reconstruct or rehabilitate such theories, despite what appear to be,
as we shall shortly see, some fairly obvious and deep-rooted
objections to them? These attractions have both a moral and
philosophical dimension. Perhaps the principal feature of voluntar-
ist theories which accounts for their appeal is the crucial role they
assign to people's voluntary choices or commitments. For what
obligates a person is some act (a contract, a promise, a form of
words, or an action or actions expressing or implying consent)
which is freely and voluntarily performed by that person. The
individual is recognised as a morally free agent, only legitimately
bound by the demands of the polity because of a free and voluntary
undertaking to be so bound. Since the individual is the author of his
or her own obligation, such an obligation in no way impairs the
moral autonomy of the person. The lucid summary of the attrac-
tions of consent theory by A.J. Simmons serves equally for any
voluntarist theory:

> '[It] respects our belief that the course a man's life takes should be determined, as much as possible, by his own decisions and actions. Since being born into a political community is neither an act we perform, nor the result of a decision we have made, we feel that this should not limit our freedom by automatically binding us to the government of that community. And these convictions serve as the basis of a theory of political obligation which holds that only the voluntary giving of a clear sign that one finds the state acceptable (and is willing to assume political bonds to it), can ever obligate one to support or comply with the commands of that state's government' (Simmons, 1979, p 69).

On this view, the polity is an association of individuals much like
other voluntary associations, such as sports clubs, political parties
and trades unions, created and maintained by the freely entered into

commitments of the multiplicity of individuals who compose the
In the modern world, at least, the voluntary membership of
association is usually thought of as a necessary condition of
having authority over its members and correspondingly of the
acquiring obligations to it. If this is true of other associations, th
why not of the polity? Clearly, if some account of politic
obligation along these lines were plausible, it would satisfy a wid
held conviction that the moral authority of a polity resides in t
voluntary agreement of its members, a conviction which is especia
attractive to those of a broadly liberal political persuasion. Such
account would also have the benefit of rendering political obligati
intelligible in terms which, if not transparent to the understandi
would at least identify it as belonging to that familiar category
moral obligations of which promises are paradigmatic. Hence i
were possible to formulate a convincing voluntarist account
political obligation, it would have considerable moral and philo
phical appeal. What then are the objections to such an account? I
possible to formulate a convincing voluntarist theory?

The most fundamental and obvious difficulty that has continua
confronted voluntarist theories has been to discover anything th
could reasonably be interpreted as corresponding to the type of a
required to create a political obligation. We have a good idea,
example, of what acts are required to become a member of a cl
but what comparable act is there which creates membership o
polity? Indeed, for those voluntarist theorists who claim to give
explanation or justification of political obligation in any existi
polities, this problem appears insurmountable. This perhaps ban
and obvious point is no less important for its familiarity a
simplicity. In the case of a supposed contract the embarrassi
questions to which this objection gives rise are easily appare
When was this contract made? Who are the parties to the contra
What are the terms of the contract? Where are we to look to resol
any disputes about the contract? It does not seem that any soci
contract theory of this very simple form could possibly provi
remotely plausible answers to most of these questions. It is true th
in some times and places oaths of allegiance and declarations
loyalty have been common, but how plausible is it to regard these
meeting the conditions of a contractual basis for political oblig
tion? First, even if they are thought to fit the bill, this would on
explain the political obligation of those who had entered into cu

commitments. Second, such oaths and declarations would need to have been freely entered into if they were to count as genuine contracts. This is a point which will be developed more fully later when considering the conditions that the weaker notion of consent requires to be met, if an act or utterance is to count as a genuine expression of voluntary agreement. Thirdly, the content of these oaths and declarations is often either too vague or too narrow to license a general political obligation. Finally, such oaths and declarations lack features which are usual to contracts: for example, only one party undertakes an obligation with the other offering little in return.

However, these objections might give rise to the reply that they take the idea of contract far too literally. Perhaps a more informal analogue of a contract such as a promise, bargain or agreement is involved. Indeed, it might be argued that what such oaths and declarations, as well as other acts, should be understood as expressing is rather a person's consent to the authority of the government. Thus, since it seems likely that the concept of consent will prove to be more defensible than that of the more formal contract, subsequent criticism will be directed to voluntarist accounts which focus upon consent. Any criticisms of consent theories are likely to apply *mutatis mutandis* to all genuinely voluntarist contract accounts (though, as will be explained later, there are versions of contract theory which are not genuinely voluntarist, as defined here). It is, therefore, most profitable to concentrate on consent theories as the most plausible and sophisticated of voluntarist accounts of political obligation.

Consent

Consent, it has been suggested, is a more informal and less legalistic concept than contract. We give and refuse consent in a wide range of contexts, for a multiplicity of purposes and in a variety of forms: a patient consents to a surgical operation; a woman consents to allow a friend to borrow her car; a father consents to the marriage of his 17-year-old daughter; an employer consents to her employee taking the day off; a famous author consents to the use of his name in a charitable cause; homosexual acts are legal in Britain if performed in private by consenting adults; and so on. However, it would be a

mistake to infer from this variety that there are not reasonably precise conditions that an act or utterance must meet if it is legitimately to be understood as a genuine expression of consent. Richard Flathman has usefully identified three such requirements. On his account a person must, when the appropriate background conditions of freedom of choice obtain:

a. know what he consents to;
b. intend to consent to it;
c. communicate his knowledge of what he is consenting to and his intention to consent (that is, communicate his consent) to the person or persons to whom the consent is given (Flathman, 1972, p. 220).

These seem reasonable conditions to require of an action or utterance if it is to be legitimately interpreted as an expression of consent, in anything like our ordinary understanding of the term. These requirements will subsequently be referred to respectively as the 'knowledge', 'intention' and 'communication' conditions. However, there are some preliminary observations on these conditions which need to be made.

First, the knowledge condition, which requires that a person know what it is that he or she consents to, is more complex than it might appear. For sometimes, due to what is called the opacity of belief or knowledge, it can be reasonably claimed that a person consented to something even though he or she did not know or fully understand what had been consented to. For example, if a mother consents to her young son going to the theatre one evening she may also consent to his coming home late. This may be true even though the mother did not know she was consenting to her son's coming home late, perhaps because she mistakenly thought the play finished earlier. (Of course, the implications would be different if her son had misled her about the time at which the performance finished.) Thus the 'knowledge condition' must not be interpreted in too narrow or strict a way, though it is obvious, despite this indeterminacy in its application, that it is an indispensable condition in deciding whether or not, in any particular case, consent has been given. Indeed, and this is the second point, it should be noted that, despite the apparent clarity of the three conditions, it is in practice sometimes very difficult to be confident about whether or not they have been met.

It is sometimes as a matter of fact very difficult to determine whether or to what a person has consented. Sexual intercourse and some kinds of medical situation provide two notorious contexts in which the difficulty of establishing whether or not consent has been given may be considerable. Of course such difficulties do not preclude there being many instances in which the presence or absence of consent is clear and entirely unproblematic. The third observation is that all three conditions apply equally to tacit consent as to express or explicit consent. Since this point is more controversial, and it is highly relevant to what may seem to be the most plausible version of consent theory, it is worth considering more fully.

The notion of tacit consent is principally familiar from situations in which an individual on being given an opportunity to express dissent from some policy, proposal or other course of action does not do so and remains silent or impassive. Here it would often be natural to say that, though the individual does not do or say anything in response to the proposal, he or she tacitly consents to it. Such situations are especially familiar in committee meetings though they also exist in more informal and less structured settings. For example, in getting into a taxi and stating my destination, though no mention is made of a fare, I normally tacitly agree to pay the fare. What distinguishes tacit from express or explicit consent, in this as in other instances, is only the *manner* or *form* in which it is indicated. Tacit consent is expressed through silence or passivity. However, it is obvious that not just any instance of passivity or silence can reasonably be interpreted as an act of consent, or else each of us would be consenting to all manner of things all the time.

What singles out a particular instance of silence or passivity as an act of consent is precisely those conditions Flathman identifies. The person must know what it is he or she is consenting to, subject to the qualification mentioned earlier; must intend to give consent; and most importantly in this context must know that silence or passivity will be understood as an expression or sign of consent. These conditions need not imply any sustained or complicated process of explicit reasoning on the part of the person consenting, but it is only when they are met that it is appropriate to impute tacit consent to someone. Thus tacit consent is distinctive only in the form in which it is expressed and in other respects is essentially similar to express consent. In particular it is important to emphasise [illegible]

qualification of consent by the adjective 'tacit' does not imply a radically different type of consent, logically distinct from other forms of consent. In the end this is to say no more than that tacit consent is an instance of *consent*, but to say that much may prevent one being misled when the emphasis is placed upon its being *tacit* consent. The difference between tacit and express consent is of the same order as the difference between consent being indicated by raising a hand or by saying yes. The nature of silence and passivity may make such consent more difficult to identify and more disputable in practice, but the logic of tacit consent is no different from that of express consent.

The intention, knowledge and communication conditions are all necessary but not sufficient conditions for an act counting as a genuine expression of consent. There also have to be present what were earlier referred to as the appropriate background conditions of choice. These need to be explained more fully, though they are both more vague and more controversial than the other conditions. However, their necessity can easily be shown from the following example. If presented with a choice between his money or his life, a man cannot be said to have genuinely consented to the taking of his money, even though he allows it to be taken and the intention, knowledge and communication conditions have all been met. The reason for denying that genuine consent is involved in this example is that the man did not have the appropriate kind of choice as to whether or not to refuse his consent. It would be natural to say that he had no real alternative to consenting, though it would not be literally true to say that he had *no* choice at all. The problem here is in establishing how much, or, better, what sort of choice is necessary for an expression of consent to be genuine. This is particularly important for voluntarist theorists of political obligation, who need to show that people do have a real choice if consent is to play the role required by their theories.

Matters are further complicated, however, if we consider a rather different example. If a man is faced with a choice between a serious operation to save his life and the inevitable consequences of a terminal illness, it would be quite proper, if he agrees to the operation, to say that he gave his consent. Indeed, under normal circumstances his consent is just what is required before the operation can be performed. In both this example and that of the man faced with the choice between his money and his life the man

will die unless he gives his consent to one course of action, yet in the latter example the attribution of consent is strongly counter-intuitive, while in the medical example it would seem to be unexceptional. How, then, are these cases to be distinguished? Why is one properly understood as an expression of consent and the other not?

The different responses to these two examples is best explained in normative terms. The difference cannot be satisfactorily accounted for simply in terms of the number of choices available or in terms of their attractiveness, though in some instances these may be relevant considerations. In the two examples under discussion, if they are filled out in appropriate detail, both the number of choices and their utilities or values could be equivalent, yet the difference in judgement about whether or not consent had been given would persist. The normative feature of these two examples which most plausibly explains this difference of response is the presence or absence of coercion by another person or persons. In the first example it is the clearly coercive element of the threat that invalidates the imputation of consent, whereas in the medical example no coercion is either exercised or threatened.

Unfortunately, though this distinction between the presence or absence of coercion is easily observed in these particular examples, it is, in many circumstances, notoriously a matter of vigorous dispute as to what is to count as an instance of coercion. For example, when are the unpleasant consequences of an action to be understood as simply following from the action and when as coercively induced? When does persuasion become coercion? The point is not that answers cannot be given to these questions but that such answers will often be both lacking in precision and also controversial and disputed. Many cases will be clear, such as in the two examples cited, but some of the most interesting and important in political contexts are likely to be contested. For example, labour contracts within a capitalist economic system are characteristically viewed as coercive exchanges by Marxists while defenders of the free-market typically see them as paradigmatic instances of free exchange. Similar disputes are liable to pervade discussions of consent in the context of voluntarist theories of political obligation. For example, Hobbes argued that even contracts entered into under extreme duress, such as those made by people whose lives were directly threatened by an external aggressor, were no less voluntary and hence equally obligatory as

The central problem for consent theorists, as with all voluntarist theories, has been to discover any action in the personal history of most individuals which meets the conditions necessary for the ascription of political obligation; that is, to discover any act registering the appropriate consent. Who has consented? When and how have they consented? To what have they consented? To whom have they given their consent? Though many very different answers to these questions could be, and have been offered, two interpretations of tacit consent have proved especially popular among consent theorists. First, it has been claimed that continued residence within a polity, or the enjoyment of the benefits consequent upon continued residence, provides sufficient evidence that an individual consents to its political arrangements. Though the two formulations of this interpretation are not strictly equivalent, and the expression 'political arrangements' for indicating what is consented to is deliberately vague, the differences which are blurred by this general formulation can be safely ignored for present purposes; for the objections which follow apply irrespective of these differences. The second interpretation of tacit consent is of more recent provenance and involves the claim that voting in a genuinely democratic election is an expression of consent to the authority of the duly elected government. This suggestion is obviously much more restricted in its scope, being limited to polities which have authentically democratic constitutional and political practices. Here it should be noted that there is likely to be some dispute about what constitutes a genuinely democratic election and also about whether any, and if so what, limits are implied upon what a government may legitimately do. Again so far as possible the details of these disputes will be ignored. I shall begin by considering the first interpretation of tacit consent.

Does the claim that residence, or the enjoyment of the benefits of residence, implies consent meet the conditions necessary for an act to count as an expression of consent? It seems highly implausible to think that it does. There are no commonly understood conventions by reference to which continued residence or the enjoyment of its fruits can be reasonably interpreted as implying consent. It is not at all clear what individuals are consenting to, that they know they are consenting, or that they intend to do so. There may of course be

cious circumstances (Hobbes, 1968, Ch. 20). While this view has some justification within Hobbes' metaphysical system, it has not won much favour with other philosophers, and generally it has not been thought to meet the conditions of an authentically voluntarist theory of political obligation. However, even among those who accept that the background conditions of choice require that genuine consent must not be coercively induced, there is still an important area of disagreement as to what exactly is to count as the absence of coercion. Any account of consent needs to be sensitive to these difficulties.

It may also be appropriate at this point to advert briefly to one further area of contention. This concerns the claims of some feminist theorists, who have argued that the way in which the notion of consent is characteristically employed within the theories of political philosophers, and indeed the entire social contract tradition, is riddled by patriarchal assumptions (Pateman, 1988, 1989). These assumptions have been such as effectively to exclude women from consent or participation in the social contract; for either it has been tacitly implied that the relevant parties are male heads of households or, as with Rousseau, it has been explicitly stated that women are excluded for other reasons. Historically there can be no doubt that there is much justice in the feminist complaint. The more difficult and more philosophically interesting question, however, concerns the extent to which this patriarchal bias is inherent within voluntarism. If it were, then this would constitute a compelling objection to the entire enterprise of developing a voluntarist theory of political obligation. Fortunately, at least for those committed to this project, there is no reason to think that this is the case. It is probably true that in some contexts implicitly patriarchal assumptions have helped the whole idea of a social contract appear more practicable, but there does not seem to be anything in the logic of voluntarism which *necessitates* a patriarchal bias. Thus while the relationship between various voluntarist theories of political obligation and patriarchalism is a topic worthy of further exploration, such theories are not irredeemably compromised by this historical association. There is no apparent reason why such theories cannot be reconstructed along non-patriarchal lines, as indeed I have done in this chapter. It remains then to consider whether there are other reasons for rejecting an account of political obligation in terms of consent.

other arguments, for example from fairness, justice, gratitude or utility, as to why individuals *should* consent but these are not to the point here. The question is rather whether people through such actions *do* imply their consent and to this the answer must be no.

Additionally there is further reason why residence or the benefits of residence are likely to be thought dubious candidates as genuine indications of consent. It might reasonably be doubted in many instances whether the background conditions of choice obtain. In many circumstances there is simply no realistic alternative to continued residence. Many polities do not permit emigration or radically constrain it, and even when it is neither legally proscribed nor actively discouraged it is often likely to be a prohibitively costly option. For as David Hume wrote in a frequently cited passage:

> 'Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the domination of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her' (Hume, 1953, p. 51).

Even allowing for Hume's characteristic rhetorical flourish, there is surely much force to his observation. It is still more telling when, even for those to whom emigration might be a real possibility, the choice they face may only be between polities more or less like their own (and in any case in the modern world immigration is yet more tightly controlled than emigration). There is no longer any refuge for a person who wants to escape political relations entirely, and hence the choice facing such a person will be more apparent than real. Together these considerations comprise a powerful case against mere residence, or the enjoyment of the fruits of residence, being regarded as indications of consent. The nature of the acts involved are insufficiently voluntary; their connection to the political obligation to which they are supposed to give rise is too diffuse and indeterminate; and there are no generally accepted conventions by reference to which it can be reasonably argued that the 'knowledge', 'intention' and 'communication' conditions have been met.

It may be that we could conceive of political arrangements being changed that many, and perhaps all, of these objections would no longer have any force, and this is a possibility which is explored with some ingenuity by Harry Beran (Beran, 1987). He advances what he calls a membership version of consent theory according to which 'consent consists in accepting membership of the state' and this requires peoples' actual personal consent (Beran, 1987, Ch. 3). His is a reform theory in that he thinks no existing states meet the conditions for such consent, but where his account is unusual is in his claim that such reforms as are necessary are comparatively modest, and that 'consent-based political authority and obligation is possible without utopian changes to existing liberal democracies' (Beran, 1987, p. 153). In particular he argues that people should be given a formal opportunity on reaching maturity to accept membership of the state, or there should be some clearly established convention according to which continued residence (or perhaps the assumption of the rights of citizenship) will be generally understood to indicate consent. Furthermore, if the proportion of people living within a state who are under consent-based political obligations is to be maximised then the following conditions should obtain:

a. there is a legal right to emigrate and to change one's nationality
b. secession is constitutionally permitted if desired and feasible
c. a dissenters' territory is created (Beran, 1987, p. 125).

While such conditions would not necessarily establish that everyone within a state consented – there might still be a role for a status similar to resident alien – they would be sufficient to establish the political obligation of most people. How successful then is Beran's reformist, membership version of consent theory in meeting our earlier objections?

Certainly the kind of changes to the liberal democratic state that Beran recommends would do something to make it more of a 'voluntary association' in accordance with the requirements of a genuinely voluntarist consent theory. However, there remain several problems. First, it seems doubtful whether these proposed reforms really are as modest as Beran thinks. For example, both the theory of secession and even more the idea of dissenters' territories (places where those who do not consent can move) are full of difficulties. While Beran has tried to deal with some of the problems of secession, he has almost nothing to say about dissenters' territories. It seems quite bizarre to think that a dissenters' territory

1982). The question which is most to the point in this context concerns what makes a person who he or she is: the question 'Who am I?' Characteristically voluntarist theories assume, for the matter is rarely discussed in detail, a view of the person which may seem at first glance admirably commonsensical, robust, non-metaphysical and unproblematic. Persons are conceived as separately existing entities, only contingently related to each other and to their social context, possessed of natural freedom and some minimal measure of reason. However, this picture and, in particular, the portrait of persons as possessing natural freedom, in opposition to the constraints imposed by social life, is potentially misleading. It is not so much that the necessity of some social context for a person's development is not appreciated, but that the connection between the person and that social context is seen as essentially contingent rather than entering into the person.

Voluntarist theorists, at least in recent times, have been suspicious of attempts to connect a conception of the person in some deeper way with the social context in which persons are formed. Typically, they have preferred to ask 'What sort of life shall I choose to lead?' and to resist the question 'Who am I?' This latter question is viewed as both metaphysically confused and politically dangerous; often being seen as damagingly associated with the obscurity of Teutonic idealist philosophy and the political fanaticism of totalitarianism and extreme nationalism. Moreover such suspicions are not without justification. However, even where this 'atomic' conception of the person does not ignore the general point that a person is in part a product of society – and the pervasive attraction of the idea of a state of nature to voluntarist theorists is in some cases evidence of a reluctance to accept even this – there is a marked failure to appreciate the more specific point, that *particular* persons are in part the products of *particular* societies. There is an obvious sense in which if we had been born and raised in a different society we would be different people; not only because we would be a different genetic bundle, but because our formative experiences would be different. Of course the specific formative experiences of each of us are different but there is also a significant discontinuity between different polities. One of our important formative experiences is the development of our sense of being a member of this particular political community. Personal identity, our sense of who we are, is partly constituted by where we

are born, resident and educated; and it is partly a function of the history, culture and rules of our community which confer a particular status on us and from which we necessarily acquire some self-understanding. In part our identity is bound up with the polity of which we are members, and it would not be surprising if this connection between the sense of who we are and the polity of which we are members were reflected in our conception of political obligation.

Much of the substance of these reflections on personal identity could be conceded, at least for the sake of argument, yet it might still reasonably be asked what specifically they show about political obligation. There seem to be at least two questions which need to be answered. First, how closely are the socially constituted elements of the person tied to distinctions between polities? There is, it has been suggested above, some connection but it is not clear how deep or extensive this must be. Second, even if some deep connection is established between the identity of persons and the polity of which they are members, what are the precise implications of this for their political obligations? These are difficult questions but they will be left until Chapter 6 since, as with the discussions of the nature of obligation and the voluntary association model of the polity, these reflections on personal identity are largely intended to prepare the ground for the account of political obligation that is advanced there. They attempt to do so in two ways. First, through undermining the plausibility and appeal of the manner in which these issues are usually treated within voluntarist theories. Second, through intimating the kind of treatment which might prove more satisfactory, they suggest that what is required is an account of political obligation in which the obligation is not created by a person's voluntary undertakings; a conception of the polity which is not modelled on a voluntary association; and an understanding of the person more deeply rooted in membership of the polity.

This chapter has been concerned with only one type of justification of political obligation, though one of great resilience in the history of political philosophy. It has tried to show that voluntarist theories do not give us a plausible understanding of political obligation. More ambitiously, it has been further argued that the terms in which such theories conceptualise the problem may effectively preclude its resolution. In arguing this, however, I would not wish to be understood as denying either that voluntarism plays

an important role with respect to some features of our moral life, of the significance of such matters as civil rights and democratic freedoms to which some, though not all, voluntarist theories give such prominence. A political community in which people have the rights associated with citizenship within liberal democracies is, for example, in my view, preferable to one in which they are lacking. My concern, however, has been to deny that these features succeed in furnishing the conditions of a convincing voluntarist theory of political obligation. The next chapter, therefore, addresses a different approach to justifying political obligation – an approach in which voluntarism plays no significant part.

3 Teleological Theories

In the preceding chapter we considered and largely rejected one broad category of accounts of political obligation. In this chapter a very different type of account will be the subject of attention. Whereas voluntarist theories seek to justify political obligation in terms of some putative voluntary undertaking by the person obligated – a specific utterance or sequence of actions – which puts the person under the obligation, the theories discussed in this chapter approach political obligation from a different perspective. These theories seek to explain political obligation by looking to the future rather than to past actions, and by looking to the likely consequences or the purposes of the obligation, rather than to some obligation-creating voluntary commitment. These theories are classified as teleological because they explain political obligation in terms of some goal, end or purpose, a *telos*, which provides the moral ground or justification of this obligation. Political obligation within teleological theories characteristically derives from a general requirement to act in a manner which will bring about the best possible state of affairs. Teleological theories, therefore, are typically consequentialist or purposive in structure: an action, practice or institution is to be judged solely in terms of the value of what it achieves. Where teleological theories divide sharply one from another is in their accounts of the nature and value of these purposes or consequences. Thus while all teleological theories account for political obligation by reference to the beneficial purposes or consequences of the obligation, and the obligation is derivative from these purposes or consequences, they often disagree both about what these are and about what makes them valuable.

It was suggested in the previous chapter that voluntarist theories of political obligation essentially conceive political relations as the result of individual choices or commitments, and polities as voluntary associations. In contrast teleological theories model polities rather differently: typically the polity is conceived as a means to achieve valuable ends. Correspondingly the relationship between the individual and the polity is basically instrumental. That is, according

duced here, though inevitably one's view of this issue is likely to be closely connected to one's overall evaluation of the merits of utilitarianism.

The structure and forms of utilitarianism

Utilitarianism is a moral theory which, in its simplest and most straightforward form, judges the rightness of acts, practices and institutions exclusively by their tendency to promote utility, or happiness. Utilitarianism is probably the most fully elaborated and discussed of all moral theories within contemporary philosophy. This process of refinement has led to the development of significantly different strands within a broadly utilitarian approach. However, there is some unity in the diversity, for as R. G. Frey has written:

> 'the term "utilitarianism" refers not to a single theory but to a cluster of theories which are variations on a theme. This theme involves four components:
> (1) a consequence component, according to which rightness is tied in some way to the production of good consequences;
> (2) a value component, according to which the goodness or badness of consequences is to be evaluated by means of some standard of intrinsic goodness;
> (3) a range component, according to which it is, say, acts' consequences as affecting everyone and not merely the agent that are relevant to determining rightness;
> (4) a principle of utility, according to which one should seek to maximize that which the standard of goodness identifies as intrinsically good' (Frey in Miller, 1987, p. 531).

Utilitarianism therefore judges actions in terms of their producing a particular kind of consequence for a specific group of beings.

However, utilitarians often disagree among themselves about how these elements are to be specified. For example, the nature of the value of the consequences to be promoted has been variously characterised as pleasure, happiness, desire-satisfaction, well-being, welfare and utility. Clearly these are not all equivalent to each other. There have also been disagreements about the scope of the theory: does it apply to all sentient creatures (including animals) or only to

human beings? Does it apply across generations and does it apply to potential people? The way in which these questions are answered will have important implications, for example, for what ecological and environmental policies should be pursued. Furthermore, utilitarians also disagree about the appropriate form that maximisation should take. Should the aim be to maximise the sum total of utility (however conceived) or instead, average levels of utility? Which of these principles is adopted is likely to have radically divergent implications for population policy: the former, aggregate utility, will incline towards a large number of people with relatively low levels of utility, while the latter, average utility, will favour a smaller number of people with in general higher levels of utility. These are merely some examples of a range of questions to which utilitarians have given different answers. It is impossible here either to survey all these variations or to attempt to evaluate the several differing strands within utilitarianism; some simplification, therefore, is not merely desirable but unavoidable. In what follows, two axes of disagreement which are especially significant will be considered: that between act- and rule-utilitarianism and that between direct and indirect utilitarianism. However, as a preliminary, a few very brief remarks about the development of utilitarianism may be appropriate.

Historically utilitarianism emerged as a fully self-conscious moral theory with the work of Jeremy Bentham but substantial elements of the theory significantly predate his work. The search for origins is not an especially fruitful activity and either Godwin or Paley might have claim to the primacy I have attributed to Bentham, but there is one predecessor of Bentham who particularly merits brief mention. David Hume, in the mid-eighteenth century, developed a broadly utilitarian account of political obligation as an alternative to the social contract theory of which he was a most trenchant critic. Among the more important of his criticisms of social contract theories was his recognition that the basis of the obligation to keep the contract cannot itself be contractual. For Hume the obligation that we have to keep our promises, of which the social contract is only one example, in turn rests upon an obligation to promote the general interest (and ultimately upon self-interest). Hence, Hume argued that reference to a social contract is redundant, because we can base our obligation to government directly on our obligation to promote the general interest, without recourse to an, in any case

largely fictional, social-contract (Hume, 1953; 1978, Bk III, Pt II, Sects VII and VIII). For Hume political arrangements were devices historically evolved, to protect people against the exigencies of the human condition and aimed at securing the benefits of a stable political order. Hume's utilitarianism, however, was blended with a conservatism which inclined him to view existing institutions, merely by virtue of their evolution and convenience, as utilitarianly justified.

In this respect Bentham, a radical reformer, endlessly engaged in designing new and better institutions, was of a very different cast of mind. However, rather surprisingly perhaps, despite his antipathy to Hume's conservatism, Bentham has very little of interest to say about political obligation. Bentham's enthusiasm for ridiculing contract theory was no less than Hume's, but he did not add much of substance to those criticisms and his positive account of political obligation is disappointingly thin. It consists of not much more than observing of the duty of subjects to their government that: 'they should obey in short so long *as the probable mischiefs of obedience are less than the probable mischiefs of resistance* . . . taking the whole body together it is their *duty* to obey, just so long as it is in their *interest* and no longer' (Bentham, 1988, p. 56). Of course political theorists are not required to be equally interested in the many questions which they could address, but in his comparative neglect of political obligation Bentham seems to have been something of an example to later utilitarians who, for the most part, have had little to say specifically about this issue. However, this neglect is more than a matter of lack of interest. One reason why Bentham, and other radical utilitarians, have had little to say about political obligation is precisely because they have wanted to deny that there is any general political obligation. They are not, therefore, even attempting to justify political obligation but consciously seeking to undermine it. This is not, though, the only reason why utilitarianism has had so little of interest to say about political obligation.

A further reason relates to the structure of the simplest and most straightforward form of utilitarianism: though whether or not Bentham was an exemplar of this form of utilitarianism is a matter of vigorous scholarly debate (see e.g. Kelly, 1990, esp. Ch. 3). Act-utilitarianism judges an action to be morally correct if it maximises beneficial consequences, however such consequences are precisely defined. On this view, how a person ought to act in a given set of

circumstances should be exclusively determined through a calculation of the likely general utility of the various courses of action available. That act should be chosen which will have, to the best available knowledge, the largest net balance of beneficial consequences over harmful ones. Act-utilitarianism requires the consequences of each act to be weighed and the decision how to act to be based on a calculation specific to the particular choices and circumstances facing the agent. Such an approach, however, will have obvious difficulty in generating a general theory of political obligation; at best it seems likely that it may issue in some rules of thumb or rough maxims of conduct (for example, obeying the law will usually be more generally beneficial than breaking it). The bottom line of act-utilitarianism is that articulated by Bentham: citizens should obey government when it is for the best, but not obey when disobedience is for the best, and there is little more to be said. Of course this is what act-utilitarianism will recommend about any practice or institution, and obedience to the government will be no different. However, whatever its other merits, this form of utilitarianism is singularly ill-fitted to provide an account of general obligations deriving from special relations, including a distinctively political obligation. This is an important problem which will be pursued further in the next section.

The requirement of act-utilitarianism that each and every act be evaluated on its utilitarian merits, however, has seemed to some utilitarians to be too simple, and to ignore both the uncertainty and the costs involved in making such judgements about each and every action. While perhaps reasonable with respect to small-scale decisions, act-utilitarianism seems more problematic when applied to complex decisions, involving a wide range of possible actions, a complicated computation of probable consequences, and where an individual's knowledge is likely to be very imperfect. The difficulty of some of these calculations, their costliness in terms of time, energy and other resources, the propensity of peoples' calculations to give undue weight to their own interests rather than the social benefit, and above all the uncertainty induced in others who have to rely on such, possibly faulty, calculations has led some to adopt a more sophisticated form of utilitarianism known as rule-utilitarianism. According to rule-utilitarianism it is better in many circumstances that people do not rely on their own uncertain calculations in deciding what to do but instead should follow a general rule.

Rule-utilitarianism dictates that people should be guided in how to act by a general rule about the best way to act in circumstances which fall under the rule. The rules should be devised in the light of generalisations about what action, or which kinds of action, in these sorts of circumstances, are most likely to maximise the beneficial consequences. For example, according to rule-utilitarians, most utility will obtain not if each person asks him or herself whether or not the killing of another person in any particular instance may be maximally beneficial, but by requiring everyone to observe laws prohibiting murder whatever the circumstances. Thus the kind of calculation undertaken by Raskolnikov in Dostoyevsky's novel, *Crime and Punishment*, which apparently justified his murdering a rich but cruel and mean money-lender for the greater social good, would be precluded. Rather we should all follow a rule prohibiting murder to avoid such disastrous miscalculations. Rule-utilitarianism, therefore, seems a potentially more promising approach to political obligation because it is better able to accommodate the institutional dimension of political obligation. For political obligation has to do with the relationship between individuals and their polity, and whereas act-utilitarianism is tied to assessments of specific actions, rule-utilitarianism appears able to give a more adequate account of practices or institutions, which are at least partially constituted by complex structures of rule-governed relationships.

One immediate difficulty about rule-utilitarianism, however, is whether it is a genuinely coherent alternative version of utilitarianism or whether it is essentially unstable and, on closer inspection, collapses back into act-utilitarianism. This is not an issue which can be pursued in any depth here but the nature of the problem at least must be stated (see Lyons, 1965). Rule-utilitarianism appears to confront a dilemma: either it must approve the violation of a rule in circumstances where such a violation will clearly be more beneficial than observing the rule; in which case it appears to be merely a more sophisticated form of act-utilitarianism, and rules are not obligatory but simply helpful guides to action. Alternatively rule-utilitarianism does hold that the rules are obligatory even when violating them would be more beneficial; in which case it does offer a genuine alternative to act-utilitarianism. but one which seems from the perspective of maximising utility to be irrationally concerned with following rules for their own sake. In short, either rule-utilitarianism

collapses into act-utilitarianism or it engages in a kind of 'rule-worship' which is utilitarianly unjustified. The problem here is that if the violation of a rule will be more beneficial, particularly if it is clearly more beneficial, then observing it in such circumstances seems irrational, given utilitarianism's overriding concern to maximise beneficial consequences. The most plausible response to this problem has been to stress the beneficial consequences of the rules, the stability and predictability they provide, which any sanctioned violation of the rules will inevitably undermine. The difficulty with this defence is that while it has some plausibility in marginal or uncertain cases, in others where the violation of a rule is obviously beneficial it seems justified only by placing an infinite weight on the beneficial effects of observing the rules. Such a strategy then seems to be motivated only by a desire to validate rule-utilitarianism and not by any empirical observation of the likely consequences of rule violations. In that respect such a strategy is entirely inconsistent with the spirit of utilitarianism.

Before proceeding to consider further the relationship between these types of utilitarianism and political obligation there is another distinction which it is useful to introduce – the distinction between direct and indirect utilitarianism. This distinction does not straightforwardly map on to that between act- and rule-utilitarianism though it is closely related to it. The distinction between direct and indirect utilitarianism is more concerned with questions of motivation than of outcome. In its simplest form it would appear that utilitarianism requires that actions be motivated by a desire to maximise utility (in some form or other). However, it was recognised fairly early in the development of utilitarianism. Sidgwick being among the clearest exponents of the view, that it may not be true that utility will be maximised if people directly and consciously aim at maximising it (Sidgwick, 1874). It may be more productive of utility, at least in some circumstances, if people act on a motive other than that of maximising utility: in such circumstances utility will be maximised indirectly, as a consequence of pursuing some other aim. Thus indirect utilitarianism severs any tight connection between the good (maximising utility) and any particular motivational assumptions. In this respect it is easy to see how indirect utilitarianism is related to rule-utilitarianism but it is also important to see that indirect utilitarianism is a more encompassing category than rule-utilitarianism. Indirect utilitarianism implies nothing

specific about the way in which utility will be maximised, other than that it is not always attained through the direct attempt to achieve it: it may or may not be best achieved by following rules in the manner recommended by rule-utilitarianism. Thus rule-utilitarianism may be understood as one form of indirect utilitarianism but it is not the only one.

On first encounter, indirect utilitarianism may appear a peculiar doctrine. It might seem that if the best situation is one in which utility is maximized then *a fortiori* it would be most likely to be achieved if people aimed at its attainment. However, this inference is fallacious as can be seen if one thinks, for example, of personal happiness. It is far from self-evident, and indeed there is a considerable body of experience to contradict the claim, that personal happiness is maximised through its direct pursuit. It seems that happiness is often best achieved indirectly, as a by-product of the pursuit of other aims and with other motivations. Similarly, social utility may in fact be maximised through means other than its direct pursuit. For example, there might be some moral analogy to the invisible hand of the free market which, according to classical economic theory, produces the economically most prosperous society from people's self-interested pursuit of their own economic advantage. This shows how the general good might be maximised as an unintended consequence of very different intentions and motivations. (The truth or otherwise of classical economic theory is beside the point for the purposes of this illustration.) Indirect utilitarianism, therefore, claims only that the best state of affairs might not result from people directly aiming to achieve the best state of affairs.

Utilitarianism and political obligation

This detour into some of the intricacies of utilitarianism is important because these refinements provide the most promising materials for a response to perhaps the most powerful objection to any utilitarian theory of political obligation. This objection, which was briefly mentioned in the previous section, has been stated most clearly and forcefully by A. J. Simmons (Simmons, 1979, pp. 45–54). He argues that there is a structural feature of act-utilitarianism which precludes its providing a satisfactory theory of political obligation. Act-utilitarianism, as we have seen, requires us to act

in whatever way will in fact maximise utility and this requirement is entirely general. There is, therefore, within this perspective no place for such particularised bonds as political obligation – the special relationship between individuals and their own polity. Thus, in discussing Bentham's account of the citizen's obligation to obey the law Simmons writes:

> 'Bentham's approach to problems of political obedience fails in obvious ways to yield an account of political obligation. Act-utilitarian calculations, as Bentham suggests, may lead us to conclude that we ought to obey but they may lead us as well to conclude that we ought to disobey on some other occasion (or perhaps support the political institutions of some other countries). Insofar as the conditions influencing the results of these calculations are by no means constant, we can derive from the simple act-utilitarian approach no moral requirement to support and comply with the political institutions of one's country of residence. There will be no particularized bonds on this model; at best, it seems obligations will be to comply when doing so is optimific' (Simmons, 1979, p. 48).

Simmons argues, therefore, that act-utilitarianism is structurally ill-equipped to provide an account of the kinds of obligation implied by a theory of political obligation. At best it can develop a rough rule of thumb that, by and large, it is right to support and comply with the institutions of one's country. However, act-utilitarianism has nothing specific to say about the nature of that relationship nor why there is, or should be, any special relationship between members and their polity. Of course, as stated earlier, this need not be an embarrassment to act-utilitarians; from their perspective any account of political obligation may be unnecessary or mistaken. However, if we are looking for an account of the kind of obligations of which political obligation is an example, act-utilitarianism is unsuited to the task.

Simmons' claim that act-utilitarianism is, by virtue of its structure, incapable of providing a theory of political obligation, is similar to our earlier conclusion, and is, in my view, convincing. However, his treatment of rule-utilitarianism is less satisfactory, and about indirect utilitarianism he is almost silent. Simmons' rejection of rule-utilitarianism depends entirely upon the argument

48

that if it is to remain consistently utilitarian it will necessarily collapse into act-utilitarianism. As he puts it, 'while the rule-utilitarian's principles of obligation will have the kind of force we want in providing an account of political obligation, these principles will not be capable of a utilitarian defense' (Simmons, 1979, p. 52). He offers no other arguments against a rule-utilitarian account of political obligation. He also fails sufficiently to distinguish 'rule' from 'indirect' utilitarianism: it is far from self-evident that the standard objections to rule-utilitarianism apply to all indirect utilitarianisms, or at least if they do this needs to be argued rather than assumed. Thus it is both desirable and necessary to say a little more about the relationship between utilitarianism and political obligation. It is desirable in the case of rule-utilitarianism since, though the arguments against it as an independent form of utilitarianism may be convincing, it would strengthen the case against a rule-utilitarian account of political obligation if there were other arguments against it. It is necessary in the case of indirect utilitarianism since it is less evident that all forms of indirect utilitarianism must collapse into act-utilitarianism.

One feature common to all forms of utilitarianism is that they are 'maximising' moral theories. Utilitarianism requires us to maximise the beneficial consequences of actions and practices. This is important because even rule and indirect utilitarianism would have to show that political obligation involves practices which do not merely have beneficial consequences but which *maximise* those beneficial consequences. In short, whatever is understood by political obligation, if it is to be utilitarianly justified, must be shown to be maximally beneficial. One noteworthy point is that it is very rare for utilitarians of any sort after Hume to attempt to demonstrate the validity of this claim. Bentham, as we have seen, made no such attempt, nor have many of his successors. Usually such attempts as have been made, for example that by R. M. Hare, point to the very considerable benefits that are supposed to flow from having a system of law and a stable political order. However, it seems implausible to think that these benefits will always outweigh the benefits of other options, or that such benefits are necessarily threatened by substantial levels of non-compliance with the law. Nor, to repeat another point, is it at all clear to what extent these arguments establish particular obligations between persons and *their* polity. Thus, for example, the kind of disutilities associated

with disobedience to the law usually apply quite generally: they do not relate specifically to disobeying the law of the particular political community of which a person is a member. The utilitarian argument will be that obedience to the law, in whatever polity, is likely to have considerable utility. But this is not enough to provide an account of political obligation.

Indirect utilitarians could argue that utility is best promoted by a world in which individuals recognise a special obligation to the polities of which they are members. While many of the particular acts which may be enjoined will not directly maximise utility, so it could be argued, overall utility is still best maximised indirectly through people meeting their political obligations to their own polity. This is not a line of thought which is addressed by critics such as Simmons, but equally it does not appear to be a line of thought much favoured by utilitarians. While an account of political obligation in these terms would meet the requirements of a theory of political obligation, it is surely short of persuasiveness from a utilitarian perspective. First, the claim that overall utility will be promoted in such a manner appears to be an act of faith rather than based on a clear-headed calculation of consequences. Second, it would be obviously implausible for utilitarians to present political obligation as a blank cheque. The requirements of political obligation would need to be 'cashed out' but doing so might leave little scope for a general political obligation. What would be the point of such an obligation, even within an indirect utilitarian theory? It may have some useful motivational role as political rhetoric, but as is often the case with indirect utilitarianism, it can function in this role only by requiring people to believe what from the perspective of utilitarianism itself is untrue: that is it might be utilitarianly best if we all believed there was a general political obligation, even though this belief is false. Other than as a defence of indirect utilitarianism such dubious moral casuistry has little to commend it (Williams, 1985, pp. 106–10).

Hare's utilitarian account of political obligation

Some of the considerations we have been discussing can be brought together by examining in a little more detail the arguments of one of the most sophisticated of utilitarians. R. M. Hare is one of the few

contemporary utilitarians who has specifically addressed the problem of political obligation. For Hare political obligations are 'the *moral* obligations that lie upon us because we are citizens of a state with laws' (Hare, 1976, p. 2). He concentrates particularly on the obligation to obey the law though he recognises that this is not the only such obligation. He also acknowledges 'that this obligation may lie, not only on citizens, but also on anybody, even an alien within the jurisdiction (most people think that foreign visitors too have a moral obligation not to steal)' (Hare, 1976, p. 1). It is important, however, to note the significance of this acknowledgement. First, and most fundamentally, it seems to transform the question that Hare originally asked. What started as a question about our obligations as citizens of a particular state becomes a question about whether there is a quite general obligation to obey the law. If even an alien has this obligation, then it is not specifically an obligation of citizenship, though of course it may be an obligation citizens share with others. Second, a further source of confusion is introduced by his example of stealing. It is likely that most people will think that there is a moral obligation not to steal, whether or not there is a legal prohibition on stealing. Hence even the revised question of whether there is an obligation to obey the law may be muddled by choosing an action which is likely to be thought wrong independently of whether there is a law prohibiting it (though in fairness to Hare nothing in his argument depends upon this possible confusion).

Hare then briefly explains his own form of utilitarianism and how he has been led to it. He writes:

> 'To ask what obligations I have as a citizen is to ask for a universal prescription applicable to all people who are citizens of a country in circumstances just like those in which I find myself. That is to say, I have to ask – as in *any* case when faced with a question about what I morally ought to do – "What universal principle of action can I accept for cases just like this, disregarding the fact that I occupy the place in the system that I do (i.e. giving no preferential weight to my own interests just because they are mine)?" This will lead me to give equal weight to the equal interests of every individual affected by my actions, and thus to accept the principle which will in all most promote those interests. Thus I am led to a form of utilitarianism' (Hare, 1976, p. 3).

He recognises that we could ask the question he identifies above directly in each and every case, but if we did no general principles would be required. However, for Hare there are reasons why we need general principles:

> 'In practice it is not only useful but necessary to have some simple, general and more or less unbreakable principles, both for the purposes of moral education and self-education (i.e. character formation) and to keep us from special pleadings and other errors when in situations of ignorance or stress. Even when we have such principles we *could* disregard them in an individual case and reason it out *ab initio*; but it is nearly always dangerous to do so, as well as impracticable; impracticable because we are unlikely to have either the time or the information, and dangerous, because we shall almost inevitably cheat, and cook up the case until we can reach a conclusion palatable to ourselves. The general principle that we ought to obey the law is a strong candidate for inclusion in such a list as I shall be trying to show; there may be occasions for breaking it, but the principle is one which in general there is good reason for inculcating in ourselves and others' (Hare, 1976, p. 4).

Hence Hare articulates briefly and lucidly the standard arguments for some form of indirect utilitarianism, and suggests how he will show that the general principle, that we ought to obey the law, can be utilitarianly justified. There are, however, several observations to be made about the argument contained in these extended quotations, though the wider issue about whether utilitarianism does indeed follow, as Hare claims, will not be addressed. This last point, while very important to any overall assessment of Hare's utilitarianism, is tangential to our concern with political obligation, and in any case it could not be discussed without considering much more fully his detailed arguments for these conclusions (Hare, 1963, 1981).

The first point again concerns his equivocation about whether the duty to obey the law is an obligation specifically connected with citizenship or membership of a particular polity, or whether it is an entirely general moral requirement. Second, and connectedly, much will depend upon how 'circumstances just like these' are to be identified and characterised. To what extent, for example, do they

permit variations between polities? This is important in determining the scope of the obligations. Do they apply only to people living in 'liberal democratic' states much like the Britain in which Hare is resident? Do they apply to anyone living in any polity? Would they apply equally, or at all, to illiberal, undemocratic, or even totalitarian states? Third, it is unclear what the precise status is of the general principle that we ought to obey the law. Hare concedes that there may be occasions when the law should be broken, but how are such occasions to be identified unless some judgement is made about the situations in which the law should not be obeyed? It is natural to assume that such judgements will be made according to utilitarian criteria. The status of the principle would then appear to be more that of a rule of thumb, a guide to conduct or a summary of experience but no more. Yet Hare believes such general principles are not mere rules of thumb and that, for reasons largely to do with moral education and the dangers of partiality, we ought to inculcate sentiments which will encourage people to feel badly about violating such general principles, even though, on his own account, such people may have acted rightly.

For Hare political obligations are those 'which arise only because there is a state with laws' (Hare, 1976, p. 5), and in discussing a hypothetical example he identifies three reasons for obeying the law which provide specifically political obligations. His hypothetical example concerns hygiene laws requiring delousing to prevent the spread of typhus. There are several good moral and prudential reasons why one should do what the hygiene laws require, as Hare observes, but there are three moral reasons specifically related to the existence of the law. These are:

1. The fact that, because there is an enforced law, resulting in general delousing, failure to delouse myself will harm people's interests much more, by making them *very much* more likely to get lice or typhus;
2. The fact that, if I break this law, it will cause trouble to the police in catching me, thus rendering necessary the employment of more policemen, who therefore cannot grow yams instead, and so harming the interests of the people who could have eaten the yams;
3. The fact that if I break this law, it may encourage people to break this or other laws, thereby rendering a little more likely

(a) the removal of benefits to society which come from the existence of those particular laws, and (b) the breakdown of the rule of law altogether, which would do great harm to the interests of nearly everybody' (Hare, 1976, p. 7).

He further remarks that the second and third reasons 'are subsidiary, but have the important property that (except for 3a) they might survive even if the law in question were a bad or unnecessary one whose existence did not promote the general interest' (Hare, 1976, p. 7). Again there are several comments which it is appropriate to make concerning Hare's argument.

At the risk of repetition, the first point is that none of these reasons applies specially to people as citizens rather than to anybody who happens to be geographically proximate. In fact the first reason applies more to geographically proximate persons whether or not they are citizens, than it does, for example, to relatively isolated citizens having less physical contact with other people. The first reason also has two other distinctive features. Most crimes are not contagious in the manner of typhus, hence it is a very special and unusual feature of this example that the cost of not observing the law is likely to be literally contagious (by contrast with what might be called the metaphorical contagiousness suggested by the third reason). The first reason also depends upon the law's being effective, not merely in the sense that it is generally observed, but in the further sense that it will actually prevent the spread of typhus. If the law required something which did not in fact decrease the likelihood of the spread of typhus, then the first reason would not provide a good justification for obeying it. This is important because it shows that the merits of the first reason are largely independent of there being a law, but depend instead upon two other considerations: that the 'advice' contained in the law is good advice and that most people follow it. This can be seen, for example, in the case of exhortations to take precautions to stop the spread of AIDS. There is no legal requirement to engage only in 'safe' sex, yet if the advice is good and most people follow it then Hare's first reason applies equally to this case, entirely independently of whether or not there is a law compelling such safeguards.

The first reason, therefore, seems to have little if anything to do with specifically political obligation, and the weight of the argument

for political obligation must be borne by the other reasons, which Hare himself regards as 'subsidiary'. The second reason does have some force but it is surely weak: while it is a general reason for obeying all laws it is also a reason against laws generally. The enforcement of a law always has costs and if this were the principal reason for obeying a law then it would be better to repeal it. These costs of disobeying a law are entirely dependent upon the existence of that law and could be eliminated by abolishing the law. Furthermore, if policemen are a necessary deterrent to law breaking, which is likely to be part of their utilitarian justification, then it is doubtful whether a single violation of a law does impose any significant extra costs (but see Parfit, 1984, Sects 28, 29). The first part of the third reason, like the first reason, depends upon the particular law having beneficial effects. Further, when the costs to me of observing the law amount to more than the benefits to others of my observing it, then it seems that the law ought to be broken. Evidently the second part of the third reason is intended to block this kind of calculation, or at least significantly to tilt the balance in favour of law-abidingness, yet it seems that even quite high levels of law breaking do not lead to the breakdown of law altogether. The net effect of one instance of law breaking will usually be negligible in the context of the preservation and maintenance of a system of law and order.

The force of these utilitarian reasons becomes weaker still when this last objection is further elaborated. It can be argued that it is quite reasonable and seems to be utilitarianly justified to act on the principle that breaking a law is morally right, when more utility will be derived from violating the law and so long as it is known that the conduct of others will not be affected by this violation. In this case, as in many others, the objection of the utilitarian is not to violating the law, but to being found out. Hare does consider this complaint and claims that such a view is unsatisfactory because it ignores people's desire not to be taken advantage of. He, therefore, suggests adding a fourth reason for obeying the laws to those listed earlier:

> 'The fact that, if I break the law, I shall be taking advantage of those who keep it out of law-abidingness although they would like to do what it forbids, and thus harming them by frustrating their desire not to be taken advantage of' (Hare, 1976, p. 11).

Unfortunately while this may be a good reason for obeying the law it is not a reason which is obviously available to the utilitarian. Richard Dagger has argued that the plausibility of Hare's contention must depend upon the plausibility of the assimilation of the frustration of any desire to a harm; yet, he argues, such an assimilation is unconvincing (Dagger, 1982). For example, if in a fair race my opponent continually beats me, then he frustrates my desire to win but still he has not harmed me. Dagger's claim has considerable force so far as our ordinary use of the term 'harm' is concerned; however, it is not inconsistent for a utilitarian to claim that the frustration of any desire is a harm to the person whose desire is frustrated (though possibly a very small one, and perhaps often outweighed by other harms).

The problem which faces Hare is the less obvious one of how the desire not to be taken advantage of is to be interpreted. The position of people who obey the law is *ex hypothesi* not worsened by those who break it, so how are they harmed? It seems that the desire not to be taken advantage of is really an independent moral principle – basically a requirement of fairness – masquerading as a desire. It is notoriously the case that utilitarianism, with its intrinsic indifference to distributive questions, has considerable difficulties in accommodating such requirements. At the very least if it is permissible to posit the desire not to be taken advantage of, then it is presumably also legitimate to represent many other non-utilitarian moral commitments as desires; a move which leads to such enormous complications that most utilitarians have sought to avoid it. On the other hand, where systematic attempts have been made to incorporate a range of diverse values within utilitarianism, one begins to doubt whether there is very much left of the theory which is distinctively utilitarian (e.g. Griffin, 1986).

These reflections show how Hare's attempt to articulate a utilitarian theory of political obligation is fraught with serious difficulties. The most fundamental of these is the persistent tendency, clearly exhibited in Hare's argument, to transform questions about political obligation into more general questions about right conduct which quite simply fail to address the issue of the specific obligations of citizens to their own polity. This is not strictly a logical implication of rule- or indirect-utilitarianism, but it is a tendency to which utilitarians of all hues seem naturally inclined. Taken together with the criticisms made earlier (and of

course a whole range of objections to utilitarianism as a mor theory more generally which have not been considered here), the suggest that the prospects for a convincing utilitarian theory political obligation are at best unpromising. Those few theorist who have sought to incorporate a substantial utilitarian compone within their justifications of political obligation have invariabl done so in a highly qualified manner (Flathman, 1972); and there have been few if any attempts to articulate a fully elaborated theory of political obligation in uncompromisingly utilitarian terms. Since utilitarianism is a far from underdeveloped theory this is of itself a most significant indication of its limitations in this area.

Political obligation and the common good

The second kind of teleological accounts of political obligation to be considered in this chapter are best known as 'common good' theories. The core of this approach is to argue that political obligation derives from the common good; and the common good may be either that of a particular community or of everybody. This common good, on either interpretation, provides the basis of the obligations of members to their polity. By contrast with utilitarianism, the common good is usually understood as a qualitative conception, including within it moral qualities which are regarded as intrinsically valuable, and does not consist of the mere maximization of desire–satisfaction, pleasure or happiness. Unfortunately terminological confusion abounds in the area, for not only is the common good on occasion used to mean utility-maximisation, but the term 'public interest' which is sometimes used as a synonym for general utility, may also be used to mean a non-utilitarian conception of the common good (e.g. Milne, 1990). However, the key point is that the common good, as we shall use it, is a more or less specific qualitative conception of the good life, which is distinct from, and often antithetic to, the maximisation of utility.

Political obligation on this view depends entirely upon whether the political arrangements of a community promote the common good. This theory, which in some forms has an affinity with Rousseau's conception of the general will, perhaps receives its fullest exposition in the work of the nineteenth century English

idealist philosopher, T. H. Green. Interestingly he also appears to have been the first political philosopher explicitly to use the term 'political obligation', by which he meant 'the obligation of the subject towards the sovereign, of the citizen towards the state, and the obligations of individuals to each other as enforced by a political superior' (Green, 1986, Sect. 1). Green's theory is rich and complex and has deserved better than the rather cursory and dismissive treatment it has mostly received in modern discussions of political obligation (e.g. Simmons, 1979; Green, 1988). It offers a more fruitful approach to political obligation than that of the much more fashionable consent theories – the account of political obligation to be defended in Chapter 6 certainly owes something to it – and it is encouraging to see it receiving more sympathetic treatment among some recent commentators (e.g. Harris, 1986, 1990; Milne, 1986; Nicholson, 1990). However, common good theories of political obligation are not without difficulties of their own, some of which will be considered in evaluating Green's account.

As with utilitarianism, though having a very different content, Green's account of political obligation is part of a comprehensive moral and political theory. Inevitably this larger context can only be briefly touched upon here. One way of viewing Green's moral and political theory is as an attempt to rescue and reconcile the valid insights of both individualism and collectivism. Green believed that the end of the moral life is self-realisation – in this respect there are some close affinities with J. S. Mill's views on self-development – but he also believed that an essential means to self-realisation was the framework afforded by life within a state. Self-realisation for Green can only be achieved through willing the common good; a good which is common to everyone. Anything which is necessary to the achievement of the common good is necessarily good for everyone. The state, therefore, should be understood as 'an institution for the promotion of a common good' (Green, 1986, Sect. 124). Green rejects any conceptualisation of the problem of political obligation in which the individual and the state are seen as inherently antagonistic, but he is also clear that collectivities have no value apart from their contribution to the self-realisation of individual human beings.

Green's view of the relationship between individual self-realisation and social and political institutions is well encapsulated by

4 Deontological Theories

It has been argued in the preceding chapters that both voluntarist and teleological theories have considerable difficulty in providing convincing accounts of political obligation. Voluntarist theories, though superficially attractive, present a picture of political relations which largely misrepresents people's actual experience of political life: teleological theories are either unable to tie political obligation to a particular polity or resort to unconvincing conceptions of the common good. Voluntarist and teleological theories both fail to capture distinctive features of political obligation. However, there is one further type of account which attempts to avoid the failings of the other two theories. This type of account seeks to explain political obligation in terms of the idea of duty and therefore may be called 'deontological'.

It is perhaps doubtful whether what will be grouped together here as deontological theories really do constitute a rigorously distinct type of theory of political obligation. In different forms they seem to have connections with both voluntarist and teleological theories. In particular, for example, the entire class of voluntarist accounts could be interpreted as a species of deontological theory; that is, in terms of a duty to keep our voluntary undertakings. Indeed, one of the objections to voluntarist theories was precisely that they require some such moral underpinning since they are unable to account for the bindingness of voluntary commitments in their own terms. What this kind of problem reveals is the dangers of attaching excessive significance to any classification of moral and political theories, including that employed in this book. The basis of most classifications is pragmatic rather than metaphysical; they help to illuminate the logical structure of different theories. I would, therefore, defend the usefulness of the tripartite categorisation employed here, even though in some respects it must be conceded that the borderline between deontological and one or other of the alternative types of theory is difficult to draw with any precision. In the case of deontological theories in particular, however, it is necessary to treat this classification with some flexibility.

The central idea informing deontological theories is that political obligation must be justified in terms of an account of our duties which are explained neither as the result of our voluntary undertakings, nor simply in terms of the promotion of some good or valuable end. The basic distinction between teleological and deontological ethical theories is lucidly presented by Richard Norman:

> A teleological theory is one which asserts that an action is right or wrong, in so far as it produces good or bad consequences . . . A deontological theory is one which asserts that at least some actions are right or wrong, and we have a duty or obligation to perform them or refrain from them, quite apart from considerations of consequences. Teleological theories thus treat "good" and "bad" as the basic ethical concepts, and define others such as "right" or "wrong" in terms of these, whereas deontological theories would treat "right", "wrong", "duty" and "obligation" as basic, or at least give them equal status with "good" and "bad" (Norman, 1983, p. 132).

According to deontological theories the moral rightness or wrongness of some actions is independent of whether or not they maximise utility, promote the common good or contribute to the achievement of any other end. Rather, these actions should be judged morally by whether or not they are required or prohibited by some general moral principle(s) or system of duties. In their most extreme form, often associated with Kant, they deny any moral significance to consequences, but in a more moderate form they claim only that there are some actions which we are either required to perform, or required to refrain from performing, whatever the net balance of beneficial or harmful consequences. A typical example of such an action for many deontologists is our duty not to lie. On this view telling a lie is often wrong, even if doing so would promote happiness, minimise suffering or have other beneficial consequences. Deontological theories of political obligation, therefore, justify it in terms of a general moral principle or some system of duties. In what follows two deontological theories in particular will be considered: first, the fair-play theory and second the theory of a natural duty to uphold just institutions. However, we shall begin with a discussion of the idea of 'hypothetical consent': an approach

which apparently closely links deontological theories with voluntarist accounts of political obligation.

Hypothetical consent

The crux of hypothetical consent is that it is *hypothetical*: that is, it does not involve showing that consent is in fact given; only that it would or should be given. Hypothetical consent, therefore, needs to be supported by arguments which establish that such consent is rationally or morally required in the appropriate circumstances. As has been argued earlier, in Chapter 2, 'hypothetical consent' cannot properly be understood as a genuinely voluntarist theory of political obligation. However, it may be useful to sketch briefly how it can be seen, nevertheless, to emerge from that tradition of thinking. A fundamental problem for voluntarist theories, it will be recalled, is that of identifying some action or undertaking on the part of citizens which could reasonably be identified as a voluntary act giving rise to their political obligations. Tacit consent was one response to this difficulty, but, as has been shown, it does little to solve the fundamental problem. A further worry about voluntarist theories is their susceptibility to the objection that people sometimes consent to arrangements which are irrational, unreasonable or unfair. While in some circumstances it may be thought proper to hold people to such arrangements on the basis of their consent, in others their consent is inclined to be overridden or nullified by the irrational or morally unacceptable nature of the arrangements. Within voluntarist theories this last point is usually taken account of by characterising the circumstances of voluntary agreement in such a way that indisputably irrational, unreasonable or unfair agreements will not meet the conditions for voluntary consent. However, this attempt to circumscribe the conditions under which consent should be understood as genuine can be taken in one of two directions. The first is that favoured by voluntarist theories, which is to look for specific actions which meet the appropriately described conditions, but this search, it has been argued earlier, has not met with much success. The second is to dispense with actual acts of consent altogether, and instead focus upon what it would be rational, reasonable and fair to agree to under the appropriately described circumstances. These

considerations would then have force regardless of whether or not people in fact consented.

From this perspective actual consent drops from the picture. The important question becomes not whether people do or did actually consent to some particular government or political system, but what it would be fair, reasonable and rational for people to agree to within appropriately characterised circumstances. It is this move which marks the transition from actual consent theories (explicit or tacit) to hypothetical consent theories – 'hypothetical' because there is no actual consent, only 'hypothesised' consent; a consent hypothesised on the basis of what would be fair, reasonable and rational in the relevant circumstances. The question for hypothetical consent theorists is not whether a person does consent but whether he or she ought to consent. Indeed it is important to appreciate just how far 'hypothetical consent' departs from actual consent, for it is not merely that actual consent is not a necessary condition of hypothetical consent, it need not be a sufficient condition either. Actual consent is at best a piece of evidence about what it might be reasonable or rational to consent to: within the theory of hypothetical consent it is redundant. Hence the earlier argument to the effect that the logic of hypothetical consent is categorically distinct from that of voluntarist theories.

A further feature of this transition which should be noticed is the enhanced role of the *theorist* of political obligation. Within voluntarist theories, there is an irreducible role for agents in the real world: it is *they* who do or do not consent. Though within voluntarist theories there is a recurrent tendency to circumscribe such contingencies, they cannot be eliminated entirely if such theories are to retain their genuinely voluntary basis. It is of course this element of voluntariness which is the prime attraction of such theories. However, within hypothetical consent theories there is no role for agents in the real world. Their 'choices' are modelled and determined by the political philosopher or theorist; it is the theorist's arguments which establish the validity of 'consent' and not the actions of agents in the real world. Hence there is no need to look to the histories and actions of actual people, instead it is the theoretical arguments of the philosopher which are crucial.

Perhaps the clearest account of hypothetical consent is provided by Hanna Pitkin (Pitkin, 1972). She develops her account in the process of interpreting the arguments of Locke and Tussman; but

our interest is not in the adequacy of these interpretations but in he account of hypothetical consent. According to her, what is important is not whether consent is actually given but the basis upon which one ought to consent. The fundamental issue then becomes one about the grounds upon which such consent is morally required. In short, there is a decisive shift within hypothetical consent theory away from the actions of the people consenting to the qualities and attributes of the government or political system which would justify consent. According to Pitkin the relationship between consent and obligation in hypothetical consent theory is the reverse of that within voluntarist theories:

> 'It is not so much your consent . . . that obligates you. You do not consent to be obligated, but rather are obligated to consent . . . you are obligated neither by your own consent nor by that of the majority but by the consent rational men in a "hypothetical state of nature" would have to give' (Pitkin, 1972, p. 61).

Thus it is the reasons for 'consent' and not the fact of consent which explain political obligation. The argument shifts entirely to what it would be rational or obligatory to consent to in appropriately specified circumstances. Thus

> 'your obligation to obey depends not on any special relationship (consent) between you and your government, but on the nature of the government itself . . . In one sense this "nature of government" theory is thus a substitute for the doctrine of consent. But it may also be regarded as a new interpretation of consent theory, what we may call the doctrine of *hypothetical* consent. For a legitimate government, a true authority, one whose subjects are obligated to obey it, emerges as being one to which they *ought to consent*, quite apart from whether they have done so. Legitimate government acts within the limits of authority rational men would, abstractly and hypothetically, have to give a government they are founding. Legitimate government is government which *deserves* consent' (Pitkin, 1972, pp. 61-2).

While it is unfortunate that Pitkin should persist with the idea that 'hypothetical consent' might be regarded as a 'reinterpretation' of

consent theory, confusion between the logic of voluntarist theories and 'hypothetical consent' is deeply enshrined within the social contract tradition.

What Pitkin demonstrates is that 'hypothetical consent' offers a very different kind of theory from voluntarist accounts of political obligation. Indeed, it now begins to look as if it may be hard to distinguish hypothetical consent from some kind of teleological theory. What is clear, however, is that 'consent' seems to have ceased to do any useful or distinctive work in the theory and it has become largely honorific in status: its role almost seems to be to provide us with reassurance that our obligation really results from our voluntary choice even when it does not. This recourse to what is essentially a comforting subterfuge is no doubt a tribute to the tenacity of voluntarism in much of our thinking in this area. However, granted that hypothetical consent is not a form of voluntarism, how persuasive an approach is it to the problem of political obligation?

The status of hypothetical agreements or choices is an issue which has been frequently discussed in recent political philosophy. Much of this discussion has been generated by the arguments of John Rawls in *A Theory of Justice*, though he does not present a 'hypothetical consent' account of political obligation (Rawls, 1971). His account of political obligation, at least in that book, is in terms of a natural duty to support just institutions and will be considered later in this chapter. However, as is well known, the idea of a hypothetical contract is central to his account of how we are to arrive at principles of justice. For Rawls, principles of justice are those that would be agreed upon by rational and reasonable people in circumstances that are accepted as fair. This requires us to think ourselves into what Rawls calls 'the original position'; a situation in which we are shorn of the kind of knowledge which would enable us to bias principles of justice in favour of our own interests or our own conceptions of the good. The original position is characterised by its being a fair situation in which to decide on principles of justice. However, as Rawls makes clear, this is a thought-experiment and there is no literal sense in which a social contract results. One criticism to which this line of argument has given rise, which applies equally to hypothetical consent theories of political obligation, concerns how people can be morally obliged by an agreement or contract that they have not in fact entered into. As Ronald Dworkin

has trenchantly remarked: 'a hypothetical contract is not simply a pale form of an actual contract; it is no contract at all' (Dworkin, 1975, p. 18). Or as Jean Hampton puts it, 'If someone tells me a story in which hypothetical people make hypothetical contracts, how does that story have any effect on what I am *bound* to do?' (Hampton, 1986, p. 268).

Such objections are decisive against 'hypothetical consent' where genuine consent is claimed to be the basis of the obligation. However, they have little force if it is recognised, as it is by Pitkin (and Rawls), that actual consent is essentially irrelevant to the argument. Certainly it is mysterious how consent which was not given, or an agreement which was not entered into, can *of itself* be morally binding. (What it might be asked does 'of itself' refer to here since *ex hypothesi* there was no consent or agreement?) This is an issue which needs to be explored more fully. It is true that, in some circumstances, to show that we would have agreed to something even though in fact we did not, may provide us with a good reason for acting *as if* we had agreed. For example, if reasonable efforts were made to seek my agreement to some course of action, but for non-culpable reasons I could not be contacted, and if the action was undertaken in good faith, then I may accept that the fact that I would have agreed does bind me to support that course of action. I may reasonably accept this even though if I were asked now I would not agree. For example, suppose I am in business and my partners enter into an arrangement correctly believing that I would have agreed to it. They therefore expect me to bear my share of the costs and are prepared to give me my share of the anticipated rewards. However, by the time I am asked I can see that the arrangement is not going to result in the anticipated rewards, and, therefore, it would be to my advantage not to be a party to the arrangement. Nevertheless, the fact that I would have agreed could reasonably be thought to bind me to my share in the arrangement: I would be treating my partners unfairly by exploiting the benefit of hindsight, if I were not to accept the arrangement to which I would have agreed.

It might appear that this kind of example will at least provide a toehold for hypothetical consent as a basis for political obligation. Unfortunately for proponents of 'hypothetical consent', however, this kind of example provides less support for their position than might at first appear. The reason is that this is a rather special kind of example, an instance of what might be called hypothetical *actual*

consent. This is not, however, characteristically the kind of hypothetical consent involved in theories of political obligation. A modification of the example should make clear what is involved. Suppose now that I would not in fact have agreed to the arrangement that my business partners have entered into. I would have accepted (perhaps not explicitly in discussion with them but still in truth) that the arrangement was the best one that could have been made, but I would not have agreed to go along with it because it was suggested by a partner whom I intensely dislike: I would have preferred an apparently less beneficial arrangement which had not been proposed by that partner. How do I react now if I am told by my partners that though they accept I would not in fact have agreed nonetheless we all believe that the arrangement they entered into was at the time the most reasonable course of action? It seems far from clear in this example that I am under any obligation to be bound by their agreement. What, though, if I am told that had I been rational and reasonable I would have agreed (and I may accept that acting on the basis of disliking my partner would have been irrational and unreasonable)?

One certainly cannot be so cavalier as to say that what is reasonable and rational provides no reason for acting, but it is also true that such a reason is not based upon a person's consent. The reason is in fact a reason only if it is true that the arrangement was the rational and reasonable course of action. What this example brings out is that this reason is entirely independent of my consent or agreement; indeed it directly conflicts with the fact that I neither did nor would have agreed to the arrangement. Thus this kind of 'hypothetical consent' may conflict not merely with whether I did consent but with whether or not I would in fact have consented: that is, with my hypothetical actual consent. Again the conclusion to which this leads is that hypothetical consent has little to do with consent but is really a theory about what constitutes good reasons for action. Thus though there is a sense of 'hypothetical consent' which does genuinely connect with voluntarism and which could in some circumstances provide a reason for binding an agent on the basis of an action (the giving of consent) which is only counterfactually true; this is not the sense of hypothetical consent typically employed in hypothetical consent theories of political obligation.

There are of course good reasons why such theories do not employ the idea of hypothetical actual consent. First, as with more

straightforward versions of consent theory, it is impossible to show that many people have in this sense hypothetically consented to their government or political system. Secondly, while in some circumstances hypothetical actual consent may generate obligations, there are others in which it clearly does not. The fact that I would have placed a bet on a particular horse in a race had I not been unavoidably detained does not entail that I am subsequently obliged to pay the stake to the bookmaker when the horse loses (any more than he would be obliged to pay me if the horse wins!). It is no doubt a difficult and complicated matter to distinguish those circumstances in which hypothetical actual consent does generate obligations from those in which it does not. However, any theory of political obligation employing such a notion of consent would need to do so: it would have to show, not merely that people would have hypothetically actually consented, but also that the appropriate circumstances obtained for the consent to warrant the attribution of an obligation. In short, unsurprisingly, hypothetical actual consent faces similar difficulties to those confronting actual consent theories of political obligation discussed in Chapter 2.

Thus the remaining type of hypothetical consent, perhaps best called hypothetical rational consent, is therefore not a genuine consent theory at all, or at least, in the terminology employed earlier, it is not a voluntarist theory. Rather it is best understood as a theory of good reasons, and as applied to political obligation it is a theory of good reasons for obeying the government or respecting the political system. Such a theory explains political obligation in terms of our duty towards the state or government. However, having distinguished a type of hypothetical consent theory which is distinct from voluntarist theories, the problem now becomes how far this theory can be distinguished from teleological accounts of political obligation. In short, is hypothetical consent a logically-distinct kind of duty-based account of political obligation different from teleological theories? In order to answer this question we need to focus more directly on the nature of the duty which explains political obligation. If the duty derives entirely from the promotion of a particular goal, such as maximising utility, then hypothetical consent is simply a disguised teleological theory. However, if, as is more usual, the duty is not entirely explicable in these terms, then hypothetical consent implies some underlying deontological theory. Here I shall examine two attempts to provide a deontological basis

for political obligation; both of which as it happens have been advanced at different times by John Rawls. These two accounts are the 'fair-play' theory and the 'natural duty to uphold just institutions', though I shall also mention other possibilities in passing. We will begin by considering the fair-play theory.

Fair-play and political obligation

The fair-play account of political obligation appears to have been first formulated by H.L.A. Hart (though he does not use the expression 'fair-play') and subsequently developed by John Rawls. Interestingly Hart specifically relates the fair-play theory to the social contract tradition. He argues that social contract theorists were right to recognise that political obligation is 'something which arises between members of a particular political society out of their mutual relationship' but were wrong to identify this 'situation of mutual restrictions with the paradigm case of promising' (Hart, 1967, p. 63). The fair-play theory, therefore, shares with social contract theories the idea that political obligation involves an essentially reciprocal relationship, but explicitly dispenses with any residual voluntarist component of such theories. The key elements of the fair-play theory are characterised by Hart as follows:

> 'when any number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission. The rules may provide that officials should have the authority to enforce obedience and make further rules . . . but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience. In social situations of this sort (of which political society is the most complex example) the obligation to obey the rules is something distinct from whatever other moral reasons there may be for obedience in terms of good consequences (e.g. the prevention of suffering); the obligation is due to the co-operating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering' (Hart, 1967, pp. 61–2).

In this way Hart distinguishes the fair-play theory from consequentialist, particularly utilitarian, theories, in addition to social contract theories. The core idea informing the principle of fair-play is the underlying conception of reciprocity – that the distribution of the benefits and burdens of membership of some body or group must be fairly shared. Thus, for example, it is sometimes argued that where terms and conditions of employment are negotiated by a trade union it is reasonable to require everyone in that employment to be a member of the union. By requiring this, it is claimed, nobody benefits from the terms and conditions negotiated by the union without bearing their share of the costs. Unfortunately, Hart's own statement of the principle of fair-play is tantalisingly brief, and his concern with political obligation is subsidiary to his attempt to provide a justification for natural rights. It is better, therefore, to consider the fair-play theory through Rawls' more extended elaboration of it.

There are some differences of detail between Hart and Rawls in their exposition of the fair-play theory, but the substance of their accounts are very similar. This similarity is readily apparent from the following passage:

> .....
>
> 'Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating' (Rawls, 1964, pp. 9–10).

Rawls proceeds to develop his account in more detail but there are already at least three components of this statement of the principle of fair-play which give rise to difficulties, especially in the context of a theory of political obligation. These concern what is to count as a co-operative scheme; the requirement that the terms of co-operation be just or fair; and determining what is involved in accepting a benefit. There are other aspects of Rawls' account about which doubts might also be raised; for example, his claim that the benefits of a co-operative scheme must depend upon everyone or nearly everyone co-operating. (In fact Rawls cannot mean everyone for in such circumstances even one non co-operator would destroy the advantage, and the standard free-rider motivation for non co-operation would not apply.) Both Simmons and Greenawalt argue that the obligations of fair-play might obtain even where the acquisition of the benefit is consistent with a substantial proportion of the beneficiaries not contributing – that is, where there is a large number of free-riders (Simmons, 1979; Greenawalt, 1987). For example, one may be obliged not to walk across a lawn by a co-operative scheme requiring everyone to use the paths, even though the grass may be protected from undue wear, the object of the scheme, if only 40 per cent of people observe the requirement. This criticism of Rawls is probably correct but it is more of a technical difficulty than a serious blow to the fair-play theory. Nothing of importance would be lost if the offending condition were reformulated to avoid this criticism.

It was noted earlier in the context of Hart's statement of it, that the principle of fair-play is distinct from both voluntarist and teleological theories of political obligation. A brief elaboration of these comparisons may help to illuminate the merits of the fair-play theory, before considering the more serious objections. A.J. Simmons identifies the principal advantage of the fair-play theory as compared to consent when he writes:

> 'No deliberate undertaking is necessary under the principle of fair play. One can become bound without trying to and without knowing that one is performing an act that generates an obligation. Since mere acceptance of benefits within the right context generates the obligation, one who accepts benefits within the right context can become bound unknowingly. This is an important difference from consent theory's account, which stressed the necessity of a deliberate undertaking' (Simmons, 1979, pp. 116–17).

The abiding difficulty which plagues voluntarist theories of political obligation is that of plausibly explaining the voluntary undertaking

by which the obligation is supposedly acquired. The fair-play account seems to circumvent this problem because its underlying model of political relations is subtly but importantly different from that informing voluntarist accounts, including consent theory. Whereas the latter basically interprets the polity as a voluntary association, the fair-play theory is premised upon a conception of the polity as an essentially co-operative structure. The justification of political obligation on this view has to do with sharing the burdens of co-operation as the price to be paid for a share of the benefits. However, the fair-play theory, while clearly dependent upon the existence of the benefits as part of its rationale, is not reducible to a teleological account of political obligation. Crucially it is not only the benefits deriving from co-operation which justify the obligation, but also the fact that one is a participant in a co-operative arrangement which is fair. A co-operative arrangement which did not produce any benefits would be highly unlikely to justify an obligation; but, though a necessary condition of the obligation according to the fair-play theory, such benefits are not a sufficient condition. It perhaps adds to the attractions of the fair-play theory that the benefits which justify political obligation must result from a co-operative practice which is also fair.

Thus, having noted some of its merits, we should now return to the first of our areas of concern: what is meant by a scheme of social co-operation? Superficially this may seem unproblematic: a scheme of social co-operation might be characterised as working together for mutual benefit. There are, however, two issues to be raised about this apparently straightforward conception. First, it is far from clear what 'working together' or 'co-operation' requires. There are obvious examples of such co-operation: a group of people engaged in a common endeavour such as sailing a ship, playing football for the same team, making a computer together and so on. However, are two firms in a competitive market both trading legally but each trying to drive the other out of business also engaged in a scheme of social co-operation? Their respect for the law hardly seems sufficient to answer the question affirmatively for one might equally say that two states at war, if they are scrupulous in observing the various conventions and rules of war, are also engaged in a co-operative scheme. War is not mutually beneficial to the two states, but nor, presumably, is a competitive market to the two firms. Further, while both firms may agree that a competitive market provides fair terms

for their conflict, does this mean they are engaged in a scheme of social co-operation?

It might be claimed that the legal structure regulating a competitive market is a means of co-operatively managing the conflict; yet while there is something to the thought that, for example, conventions governing duelling involve social co-operation, it seems odd to describe the opponents as engaged in a scheme of social co-operation. In short, there is a distinction between participating in a socially constructed practice, which may be said to involve co-operation only in a most attenuated form, and engaging collaboratively in a common endeavour for mutual benefit. While both may involve obligations it is the latter that Rawls and other proponents of the fair-play theory seem to have in mind. (It will be argued in Chapter 6, however, that political obligation would be better understood in terms of the former.) One problem for proponents of the fair-play theory of political obligation is that while there are many micro-situations within a society which provide clear examples of schemes of social co-operation in the stronger sense required by the fair-play theory, it is less clear that a society or state can plausibly be so conceived. The model of political relations as a scheme of social co-operation seems partial and incomplete: so much of politics is about coercion and the threat of coercion, about fundamental conflicts of value and interest, that it sits uneasily with what appears to be an unduly sanguine, indeed a rather cosy conception of political relations as primarily a scheme of social co-operation. Of course it would be equally one-sided to deny any place to social co-operation in an account of political life; but the overall role of social co-operation within fair-play theories shows some similarities to that of the common good within those theories, and it seems to face some similar difficulties.

One thought which has often motivated the conception of the polity as a scheme of social co-operation is some putative contrast with a state of nature. This pre-political situation is typically a situation 'red in tooth claw' or in which the life of man is 'solitary, poor, nasty, brutish and short' or at the very least lacking the 'conveniences' of society. From this perspective it is doubt about the state's being a scheme of social co-operation which is likely to appear odd. However, this gives rise to the second difficulty concerning the idea of a scheme of social co-operation. According

to the fair-play theory a scheme of social co-operation must be mutually beneficial, but this implies a background or baseline against which the benefits can be measured, or at least assessed. Again the micro-examples standardly used to illustrate the theory tend to assume this background, often entirely reasonably; but what is it reasonable to assume about this background in the case of the state or society as a whole? How is this background to be characterised and justified? Is it a Hobbesian war of all against all or is it a Lockean state of intermittent transgression or even the still more benign pre-social condition described by Rousseau? Furthermore, according to at least one political theory, anarchism, the state (though not society, from which it is usually distinguished) is not a form of mutually beneficial social co-operation at all, but an instrument of exploitation and oppression. However, I shall raise doubts about the claims of anarchism in the next chapter. The point at issue here is not so much whether or not in general it is better to live within a political community – we can assume that it is – but how the distribution of the benefits of so doing is to be measured and assessed.

For the fair-play theory it is not enough that there be some baseline relative to which the polity *can* be conceived of as a scheme of mutually beneficial social co-operation, since some such baseline can always be constructed. For example, for most people a situation in which they live largely painlessly as slaves is probably preferable to one in which they suffer agonising pains for the whole of their natural lives. Yet this does not show that a system of slavery is a fair scheme of mutually beneficial social co-operation simply because we can imagine or construct some other situation by comparison with which almost everyone would find it preferable. This particular comparison is simply arbitrary and unjustified. In short, therefore, the conception of the polity as a scheme of social co-operation must be explained by reference to its being an improvement relative to some baseline or background conditions which provide an *appropriate* basis for comparison. It is this issue which is partly addressed by the claim that the terms of social co-operation should be fair or just.

It is insufficient, according to the fair-play theory, that a scheme of social co-operation be mutually beneficial: if it is to generate the appropriate obligation, it must also be fair. The reason for this requirement is that people cannot reasonably be expected to feel an

obligation, even to an arrangement from which they benefit, if the distribution of the benefits and burdens of the scheme of co-operation is unfair. Suppose, for example, that two people acting co-operatively produce an extra ten units of value, and the input of each person is of equal worth (however that is measured). It will be true then that both parties benefit from this co-operative scheme even if one person receives only one extra unit and the other receives the remaining nine extra units of value. Why then should the person who only receives the one extra unit be obliged to support the scheme, even though, relative to a situation of non-co-operation, it is mutually beneficial? In short, without a requirement of justice or fairness a scheme of social co-operation can be both advantageous to all and yet exploitative (a claim, for example, Marxists would make about states with capitalist economic systems); hence the requirement that they be fair in addition to being mutually advantageous.

However, this example, through deliberate underdescription, obscures a rather large problem: that what is fair is itself highly controversial. Thus suppose we add to the example the fact that the person receiving an extra nine units also has a large number of dependants whereas the person receiving one extra unit has no dependants: how will these changed circumstances affect our judgement of the fairness of the distribution? Certainly at the level of moral intuitions there is not likely to be agreement about the answer to this kind of question; as soon as the implicit simplifying and highly unrealistic *ceteris paribus* assumptions are removed, we are confronted by a morass of diverse and conflicting judgements.

It was in large part in recognition of these conflicting ordinary moral judgements that Rawls developed his enormously influential and highly sophisticated theory of justice. The principal aim of his theory is to transcend these conflicting judgements by finding a point of view at a higher level of abstraction which would embody our agreed moral judgements, and yet also provide a generally acceptable method for adjudicating or mediating serious moral disagreement. The purpose of the construction of his original position is precisely to characterise a point of view from which we can agree on the principles which would determine a just distribution of the benefits and burdens of social co-operation. It is not feasible here to go into the details of Rawls' rich and complex theory of justice, but three general points of relevance to the fair-play

account of political obligation should be noted. First, some substantial theory of justice or fairness, whether or not it is Rawls', will be necessary to fill out the fair-play account. Second, the nature of that theory will be crucial to a full explanation and characterisation of the obligation deriving from fair-play. Third, neither Rawls' theory of justice nor any other has won widespread agreement, and hence even a formally shared commitment to the fair-play theory of political obligation is likely to disguise significant differences of substance as to what is implied by it. Taken together these observations, while not a conclusive argument against the fair-play theory, indicate the very real difficulties which such a theory must overcome.

The final area of concern is the claim that participants in a scheme of social co-operation 'accept the benefits' of such a scheme. Where a person voluntarily and with full knowledge of what is involved enters a scheme of social co-operation, what is meant by 'accepting' the benefits of the co-operative scheme is likely to be unproblematic. However, such clear cases cannot be straightforwardly invoked by proponents of the fair-play theory of political obligation: a crucial feature distinguishing fair-play from consent theories is that according to the former view no voluntary undertaking is necessary to acquire the obligation. It is sufficient for the fair-play theory that a person accept the benefits of a mutually beneficial and fair scheme of social co-operation. The question which arises, therefore, concerns the conditions which have to be met in 'accepting a benefit'. For example, is the mere receipt of a benefit sufficient? This seems unlikely since it gives rise to the problem of imposed benefits, first articulated by Robert Nozick (Nozick, 1974, pp. 90–3).

To explain this let us return for the moment to the simple example of a scheme of co-operation to protect the grass from excessive wear. A woman might agree that unspoiled grass is a benefit, and she might also agree that the general rule that nobody should walk across the grass involves a fair distribution of the benefits and burdens within the co-operative scheme, but does it follow that she is therefore obliged to refrain from walking across the grass if others similarly refrain from doing so? It is difficult to see how such an obligation does necessarily follow, for the woman might still prefer to walk across the grass while allowing that if everyone else acts similarly then the benefit of an unsullied lawn will be lost. It is not possible to infer from the facts that she regards the unsullied lawn as

a benefit and that others are prepared not to walk across the lawn to ensure that this benefit obtains, that she must value the benefit sufficiently to oblige her not to walk across the lawn. She might simply prefer not to be inconvenienced by the detour, accept that everyone else too has the right to walk across the grass, and that if they do it is likely that the grass will be spoiled. Such a view is a reflection of her priorities: she values a nice lawn but she values her not having to make a detour more. In short, she agrees that a co-operative scheme prohibiting everyone walking across the grass would be fair and beneficial but it is not a scheme in which she wishes to participate. It is not clear, therefore, how the woman acquires an obligation to share the burdens simply because others agree not to walk across the grass and this will be sufficient to produce the benefit of an unsullied lawn.

The example of the lawn is a very simple one, and matters are obviously made still more difficult when richer and more complex political examples are considered. One need only think of problems such as the control of pollution, defence and welfare policy to see how complicated and contentious the issues are likely to become. In particular the issues become extremely thorny when the benefits from any scheme of co-operation are costly and difficult to avoid... The more a benefit is 'imposed' upon a person, and the higher the cost of producing the benefit, the more implausible looks the claim that it is simply through receiving the benefit that a person is placed under an obligation to comply with the terms of even a fair scheme of co-operation giving rise to the benefit. Thus it is reasonable to believe that 'accepting a benefit' must involve more than simply being a recipient of a benefit.

There are, principally, two lines of argument which can be advanced in response to this problem. First, stress might be laid on the idea that the beneficiaries have to be parties to, or participants in, the scheme of social co-operation and not merely beneficiaries of it: that is, what is envisaged is a genuinely co-operative structure and not the arbitrary or random imposition of benefits. The second line of thought stresses rather that the acceptance of benefits must be voluntary: acceptance is a voluntary action, hence is not something which can be imposed upon a person. Unfortunately both these strategies lead back towards voluntarist accounts of political obligation and their difficulties. The first has to confront the problem that being a member of a polity is not for the

62

most part something over which people have much control. It mig
be possible to try to distinguish membership from participatio
perhaps in terms of the resident/voter dichotomy, but again thi
seems to encounter analogous problems to those faced by consen
theory. The second line of argument must address the problem tha
many of the benefits of living in a polity cannot realistically b
rejected; hence *voluntary* acceptance seems otiose. The difficulty i
this case is once more that of identifying reasonable and realistic
possibilities of rejecting the benefits.

In short, therefore, the problem for proponents of the fair-play
theory of political obligation is that though the idea of 'the
acceptance of benefits' can be understood in either of two ways,
neither has much plausibility as a justification of the supposed
obligation. On the one hand, acceptance of benefits is equivalent
to mere receipt of benefits; while on the other, acceptance of benefits
entails a voluntary act of acceptance. The first interpretation
provides a plausible account of the realities of political life – we
do receive benefits about many of which we have no choice – but
this does not seem to justify a corresponding obligation. The second
interpretation, on the other hand, provides a potentially plausible
justification of how an obligation is generated by accepting benefits,
but one which has little application to the realities of political life. It
is difficult to see how the fair-play theory can circumvent both of
these difficulties; in consequence it seems either unconvincing or
largely irrelevant as a general theory of political obligation.

Natural duty, political obligation and gratitude

The final example of a deontological theory to be considered in this
chapter is Rawls' account of the natural duty to support just
institutions. Before commencing this consideration, however, it
should be noted that this is but one of several possible accounts
of political obligation in terms of a natural duty. Kent Greenawalt,
for example, distinguishes five such theories; though he does
recognise that 'these theories rest on diverse foundations, and a
plausible challenge to my whole enterprise is that I am treating
similarly theories whose underlying bases are radically different'
(Greenawalt, 1987, p. 160). Thus it is as a natural duty theory that
Greenawalt considers traditional natural law arguments. This is

surely unobjectionable in the sense that natural law might be taken
as a paradigm example of a deontological theory, yet it also shows
the awkwardness and limitations of such classifications, because the
promotion of the common good tends to figure prominently in such
accounts, indicating a close affinity with teleological theories.
Traditional natural law theories will not be discussed here, since,
in so far as they are distinct from theories which are considered,
their particular features depend in some fundamental way upon a
theological or deist background. Though it can be argued with some
plausibility that natural law doctrine can be adapted for secular
purposes, in the form of theories of human rights or various kinds of
ethical naturalism for example, such an adaptation does involve
their more or less radical transformation. Such secular natural law
theories inevitably invoke highly contentious judgements about
human nature (see Berry, 1986). In so far as traditional natural
law theories are bound up with theism, however, whatever their
merits, they cannot be expected to provide a general theory of
political obligation which will be persuasive to non-believers; and it
is obviously impossible to consider the larger questions about
religious belief and the existence of God, as an aside to the main
concerns of this book. For this reason, if no other, all essentially
theologically based theories of political obligation will be passed
over without any detailed consideration. Historically such theories
have been important – the divine right of kings being one
theoretically quite sophisticated example – and the resurgence of
near theocratic states such as Iran suggests that in some contexts the
theological justification of political obligation has continuing
appeal. However, in so far as such theories employ arguments
which have an appeal apart from their theological setting, these
arguments are considered as part of other secular theories of
political obligation.

A further reason for restricting the range of discussion of what
Greenawalt classifies as natural duty theories is that the account of
political obligation which will be defended in Chapter 6 shares
important features with some natural duty theories, though it also
needs to be distinguished from theories such as Rawls'. Greenawalt
characterises a natural duty as:

'one that arises because one is a person or a member of a society
or because one occupies some particular status, such as being a

63

parent. Because such duties do not depend upon voluntary actions that bring one within their reach, their application is potentially broader than duties based on promises or fair play. In contrast with utilitarianism, theories of natural duty may explain why obedience to law is a genuine duty, not just a question of morally preferable action and why obedience may be called for though no untoward consequences will flow from disobedience (Greenawalt, 1987, p. 159).

....

The aspect of natural duty accounts which, it will be argued, is of fundamental significance is the claim that political obligation has to be understood in the context of a person's membership of a polity. The account defended later will suggest a much looser connection between political obligation and obedience to the law, but it will involve a similar rejection of voluntarist, teleological and fair-play theories. However, it will also involve rejecting features of some other natural duty theories of which Rawls' version is both an interesting and influential, if not necessarily typical, example.

There will also be no sustained discussion of attempts to justify political obligation in terms of a duty of gratitude. This idea can be found lucidly and forcefully expressed as early as Socrates' claim that we owe a debt of gratitude to our political community similar to that which we owe our parents. In both cases gratitude is merited because of the succour and support which they have provided (Plato, 1969, pp. 90–1). This analogy between the duty we owe our parents and the duty which we owe the polity has been a recurrent theme in discussions of political obligation (and it will be taken up again in Chapter 6); but not all accounts of political obligation in terms of a duty of gratitude rely upon it. Sir David Ross, for example, identifies a *prima facie* duty of gratitude owed generally to those who benefit us. In the context of political obligation he claims that, 'the duty of obeying the laws of one's country arises partly (as Socrates contends in the *Crito*) from the duty of gratitude for the benefits one has received from it' (Ross, 1930, p. 27). The kernel of this conception is briefly stated by one of its critics, A. J. Simmons:

> 'The gratitude account of political obligation maintains that our receipt of the benefits of government binds us to repay the government because of considerations of gratitude. It maintains further that this repayment consists in supporting the government, part of which support consists in obeying the law' (Simmons, 1979, p. 183).

Unfortunately most references to gratitude as an explanation of political obligation are extremely brief and underdeveloped; and though it has recently been the subject of renewed interest this has been mostly of a critical sort (e.g. Smith, 1973a; Simmons, 1979, ch. 7).

Much of this criticism has centred on questions about whether the government or polity is an appropriate object of gratitude; whether it has done anything which merits gratitude; whether even if gratitude is appropriate and merited it need take the form of political obligation; or indeed whether gratitude is a duty at all. The gratitude account also seems to be open to the objection concerning unsolicited benefits discussed in the context of the fair-play theory: must we be grateful for benefits which have been imposed upon us? It has, however, also been defended in a sophisticated and developed form by A. D. Walker, who argues that most critics misrepresent the argument from gratitude as resting on a principle of requital or reciprocity; that receipt of a benefit places a person under an obligation to requite the benefactor (Walker, 1988, 1989). Walker, however, reformulates the argument from gratitude in a manner which he claims avoids the objections to this principle. He argues as follows:

> 1. The person who benefits from X has an obligation not to act contrary to X's interests.
> 2. Every citizen has received benefits from the state.
> 3. Every citizen has an obligation of gratitude not to act in ways that are contrary to the state's interest.
> 4. Non-compliance with the law is contrary to the state's interests.
> 5. Every citizen has an obligation of gratitude to comply with the law' (Walker, 1988, p. 205).

As Walker explains, this reformulation of the argument from gratitude does do something to meet the standard objections, but it still leaves many problems unresolved. It also seems worryingly open to exploitation by unscrupulous political powers. However, my principal difficulty with the argument from gratitude, including

Walker's account of it, is that nothing he says persuades me that the kind of obligation he characterises is best understood as one of gratitude.

Walker himself writes that this argument 'suggests a view of political communities as communities whose members are, or should be, bound to one another by ties of goodwill and respect' (Walker, 1988, pp. 210–11). At best, however, this might indicate that gratitude is in some circumstances a part of such ties: it does not suggest that such ties are based on gratitude. Relationships of respect, and even to some extent goodwill, need not imply a duty of gratitude: indeed there would be something almost paradoxical in suggesting that gratitude is the appropriate response to being shown respect. Gratitude may be a more appropriate response to goodwill, but it seems too attenuated a basis for political obligation. In short, therefore, while this model of a political community has some attractions, it does not support a defence of political obligation couched in terms of gratitude. However, the development of the positive aspects of such an account must await our later discussion, for it is now time to consider Rawls' second attempt to present a theory of political obligation.

Rawls' duty to uphold just institutions

In *A Theory of Justice* Rawls does not develop the fair-play theory as his account of political obligation, and it is one of the significant departures from his earlier work that he advances instead an explanation in terms of a natural duty to promote and support just institutions. (In fact Rawls distinguishes obligations – which all arise from a principle of fairness – from natural duties; and hence in his use of the term most people do not have any *political* obligations, only natural duties to a just polity. However, I shall ignore this point since the natural duty to promote and support just institutions clearly plays the role of an account of political obligation within Rawls' theory.) His exact statement of the relevant natural duty is as follows:

> 'first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves' (Rawls, 1971, p. 351).

While it is possible to see residual elements of the fair-play theory in talk about 'doing our share' in just institutions, this account is significantly different from his earlier theory. Rawls does retain the fair-play theory as a specific partial justification for the political obligation of 'those who have assumed favoured offices or positions, or who have taken advantage of certain opportunities to further their interests' (Rawls, 1971, p. 350); but the details of this exception need not concern us. He explicitly rejects the fair-play account for most people, precisely for the kind of reasons we have already examined. He writes that under the fair-play theory (he calls it the principle of fairness):

> 'citizens would not be bound to even a just constitution unless they have accepted and intend to continue to accept its benefits. Moreover, this acceptance must be in some appropriate sense voluntary. But what is this sense? It is difficult to find a plausible account in the case of the political system into which we are born and begin our lives' (Rawls, 1971, pp. 336–7).

Hence Rawls concludes that a satisfactory account of political obligation, if it is to have general application, cannot depend upon the voluntary acceptance of benefits and he is clear that his revised theory obliges each member of the polity 'irrespective of his voluntary acts, performative or otherwise' (Rawls, 1971, p. 334). Nor in this revised account does political obligation directly derive from a fair distribution of the benefits and burdens of social co-operation; such considerations are encompassed within the theory of justice rather than the account of political obligation. Instead our political obligation arises from a natural duty to support and to promote just institutions.

Rawls is not principally concerned with the issue of political obligation in *A Theory of Justice*; nor has his treatment of it there received much attention from his many commentators. His arguments in support of the claim that we have a natural duty to support and to further just institutions are not especially clear, but they appear to be of two sorts. First, there are the arguments from the inadequacy of other accounts of political obligation, such as his

reasons for discarding the fair-play theory. Certainly the conc
sions of this book are consistent with Rawls' rejection of fair-pl
consent and utilitarian theories, the three other accounts
mentions. However, these arguments can provide only indire
support for his own theory, since the weaknesses of other accoun
do not provide positive reasons in its favour. Secondly, there is
argument that the natural duty would be chosen by people in t
original position. As explained earlier, the original position is
theoretical construct devised by Rawls to justify basic principles
justice, but it would take us too far from our present purposes
explore this construct in more detail. In any case Rawls' argument
in this context seem to amount to little more than the claim that w
need some principle of political obligation, and that the natural du
to support and to further just institutions is preferable to an
alternative. However, though Rawls' arguments for his natura
duty are not very strong, I do not think this matters. If it can
provide a convincing account of political obligation in its own term
this will do much to commend it. I suspect it is more profitable to
interpret Rawls' natural duty to support and to further just
institutions as a basic moral principle, and to ignore, so far as is
possible, its theoretical foundations in his theory of justice. In fact
we will not be able to ignore the theory of justice entirely, but that
will become an issue in considering the content of the natural duty,
and not its foundations. Let us turn, then, to an assessment of his
account of this natural duty.

One difficulty for Rawls' new theory is how it encompasses the
'particularity' requirement which, so I have argued, is a necessary
feature of any adequate account of political obligation. How, that
is, does a general duty to support and promote just institutions bind
members to a particular polity, since such a duty would seem to
apply to them as persons or moral agents and not specifically as
members of this or that particular polity? Of course there are
practical or contingent reasons why it is likely to be far easier to
support or promote just institutions in the community of which a
person is a member. For example, I am called upon to observe the
laws of my own community much more often than those of other
polities; I can campaign more effectively locally than in a different
part of the world; my knowledge and understanding of my own
community is likely to be much greater; and I am simply more likely
to be involved on a day-to-day level with the institutions and

...olices of my political community than those of any other.
However, such practical considerations would not establish any
distinctive duty attached to membership and the general duty
would seem to apply equally to supporting or promoting just
institutions in political communities other than one's own.

Rawls may appear to circumvent this problem by writing of just
institutions which 'apply to us'; the point here seems to be explicitly
to distinguish the just institutions of the community of which a
person is a member from the just institutions of other polities.
Unfortunately it is the apparently *ad hoc* character of this require-
ment which arouses the suspicions of some of Rawls' critics
(Simmons, 1979, pp. 147–52). After all, they continue, is it not
more plausible to hold that if there is a duty to support and promote
just institutions, this duty is generally applicable: that wherever and
whenever one has the opportunity, perhaps subject to the qualifica-
tion about personal costs, one should support and promote just
institutions? However, it is not clear that this criticism is entirely fair
to Rawls. His theory of justice is, as he has increasingly emphasised,
a theory for a particular society. It is not only that his principles of
justice apply within particular societies, but that the method by
which they are arrived at is also society-specific. In so far, therefore,
as the natural duty to uphold just institutions emerges from the
original position, and in so far as the principles are specific to a
society, Rawls seems to have some reasons for restricting the scope
of this natural duty to the institutions of the society of which one is
a member. This reply is at least consistent with his theory, and
suggests that his limitation of the requirement of the natural duty to
institutions which 'apply to us' may not be as arbitrary as his critics
claim. It does, however, imply that this restriction is dependent
upon the cogency of Rawls' methodological approach to his theory
of justice more generally. In the final analysis the adequacy of this
reply is likely to depend in large part on one's overall judgement of
Rawls' larger enterprise.

Whatever the merits of this response to the first difficulty, there is
a second area of difficulty in his account of the natural duty to
support and promote just institutions which relates to the impor-
tance of the *justice* of institutions. The problem here is more than
that of the endemic disputes about justice mentioned earlier, though
the seriousness of that problem should not be underestimated.
While Rawls' own theory of justice is supposed to go some

considerable way towards solving that problem, there is an extensive literature which calls into doubt its success (e.g. Daniels, 1973). However, leaving aside these doubts, there is also the problem of where people stand in relation to institutions which do not meet the criteria of justice. Rawls claims that the natural duty obtains where institutions are 'just or nearly just', and it is not my intention here to exploit any possible difficulties in defining what is 'nearly just'. What of institutions, however, which are not 'nearly just'? Do we have any political obligations in such circumstances? While the requirement that one should try to promote just institutions is no doubt of some help, it does not take us very far in answering this question, which concerns our response to institutions that are not nearly just or to institutions that are substantially unjust. It might seem self-evident that people are under no obligation to support or comply with unjust institutions, yet there are reasons for doubting this apparently self-evident conclusion, as I shall go on to explain.

Undeniably there are some institutions so unjust that there is no decent alternative to a thoroughgoing opposition (though the personal cost qualification which Rawls inserts might suggest the reverse, since such institutions are likely to be those which it is most dangerous to oppose), but there is injustice and yet worse injustice. As the best is the enemy of the good, so the worst is the enemy of the bad. Something like this seems to underlie Hobbes' conception of political obligation; that short of a direct threat to one's life one is better off under any sovereign than in the state of nature, which is the only alternative. It is not necessary to accept Hobbes' general theory, however, to see that there is some truth in the thought that sometimes it is better to support bad or unjust institutions because the only realistic alternatives are worse. Of course, this is a view that needs to be expressed with appropriate caution for it can be, and often has been, exploited as a specious justification for complacency in the face of tyranny, but there cannot be any *a priori* argument to show that such a view is never justified and there is a reasonable amount of experience to the contrary. For instance, to take a recent example, in the early years of the Gorbachev regime many Soviet citizens might well have regarded their society as radically unjust; they might also have had serious doubts about how far that regime was willing to take the process of reform; and yet they could also have believed that the regime should be supported for all its failings because the only realistic alternatives were likely to be worse rather

than better. They might rightly have believed that any more vigorous attempt to promote just institutions would have been counter-productive. Compromise, pragmatism and above all prudence are a necessary part of political morality in a world which does not conform to the moral blueprints of philosophers. Inevitably in practice it may sometimes be difficult to distinguish these virtues from opportunism, timidity or cowardice, but political life, more than most areas of human activity, is not a realm of even near perfection.

A theory of political obligation must address itself realistically to circumstances which are not ideal or nearly ideal, and even to situations which are distinctly morally unappealing. A theory of civil disobedience might do something to fill such a lacuna but the problem is much deeper. In some circumstances we may be morally required to support institutions considerably less than nearly just, yet Rawls' account of political obligation in terms of a natural duty to support just institutions is at best silent, and at worst misleading, on this matter. The force of this observation is further enhanced by the consideration that on Rawls' account of justice (or indeed, according to most theories) few if any states, either present or past, meet the conditions of being nearly just. There is here a point of more general significance. Political philosophy necessarily involves some measure of simplification and abstraction; it cannot accommodate all the rich complexity and nuance of political life. However, this tendency towards abstraction has real dangers to which we need to be alert. What may begin as a laudable attempt to focus on essentials by abstracting from the incidental contingencies of political life may easily degenerate into a philosophically idealised abstraction, bearing at best a very distant and obscure relationship to the world as we experience it. It is this world, not the idealised abstraction of the theorist, which we have to try to comprehend and in which we have to decide how to act. Interestingly enough, this is a point to which Rawls himself seems to have attached increasing importance in his most recent work (e.g. Rawls, 1985). It is also a point of particular relevance to any account of political obligation which aspires to make sense of people's relationship to the polity of which they are actually members.

Leaving aside the specific criticisms of Rawls, however, the conception of political obligation as a natural duty does, I believe, move us closer to a more adequate understanding of political

obligation. It needs to be detached from Rawls' theory of justice and to be revised in other particulars as I shall indicate in Chapter 6. However, before proceeding to that argument, it is necessary to consider one response to the failure so far to come up with any very convincing general theory of political obligation: this is to draw the seemingly obvious conclusion that people do not generally have any political obligations. It may be granted that there are particular instances and circumstances where one or other of the theories is able to provide a more or less convincing justification of a few specific cases of political obligation, but none provides a convincing general account. Perhaps, therefore, for most people political obligation is a chimera. This kind of conclusion seems to have become increasingly commonplace in recent years in the literature discussing political obligation: it is also a central strand in anarchist thought. It is appropriate, therefore, as a preliminary to the positive account of political obligation defended later, to examine the claims of those who deny that (most) people have any such obligations; and in particular to assess the merits of the various forms of anarchism.

in Richard Bellamy ed., Theory and Concepts of Politics: An Introduction, Manchester, MUP, 1993.

Richard Bellamy, ed, Theories and Concepts of Politics: An Introduction Manchester: MUP, 1993

8 Michael A. Menlowe

Political obligation

Introduction

Does one have a moral obligation to obey the laws of one's State? This is one of the oldest questions in political philosophy. Since Plato's dialogue the *Crito*, the question has continually engaged reflective citizens (Plato, 1953). Often, it has erupted as a crucial question for large sections of a society. For example, in Britain in the late 1980s many decided that they had no obligation to pay their community charge (or poll tax) because they believed that the law that imposed it was unjust. Although the question is raised most dramatically by injustice, it will be posed more generally here. Consider this simple example. A motorist considers whether to go through a red light at 3 a.m. when she can see that there is no one else around. If there is a moral obligation to obey the law, then there is a reason to say that going through the red light would be morally wrong.

The most fundamental question in this context is: ought one to obey the law? I take that question as a request for reasons why we ought, morally speaking, to obey the laws of the state. It is a question about the grounds of compliance. Since I am interested in reasons which may be regarded as moral reasons, I exclude from consideration the ground of prudence. It is beyond dispute, I think, that we all have prudential reasons for obeying the law; for example, we fear punishment if we disobey. I shall treat the claim that we have an obligation to obey the law as offering one kind of reason why we ought to obey the law. There are different theories about what gives rise to obligations to obey the law. (For the moment, I am not distinguishing obligations and duties.) The most interesting and influential writers have suggested the following accounts of our obligation (or duty) to obey the law:

II (3)

1) We have consented to obey it.
2) We have a duty of fair play.
3) We have a natural duty to obey the law.

In the following sections, I will examine each of these theories. The conclusion I find most persuasive is that none of these theories satisfactorily demonstrates that citizens in general have a moral obligation to obey all the laws of their State. This conclusion has been ably defended at length by a number of recent writers, notably A. J. Simmons (Simmons, 1979). Much recent writing, including this chapter, owes a great deal to Simmons.

Consent theory

The basic idea of the consent theory is that no person has an obligation to obey the law unless that person consents. So, for example, being born in a State is not a ground for an obligation to obey the laws of the State. The consent theory treats as crucial the individual's freedom to decide whether or not to obey the law. The classical exponent of the consent theory is often taken to be John Locke, in his Second Treatise (Locke, 1967), but that is not uncontroversial. The consent theory is often associated with the political theory known as the social contract theory, and hence with such philosophers as Hobbes and Rousseau, as well as Locke. There are distinctions that need to be drawn here, and I shall mention them later. My argument in this section will be that, in giving a clear account of consent, we must distinguish what counts as consent from the normative consequences of consenting. Since the personal explicit consent of every citizen is too strong a requirement for an obligation to obey the law, the weaker requirement of tacit consent has been advocated. But the notion of tacit consent generates confusion without solving any problems. Moreover, tacit consent would undermine the voluntarist essence of the consent theory.

Simmons defines a consent theory as follows: 'any theory of political obligation which maintains that the political obligations of citizens are grounded in their personal performance of a voluntary act which is the deliberate undertaking of an obligation' (Simmons, 1979, p. 57). Notice his emphasis that the consent must be personal. It cannot be argued that, in the remote past, some ancestor of mine consented to obey the State and his consent still binds me.

Consent theory assumes that, since persons are naturally free,

69

the only way they can acquire an obligation to restrict their freedom according to law is if they voluntarily undertake the obligation. The only way in which a person can undertake an obligation is by giving some clear sign of the desire to do so. The clear sign is the giving of consent. Finally, it is thought to be a virtue of the theory that consent protects the individual from injury by the State. What this means is controversial (Simmons, 1979, p. 65). It may mean that an individual cannot be bound to obey unknowingly. Alternatively, it might mean that an individual who consents to obey the State cannot logically be harmed by the State. But if the latter is what the consent theorists mean, then it is odd that they should also hold that there are limits to what one can consent to. If my consent negates the harm, then why can I not consent to be enslaved?

It should be clear that the consent theory is a liberal theory, a theory committed to the importance of the individual's freedom to choose. It is this central feature which gives rise to an important problem for the theory. Suppose that a State has authority (or is legitimate) only if citizens have an obligation to obey. On the consent theory, citizens have an obligation to obey only if they individually consent to what the State does. In other words, authority or legitimacy require unanimous consent. But this requirement is too strong, since no State would be legitimate. Instead, authority or legitimacy are founded on the consent of the majority. However, the theory is now impaled on the other horn of the dilemma: if a State has authority when the majority consent to its acts, then the minority have an obligation to obey even though they did not consent. Somehow the consent theory has to be weakened. Either something less than individual personal consent is to be required – but that seems unpromising – or it must be argued that the minority have, in some way, consented.

What is consent?

It has obviously become essential to give some account of consent. There is a mistake which it is crucial to avoid. The mistake is to confuse consent with its consequences (Green, 1990, pp. 162ff). There are two questions to distinguish. The first question is, what actions count as the giving of consent? The answer to this question is largely factual. Someone who utters the words 'I promise' is giving one of the conventional signs of consent. The second question is, what are the normative consequences of those actions? The usual normative

consequence of consenting is that the consentor is under an obligation. But someone may consent and not be under an obligation because we make the moral judgement that the consent was not valid. If someone is induced to give consent, he nonetheless consents. However, we might hold that the consent is not valid, has not placed the consentor under an obligation, because we hold – and this is a matter of morality – that induced consents do not create obligations. The distinction being drawn is reflected in the distinction between, for example, promises that are void initially and promises that are voidable.

The first question – what actions count as the giving of consent – is problematic. The core of the consent theory is the claim that there is a distinctive way of acquiring obligations, i.e. by consenting. Since the same normative consequence could come about in various ways (my obligation to pay £100 for example), what the consent theory seeks to explain is how consent brings the obligation about.

Simmons has offered an influential account of consent. However, it seems to me that it runs into difficulties because it fails to make with sufficient rigour the distinction I have just made. While recognising that we use the word 'consent' in various ways, Simmons recommends that we adhere to a strict account:

> [Consenting] is the according to another by the consentor of a special right to act within areas within which only the consentor is normally free to act; this is accomplished through a suitable expression of the consentor's intention to enter such a transaction and involves the assuming of a special obligation not to interfere with the right accorded. (Simmons, 1979, p. 77)

Let us consider Simmons' answer to the first of my questions: what actions count as the giving of consent? He tells us that consent is a voluntary act which involves a suitable expression of the consentor's intention to undertake an obligation. Leave aside for the moment that 'suitable expression' is too vague. Consider an argument that consent does not require having the intention to undertake an obligation (Green, 1990, pp. 163–4). As Joseph Raz has argued, we may say that a diner at a restaurant consents to pay the bill after the meal even if the diner intends to leave before paying (Raz, 1986, pp. 80–8).

I suppose that Simmons would defend his account by arguing that that is a different use of consent; that is, it is not the kind of consent that figures in discussions of political obligation. It might

the only way they can acquire an obligation to restrict their freedom according to law is if they voluntarily undertake the obligation. The only way in which a person can undertake an obligation is by giving some clear sign of the desire to do so. The clear sign is the giving of consent. Finally, it is thought to be a virtue of the theory that consent protects the individual from injury by the State. What this means is controversial (Simmons, 1979, p. 65). It may mean that an individual cannot be bound to obey unknowingly. Alternatively, it might mean that an individual who consents to obey the State cannot logically be harmed by the State. But if the latter is what the consent theorists mean, then it is odd that they should also hold that there are limits to what one can consent to. If my consent negates the harm, then why can I not consent to be enslaved?

It should be clear that the consent theory is a liberal theory, a theory committed to the importance of the individual's freedom to choose. It is this central feature which gives rise to an important problem for the theory. Suppose that a State has authority (or is legitimate) only if citizens have an obligation to obey. On the consent theory, citizens have an obligation to obey only if they individually consent to what the State does. In other words, authority or legitimacy require unanimous consent. But this requirement is too strong, since no State would be legitimate. Instead, authority or legitimacy are founded on the consent of the majority. However, the theory is now impaled on the other horn of the dilemma: if a State has authority when the majority consent to its acts, then the minority have an obligation to obey even though they did not consent. Somehow the consent theory has to be weakened. Either something less than individual personal consent is to be required – but that seems unpromising – or it must be argued that the minority have, in some way, consented.

What is consent?

It has obviously become essential to give some account of consent. There is a mistake which it is crucial to avoid. The mistake is to confuse consent with its consequences (Green, 1990, pp. 162ff). There are two questions to distinguish. The first question is, what actions count as the giving of consent? The answer to this question is largely factual. Someone who utters the words 'I promise' is giving one of the conventional signs of consent. The second question is, what are the normative consequences of those actions? The usual normative

consequence of consenting is that the consentor is under an obligation. But someone may consent and not be under an obligation because we make the moral judgement that the consent was not valid. If someone is induced to give consent, he nonetheless consents. However, we might hold that the consent is not valid, has not placed the consentor under an obligation, because we hold – and this is a matter of morality – that induced consents do not create obligations. The distinction being drawn is reflected in the distinction between, for example, promises that are void initially and promises that are voidable.

The first question – what actions count as the giving of consent – is problematic. The core of the consent theory is the claim that there is a distinctive way of acquiring obligations, i.e. by consenting. Since the same normative consequence could come about in various ways (my obligation to pay £100 for example), what the consent theory seeks to explain is how consent brings the obligation about.

Simmons has offered an influential account of consent. However, it seems to me that it runs into difficulties because it fails to make with sufficient rigour the distinction I have just made. While recognising that we use the word 'consent' in various ways, Simmons recommends that we adhere to a strict account:

> [Consenting] is the according to another by the consentor of a special right to act within areas within which only the consentor is normally free to act; this is accomplished through a suitable expression of the consentor's intention to enter such a transaction and involves the assuming of a special obligation not to interfere with the right accorded. (Simmons, 1979, p. 77)

Let us consider Simmons' answer to the first of my questions: what actions count as the giving of consent? He tells us that consent is a voluntary act which involves a suitable expression of the consentor's intention to undertake an obligation. Leave aside for the moment that 'suitable expression' is too vague. Consider an argument that consent does not require having the intention to undertake an obligation (Green, 1990, pp. 163–4). As Joseph Raz has argued, we may say that a diner at a restaurant consents to pay the bill after eating a meal even if the diner intends to leave before paying (Raz, 1979, pp. 80–8).

I suppose that Simmons would defend his account by arguing that that is a different use of consent; that is, it is not the kind of consent that figures in discussions of political obligation. It might

be argued that the diner case invokes a different principle. The diner is regarded as having consented as a way of protecting the interests of those who might be harmed by the subsequent denial of consent. If that is correct, then a reason for not taking the diner case as relevant to our obligation to obey the law is that consent theory is to be a theory about a special way of undertaking obligations. If the core of the consent theory is that consent is a special way of acquiring an obligation, it must tell us what that way is.

I don't think that this is a trivial problem. Of course, we do agree on certain clear cases of consent, such as promising. But it is likely that we don't agree on anything but a few clear cases. If so, then consent theorists may have to accept that there are only a few actions that count as consent. The fewer the actions which count as consent, the fewer the number of people who have consented. Even if consent is a reason why we ought to obey the law, or a ground of our obligation to obey, it is a reason only for a very few (i.e. few will have the obligation). The net has to be spread wider and the device for attempting to do so is the notion of tacit consent.

Tacit consent

Locke is usually regarded as the most vigorous proponent of the view that tacit consent is sufficient for an obligation to obey the law.

> The difficulty is, what ought to be look'd upon as a tacit Consent, and how far it binds, i.e. how far any one shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expression at all. And to this I say, that every Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is as far forth obliged to Obedience to the Laws of that Government, during such enjoyment, as any one under it; whether his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a week; or whether it be barely travelling freely on the highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government. (Locke, 1967, Para. 119)

The usual objection to Locke's view is that, according to our previous account of consent, the examples Locke cites are not acts of consent at all, and so are not acts of tacit consent.

In order to explain Locke's mistake, Simmons has attempted to clarify further the distinction between explicit and tacit consent. Explicit consent is the explicit expression of the consentor's intention

to undertake an obligation. Simmons illustrates tacit consent with the following example. Suppose that the chairperson concludes a meeting by saying, 'The next meeting will be on Tuesday instead of as usual on Thursday. Any objections?' No one says anything and the meeting adjourns. Have the participants all consented to rescheduling the meeting? Simmons argues that we do sometimes take it that silence, or other forms of inactivity, constitute tacit consent, but only when certain conditions are satisfied. It has to be understood that consent is being sought, that dissent is appropriate only during a specified period, that the means of dissent are reasonable and the consequences of dissent not seriously detrimental to the dissenter (Simmons, 1979, p. 80).

I take it that Simmons' point is that, although any consent requires the expression of an appropriate intention, the expression need not be explicit. Tacit consent is possible because there are circumstances in which doing (or not doing) certain things are recognised as expressions of the appropriate intention. Tacit consent then depends on the fact that there are widely recognised conventions. On this account of the matter, Locke's examples are not examples of tacit consent because it is false that we have the convention that, for example, continuing to reside in a country is an expression of the intention to obey the law.

Simmons' argument is questionable. It may well be true that people have obligations to do things to which they have not explicitly consented, but false that these obligations arise from tacit consent. Suppose that one of the participants at the meeting finds the proposed new time inconvenient. She prefers the meeting to remain on Thursday because she has important things to say at the meeting and does not know whether she can attend a meeting on Tuesday. However, she decides to remain silent. All of Simmons' other conditions are true. If consent requires the expression of an intention to undertake the appropriate obligation, then the participant has not consented.

The problem in Simmons' argument can be brought out by distinguishing the two questions I distinguished before. First, has the participant consented? This is a question about conventions, about whether, as a matter of fact, silence is regarded as the expression of an intention in certain circumstances. Second, what are the normative consequences of what the participant does? Does the participant, by virtue of her silence, have an obligation (or some other non-prudential reason) to turn up at the meeting? This question

is about moral principles. For example, it might be argued that some moral principle about fairness requires her to attend the meeting whether or not she has consented.

As to the first question, it seems to me doubtful that we do have the convention that the participant has consented. I return to my earlier point that, except for a few cases, it is just not clear what counts as consent. But Simmons' case seems to be particularly doubtful since the relevant convention would be that, in certain circumstances, anyone who keeps silent thereby expresses her intention to transfer her right even if she has no such intention. Compare with Simmons' example the following: suppose that some person gives clear evidence (such as telling us) that he regards his continued residence within a country as an expression of his intention to undertake the appropriate obligation. In that case, we would regard his continued residence as tacit consent.

As to the second question, we might argue that the participant has an obligation to attend the meeting *whether or not* she consented. We might argue that a moral principle about fairness applies to the case. Thus, the case of the meeting is parallel to the earlier case of the diner in the restaurant. If the latter is not a case of consent, then neither is the former. In my view, in neither case is it clear whether consent is being given. However, in both cases, it is arguable that there is an obligation. But to argue, as perhaps Simmons does in the meeting case, from the normative consequence that there is an obligation to the conclusion that someone has consented is to make the mistake I described earlier.

The argument that Simmons wants to make against Locke – namely that Locke is mistaken about what counts as tacit consent – has not got to the root of the matter. Either genuine tacit consent does not establish a widespread obligation to obey, or, if there is a widespread obligation to obey, it does not follow that the obligation is based on tacit consent. If continued residence is a way of undertaking the obligation, that could be because we have a principle that it is fair to regard people who continue to reside in a country as having an obligation to obey the law. Thus, whether continued residence is consent is not the problem. The real question is whether continued residence should have the normative consequence of an obligation to obey the law. Both Simmons and Locke appear to have made the same mistake of arguing from the normative consequence to the conclusion that consent has been given.

One cannot appeal to tacit consent to ground an obligation for most citizens to obey most laws since tacit consent is almost as rare as explicit consent. Consent is plausible as a basis for a general obligation to obey the law only if consent theory is transformed into some other kind of theory, such as a theory about fairness.[2] Thus, there is a paradox in the theory of tacit consent of which Locke seems unaware. In the attempt to generate a general obligation to obey, Locke appealed to tacit consent. But his account of tacit consent is inconsistent with the spirit of the theory, that a special voluntary act is required to undertake an obligation.

One should mention a modern version of the tacit consent theory. It has been argued by John Plamenatz that voting is tacit consent to obey the laws (Plamenatz, 1968, pp. 168ff). Two replies can now be given. First, there is no evidence that voting is generally tacit consent, although in particular cases it could be. So, voting could not ground a general obligation to obey the law. Second, even if it is argued that voting does give rise to an obligation to obey, it does not follow that the obligation arises from tacit consent. If there is an obligation, it may arise because it is unfair to vote and not to obey the law (Singer, 1973, pp. 47–9).[3]

Consent and contract theories

There is a further objection to consent theory that comes from Hume (Hume, 1987). Hume asked, why does consent create obligations? His reply was that we find it useful to have a device by means of which we can create obligations. However, Hume reasoned, since the reason to obey the law was also the utility of doing so, consent dissolves into utility. Thus, no work is being done by the consent theory of obligation: we can dispense with it.

Hume's argument can lead us to another problem. Why would people consent to obey the law? Imagine that I continue to reside in the country of my birth. I comply with all the laws and accept all the benefits of citizenship. What motivation is there for me to consent to obey the law? The answer must be that, unless I consent, I am not going to be able to obtain the benefits I enjoy. Thus, consent theories are also social contracts theories.

Consent theories and social contract theories often go together, but it is best to distinguish them (Green, 1990, p. 122; Rawls, 1972, p. 115). A rough distinction is this: whereas a contract usually requires a return, consent does not. If I consent to your campaign in my field,

I undertake not to interfere with your doing so. If I contract with you, you have to give me something in return, such as a fee. On its own, a consent theory of political obligation does not explain why anyone would consent to obey the law. So consent theories seem to require to be social contract theories as well. The basic idea of a social contract theory is that one agrees to obey the law in return for certain benefits, such as security (Green, 1990, Ch.5). There is no need to discuss further consent theories that are also social contract theories. They are vulnerable to the objections that have been made, as well as to the following: it just does not seem plausible to argue that, in general, consent is necessary in order to obtain certain benefits. If I comply with the law without consenting (perhaps for prudential reasons), I can obtain the benefits. Nor can one argue that there has to be some original act of consent in order to set up the society which provides the benefits. Since original consent binds no one but the original consentors, one is returned to the theory of tacit consent.

Finally, a number of problems that have been raised thus far about consent theories received interesting and influential solutions in Rousseau's *Social Contract* (Rousseau, 1958). It was remarked earlier that one of the intuitions of the social contract theory is that consent is important as a device which protects the individual from harm from the State. The assumption is that there is at least the risk of serious antagonism between the individual and the State of which he is a member. Rousseau, famously, refused to make that assumption. Rousseau identified the will of the individual with the will of the State, the 'general will' as he called it. According to Rousseau, a person becomes a moral person only within the State. His particular will is then transformed into the general will. In obeying the laws of the State, he is only obeying himself.[4] The standard criticism of Rousseau is that his theory demands too great an identification of the individual with the State to be plausible as a contract theory. In practice, agreement on the general will can only be achieved by coercive socialisation.

Duty of fair play

There is a view that the obligation to obey the law is based on a duty of fair play. The central intuition of those who hold this view is that receiving benefits can, in certain circumstances, create obligations

for those who receive them. Consider the following example. Smith is joint owner of a plot of ground in the front of the building in which he lives. His neighbours, the other joint owners, decide to turn it into a garden. Smith is unwilling to co-operate, but does not refuse his permission for the others to do what they like. When the garden comes into being, Smith is often there, enjoying the flowers. He is asked to contribute to its upkeep, but refuses. Smith is what some people would call a free-rider. He receives benefits but makes no contribution. If Smith is a free-rider, what he does is wrong because it is unfair. The duty of fair play makes free-riding wrong. The duty of fair play, it is argued, creates an obligation on Smith to contribute to the garden if he receives benefit from it. According to the duty of fair play theory, the obligation to obey the law is a special case of the duty of fair play. The main fair play theorists are H. L. A. Hart (Hart, 1955) and John Rawls (Rawls, 1964). Let us consider Rawls' argument.

Rawls argued that the duty of fair play arises when the following conditions are satisfied:

1) There is a mutually beneficial and just scheme of social co-operation. The benefits of the scheme are obtained only if nearly everyone co-operates.
2) Co-operation requires certain sacrifices.
3) Free-riding is possible.
4) If 1, 2 and 3 are satisfied, and if one has *accepted* benefits, then one is bound by the duty of fair play not to be a free-rider.

Rawls holds that the duty of fair play creates an obligation to obey only if the scheme is just. It may seem intuitively obvious that a slave cannot have a moral obligation to obey the system that enslaves him. However, a number of writers have argued that that is false (Greenawalt, 1989, pp.129–33; Simmons, 1979, pp.109ff). Their objection, if correct, is important. If a duty of fair play could create obligations in respect of a scheme which is unjust, then one could have an obligation to obey the law when the legal system is very unjust.

Consider the following counter-example (Greenawalt, 1989, p. 130). Constance lives in a village occupied by an invading army. To deal with the village's severe water shortage, the army's commander sets strict limits on the use of water and requires every villager to transport a certain amount of water each day from a distant stream. The water

to be hauled by the villagers is to be consumed only by the army. If insufficient water is hauled, villagers will be shot at random. Many villagers, including Constance, haul water not only to save themselves but to protect their neighbours.

This looks like a counter-example because it satisfies all of Rawls' conditions except the condition that the scheme is just, and it is arguable that Constance has a duty to her neighbours to obey the invader's law which arises from the duty of fair play.

Now it might seem that Rawls needs a distinction here. He needs to distinguish two kinds of just scheme: (a) schemes which come about in just ways; (b) schemes which distribute goods justly. The counter-example only shows that it is false that schemes have to be just in the first way, that is, coming about in a just way. Perhaps Rawls should have said that the scheme must be just in the sense that it distributes goods justly among the participants?

Suppose, instead of requiring a just scheme, Rawls had required a scheme in which each participant was allocated a fair share of benefits of the scheme. In that case, we could claim that Constance has a duty to her neighbours arising from the duty of fair play. But this amendment will not work because it requires too much. It requires that *for anyone* to have an obligation based on fair play, then *everyone* must be allocated a fair share of the benefits. However, all that is required for some person to have a duty of fair play is that *that* person receive a fair share (Simmons, 1979, pp. 111–12).

Instead of Rawls' condition that the scheme is just, he probably needs a condition that each is bound to co-operate with the scheme to the extent that he receives benefits from it. Rawls may have considered this condition and rejected it because he may have thought that it has unacceptable consequences. Suppose a scheme in which some participants benefit a great deal more than others. If each has an obligation to support the scheme to the extent that he or she has benefited from the scheme, then those who benefit most from an unfair scheme have the strongest obligation to support it. Is this an acceptable consequence or not? Simmons thinks it is (Simmons, 1979, p. 113). His argument is that those who benefit most from an unfair scheme will have the strongest obligation to support it, but that obligation may itself be overridden by a stronger obligation to oppose unfair schemes.

The conclusion thus far is that it is not a necessary condition for a duty of fair play that the relevant scheme is just. If Simmons is

correct, the duty of fair play arises even when the scheme is unfair. So it seems that if we use the duty of fair play argument, we have to accept that we have *some* obligation to obey even unjust laws. Thus the crucial feature of the duty of fair play argument is not the justice of the co-operative scheme but the claim that a person has an obligation simply by virtue of receiving benefits from the scheme. That crucial feature has been vigorously attacked by Robert Nozick (Nozick, 1974, pp. 90–101).

Here is Nozick's argument:

> Suppose some of the people in your neighbourhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day ... a person is to run the public address system, play records over it, give news bulletins, tell amusing stories, and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so? As it stands, surely not. Though you benefit from their arrangement, you may know all along that 364 days of entertainment supplied by others will not be worth your giving up one day. You would rather not have any of it than have it all and spend one of your days at it. Given these preferences, how can it be that you are required to participate when your scheduled time comes? (Nozick, 1974, p. 93).

If Nozick's argument is correct, it shows that one does not have a duty just because one has accepted benefits.

Rawls might be defended against Nozick in this way: it should be remembered that Rawls limits his argument to those who accept benefits. The reluctant broadcaster is not an acceptor and that is why he has no duty to participate. But one has to take care that this defence does not collapse into a requirement that consent is necessary for an obligation. So what account of acceptor can we give?

Simmons argues that we need two distinctions. The first distinction is between *accepting* benefits and *receiving* them. One accepts benefits if either (a) one tries to get the benefit and succeeds or (b) one takes benefits willingly and knowingly. Otherwise, one receives benefits. The second distinction is between *open* benefits and *readily accessible* benefits. Open benefits are those which I cannot avoid receiving without considerably altering my lifestyle. Otherwise, benefits are

readily accessible. For example, police protection is in general an open benefit. However, if I required special police protection, that would be a readily accessible benefit.

Since I must *accept* readily accessible benefits, in those cases the duty of fair play does give rise to an obligation. Open benefits are more complicated. There are two cases to distinguish. First, I *receive* open benefits. In that case, the duty of fair play is not applicable. Second, I *accept* open benefits in the sense that I take them willingly and knowingly. In that case, the duty of fair play does arise but this is not, Simmons argues, a normal case.

> [Accepting open benefits] involves a number of restrictions on our attitudes toward and beliefs about the open benefits which we receive. We cannot, for instance, regard the benefits as having been forced upon us against our will, or think that the benefits are not worth the price we must pay for them. And taking the benefits 'knowingly' seems to involve an understanding of the status of those benefits relative to the party providing them. Thus, in the case of open benefits provided by the co-operative scheme, we must understand that the benefits *are* provided by the co-operative scheme in order to accept them [as opposed to free for the taking]. (Simmons, 1979, p. 132)

Simmons' conclusion is that the duty of fair play arises either when we *accept* readily accessible benefits or when we *accept* open benefits. However, accepting open benefits is unusual. So the duty of fair play will not be an important justification of our obligation to obey the law.

The crucial point in Simmons' argument is the claim that acceptance of open benefits is unusual, and therefore cannot be used as a basis for the claim that there is a general obligation to obey the law. Why does Simmons think that most people do not accept open benefits? He offers two reasons (Simmons, 1979, pp. 138–9). First, many citizens barely notice the benefits they receive. So they do not regard the benefits as the benefits of a co-operative venture. Or if they do notice benefits, they regard the benefits as purchased from government through taxation, rather than as benefits received from a co-operation scheme. Second, many citizens, if they think about the benefits at all, do not consider them worth the price. So they do not accept the benefit willingly.

One might not be convinced by the argument that most citizens *don't think about the benefits*. Even if true, is it necessary that they do for a duty of fair play to arise? Might it not be enough that

either they would think about the benefits in an appropriate context (in which case Simmons' claim that acceptance must be knowing needs qualification) or that they ought to think about the benefits as benefits of a co-operative scheme, that is, they should be blamed if they do not (Greenawalt, 1989, pp. 127–9)? The argument that people regard benefits as purchased through taxation is opaque. Let us distinguish three kinds of benefit:

1) Open. Examples: security, planning controls, environmental health/sanitation controls.
2) Readily accessible. Examples: NHS, special police protection.
3) Contracted. These benefits do not depend on a co-operative scheme but result from exchanges between individuals. Examples include going into a supermarket and buying a loaf of bread; hiring a private security firm.

As I understand it, Simmons' argument is that people view the benefits provided by taxation as contracted benefits and not as open benefits provided by a co-operative scheme (Simmons, 1979, p. 132).

Bear in mind the previous suggestion that the criterion is not what people think, but what they would think if they thought about it. Simmons might argue that the public security provided by the police is a contracted benefit. But that would be to oversimplify. Security is only indirectly a contracted benefit. Taxation purchases the criminal law machinery which encourages self-restraint by punishing the lack of it (Greenawalt, 1989, pp. 135–6). What people benefit from is the co-operative system of self-restraint. Equally, in order to benefit from the criminal justice system, people would realise that the benefits are obtainable only if many do jury service when called, offer to act as witnesses to accidents, and so on. Similar arguments could be made about environmental health. If these points are accepted, then accepting open benefits is not as rare as Simmons thinks.

Notice however that the argument just concluded relies on turning the acceptors into the *first* kind of Simmons' acceptors: i.e. those who are trying to get the benefit. But these acceptors also have strong prudential reasons to co-operate. They want the benefit and they recognise (or would recognise) that the benefit can be obtained only as the product of a co-operative scheme in which they need to play their part. The conclusion that all and only those who have the required co-operative spirit have an obligation to obey the law is not the most interesting conclusion, since they are precisely those

for whom the obligation is least essential as a reason to obey the law.

The interesting case remains those acceptors of the second kind: i.e. those who accept benefits willingly and knowingly. Simmons thinks that such acceptors are rare, but it may be that there cannot be any such acceptors. If I am correct that the second kind of acceptor must be one who would know or ought to know that the benefits are benefits of a co-operative scheme, then it seems that there is no difference between that acceptor and a receiver of benefits. The crucial feature of an open benefit is that it is one that one cannot reject, at least not without great inconvenience. If one cannot reject the benefit, neither can one accept it (Arenson, 1982, p.619).

To sum up the argument thus far, Nozick argues that receiving open benefits does not give rise to obligations. Simmons agrees but adds: acceptance of open benefits could give rise to obligations; however, acceptance of open benefits is rare. My argument is that acceptance of open benefits may not be so rare, and so it may be possible to justify an obligation to obey the law that is more extensive than Simmons thinks. However, the obligation is on those who least need it as a reason to obey the law. Arguably, Simmons is correct in thinking that accepting open benefits is not going to provide a significant justification for obeying the law; but he has given the wrong reasons. So it may seem that we may draw the conclusion that if receipt of obligations cannot ground obligations (as Nozick claims), then the duty of fair play argument can at best establish obligations for those who least require them as reasons to obey the law (i.e., those acceptors who try successfully to obtain the co-operative benefits). The duty of fair play argument cannot establish that free-riding is wrong because unfair.

However, we should consider an argument that both Nozick and Simmons are wrong in thinking that receipt of benefits cannot generate obligations. Richard J. Arenson (Arenson, 1982) detects a flaw in Nozick's argument. The reluctant broadcaster does *not* think the benefit worth his time as a broadcaster. Suppose, however, that he did. That would make him a different kind of free-rider. He now both wants the benefit and is unwilling to do his part in creating it. (I take it that he is also distinguishable from the first kind of Simmons' acceptor in that this free-rider wants but does not try to obtain the benefit. He is a passive, willing receiver of benefits, distinguishable from Simmons' second *kind* of acceptor in that he

does not satisfy the willing and knowing conditions.) Arenson argues that *this* kind of free-rider does have an obligation generated by fairness. So it is possible to have an obligation to obey the law that is grounded in fairness.

Arenson's intuition is that mere receipt of open benefits (or public goods, as he calls them) does create obligations because many of these open benefits are 'non-excludable', i.e. if the benefit is provided at all, it is provided for all. He proposes the following principle of fairness (Arenson, 1982, p.623):

1) When a scheme of co-operation is established that supplies a collective benefit (i.e. if anyone is consuming the good it is not feasible to prevent anyone else consuming it) that is worth its cost to each participant.
2) Where the burdens of co-operation are fairly divided.
3) Where it is not feasible to attract voluntary compliance to the scheme via supplementary private benefits.
4) Where collective benefit is either voluntarily accepted or such that voluntary acceptance is impossible.
5) Then those who contribute their assigned fair share of the costs of the scheme have a right, against the remaining beneficiaries, that they should also (i.e. have a moral obligation to) pay their fair share.

There is trouble with condition 2. As I argued earlier, that condition appears to be too strong. All that is required for a person to have a duty of fair play is that that person receives a fair share of the benefits. If that earlier argument is correct, then it may be that one has an obligation arising from fair play to obey the law even when the law distributes benefits unfairly.

What are the arguments in favour of this principle of fairness? First, Arenson argues that Nozick cannot consistently reject it, given his views about private property. What underlies the Lockean–Nozickean view about private property is the self-benefit principle: 'moral rules should be so structured that, if the rules are obeyed, the acts of each person benefit or harm only himself, except as he himself chooses to confer or exchange the benefits of his acts' (Arenson, 1982, p.626, quoting Gibbard). Since the principle of self-benefit justifies both Nozick's views on private property and Arenson's principle of fairness, one cannot consistently advocate the former and deny the latter.

Second, Arenson argues that his principle of fairness is consistent with the self-benefit principle extended to include obligations of charity. If obligations of charity exist, then either (a) the principle of fairness does not cover those cases or (b) it does, but it is controversial what a just distribution of benefits requires but uncontroversial that it is not permissible to desire benefits without being willing to reciprocate at all.

In drawing this discussion to a close, we may conclude that if the duty of fair play is an attractive basis for the obligation to obey the law, it is because of the issue of open benefits. A number of positions have been examined: (a) receipt of open benefits cannot create obligations (Nozick); (b) acceptance of open benefits does create obligations but these obligations are not significant because they are either rare (Simmons) or (as I have argued) obligations of those who least need them as a reason to obey the law; (c) receipt of open benefits by a genuine free-rider does create obligations (Arenson).

The natural duty to obey the law

In his *Theory of Justice*, Rawls offers a different account of the duty to obey the law from the account he offered in his earlier paper (Rawls, 1972, Paras. 18–19, Ch. 6). His later argument is that there is no *obligation* to obey the law, but there is a *duty*. It now becomes important to distinguish obligations and duties.

According to Rawls, obligations have four features (Rawls, 1972, p. 113):

1) They arise from voluntary acts, including accepting benefits.
2) Their content is determined by institutions.
3) They are owed to definite individuals, namely those co-operating in maintaining the institution in question.
4) All derive from the principle of fairness. A person has an obligation to do her part as defined by the rules of the institution when:

4a) the institution is just or fair, that is, satisfies Rawls' two principles of justice, which are: that everyone has the maximum liberty compatible with like liberty for all; that social and economic goods be distributed equally unless an unequal distribution would be to the advantage of the least well-off members of the society;

4b) she has voluntarily accepted benefits.

There are two changes from Rawls' earlier account. First, the former *duty* of fair play has become an obligation. Second, Rawls admits that the principle of fairness cannot ground a general obligation to obey the law because there is no relevant voluntary act. However, when there is a relevant voluntary act, such as running for a political office, then an obligation may be created.

Rawls does not tell us as clearly what a duty is. He tells us that none of the four conditions above applies to duties. He tells us that natural duties 'obtain between all as equal moral persons'. He gives us illustrations of natural duties: helping others in distress, not harming another, obeying just laws. His argument is that natural duties are 'derived from a contractarian point of view'. They are 'those that would be acknowledged in the original position. These principles are understood as the outcome of a hypothetical agreement' (Rawls, 1972, p. 115).

In order to understand Rawls' account of natural duties, we have to understand his method of arriving at a theory of justice. Rawls thinks that moral and political thinking rests on a contractarian basis. That is, the moral and political principles that are right are those which would be chosen by persons in a carefully described hypothetical situation. This hypothetical situation is what Rawls calls the original position (Rawls 1972, Ch. 3). In the original position, everyone is behind a veil of ignorance. Everyone is required to choose moral and political principles for a society to which all will belong without knowing anything about the society and without knowing what roles they will occupy within that society. All that those in the hypothetical situation know are certain basic facts about human nature. Rawls contends that whatever principles would be chosen by rational, self-interested choosers in the original position are just because the procedure by which they are chosen is fair. Rawls argues that two principles of justice would be chosen first in the original position. People would choose first to have maximum liberty compatible with like liberty for all. Second, they would choose a principle that social and economic goods would be distributed equally unless an unequal distribution would be to the advantage of the least well-off member of the society. These two principles of justice are then used to create the basic institutional structures. Once they have got the basic institutional structures into place, the choosers in the original position can consider principles for individuals. Rawls' claims that certain principles of natural justice would be chosen, such as the principle that we have a duty to support ... institutions.

What then is the natural duty of justice that would be chosen in the original position?

> From the standpoint of justice as fairness, a fundamental natural duty is the duty of justice. This duty requires us to support and to comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. (Rawls, 1972, p. 115)

Why would principles of natural justice be chosen in the original position? One of Rawls' arguments is that the previous choice of principles to set up the basic institutions now constrains choosers to choose principles of natural justice. But there is another consideration, which Rawls calls the assurance problem (Rawls, 1972, pp. 136–7). In a well-ordered society, the public knowledge that citizens have an effective sense of justice contributes to the stability of just arrangements. That stability is weakened by the apprehension that others will not obey the laws when it is in their interest not to obey. That apprehension is increased if some voluntary act, like accepting benefits, is required for an obligation to obey the law. Stability seems to require that everyone recognise that everyone has a duty to obey the law independently of the performance of any voluntary act, and that is why the natural duty of justice would be chosen in the original position. To show that we have a duty to obey the laws of just institutions it is sufficient to show that the natural duty of justice would be chosen in the original position.

Obviously, Rawls' claim that there is a natural duty to obey the law depends to a great extent on the soundness of his method, especially the device of the hypothetical contract in the original position. His method has been extensively criticised.[4] It has been frequently argued that we cannot know what choices would be made in the original position, or, if we can know, it is only because the original position has been tailored to produce certain choices. While very important, these are not arguments that can be pursued here.

Simmons argues that an objection can be made to Rawls' theory that does not depend on our taking a view about the soundness of his method. The objection focuses on Rawls' claim that a condition of having a duty to obey the law is that just institutions 'apply to us'. Institutions might apply to us for different reasons. They might apply to us by virtue of some general description (such as 'married') or apply to us by virtue of residing within a given territory. Simmons

argues that neither reason for institutions applying to us is a morally relevant reason and thus the application clause is not a necessary condition of our duty to obey (Simmons, 1979, pp. 147ff). For example, he claims that the fact that we are born within a given territory does not give us a relevant reason for obeying the just laws of that territory. Therefore, if we have a duty to obey just institutions, we have a duty to obey all just institutions and not only those which apply to us in either of the ways just mentioned. Of course, if institutions applied to us because we joined in them, then that would be a relevant reason for obeying the laws of *that* institution. But interpreting 'applies to' in that way returns us to an obligation-based account. So the requirement that the institutions must apply to us must be deleted, with the result that we have a natural duty to obey all just institutions. But Simmons argues that this is an unreasonable demand because it requires too much of us.

Suppose that Simmons is correct that we cannot have a natural duty to obey all just laws.[5] The most obvious restriction is to the laws of the individual's own State or that State with which he or she has a significant connection. But Simmons does not have a persuasive argument against the view that one has a natural duty to obey the laws of one's own State. What he offers is an illustration which he claims supports the intuition that someone born into a territory governed by just laws does not thereby have a duty to obey the law. As against that intuition, Rawls could well argue that the principle that he advocates is the one that would be chosen in the original position.[6]

Concluding remarks

We have now examined three influential theories which claim that citizens generally have an obligation or a duty to obey most laws. None of these is convincing, although the duty of fair play theory may be the most promising. There are, then, three conclusions that one needs to consider:

1) There is no obligation (or duty) to obey the law.
2) The obligation is very limited.
3) There is some moral reason other than an obligation why we ought to obey the law.

The arguments that have been discussed in this chapter lend most support to the second conclusion. However, the third should not be

entirely overlooked. Even if there were no obligation to obey all or most laws, it does not follow that there is no moral reason to obey. There may be moral reasons to obey which do not essentially involve obligations[9] or natural duties. Utilitarian writers argue that one ought to obey the law of one's State when and only when obedience maximises some desired value, for example, the greatest happiness of the greatest number.[10] Some utilitarians would argue that every act of justified obedience must (for example) promote the greatest happiness of the greatest number. Others argue that all that needs to be justified is a general rule requiring general obedience to the law, and that such a rule can be justified because it does maximise the desired value.

Notes

1 At least one philosopher has grasped this particular nettle and concluded that a committed consent theorist must be a philosophical anarchist. See Wolff, 1970.

2 I think that Simmons may agree with much of this, but he misleads one with his discussion of tacit consent into making Locke's mistake.

3 Voting may have significance because of an underlying social obligation rather than being itself a source of the obligation to obey. See Waldron, 1990, pp. 169–73.

4 For a modern example of an account of political obligation influenced by Rousseau, see Charvet, 1990.

5 In his later work, Rawls accepts that one may have a duty to obey some unjust laws. See Rawls, 1972, Para. 53.

6 See Daniels, 1975, Parts 1–3. For a recent defence of Rawls, see Kymlicka, 1990, pp. 62–3.

7 But see Waldron, 1990, pp. 169–73 and his Note 13.

8 There is another way of dealing with Simmons' intuition. Natural law theorists also argue that we have a natural duty to obey just laws. According to traditional natural law theory, laws are rules for the common good. Because individuals have a duty to promote the common good, they have a duty to obey just laws. For a fuller account, see Greenawalt, 1989, Ch. 8.

9 Narrowly construed as, for example, by Simmons, 1979, Ch. 1.

10 Utilitarianism was developed by Bentham, 1948 and J. S. Mill, 1962. For examples of modern utilitarian work on political obligation, see Hare, 1976 and Brandt, 1964. Utilitarian theories of political obligation are criticised by Greenawalt, 1989, Ch. 6.

References

Arenson, R. J. (1982), 'The Principle of Fairness and Free-Rider Problems', *Ethics*, 616.

Bentham, J. (1948), *A Fragment on Government with An Introduction to the Principles of Morals and Legislation*, Ed. W. Harrison, Oxford: Blackwell.

Brandt, R. (1964), 'Utility and the Obligation to Obey the Law', in S. Hook, *Law and Philosophy*, New York: New York University Press.

Charvet, J. (1990), 'Political Obligation: Individualism and Communitarianism', in P. Harris, *Political Obligation*, London: Routledge.

Daniels, N. (1975), *Reading Rawls*, Oxford: Blackwell.

Green, L. (1990), *The Authority of the State*, Oxford: Clarendon Press.

Greenawalt, K. (1989), *Conflicts of Law and Morality*, Oxford: Oxford University Press.

Hare, R. M. (1976), 'Political Obligation', in T. Honderich, *Social Ends and Political Means*, London: Routledge and Kegan Paul.

Hart, H. L. A. (1955), 'Are There Any Natural Rights?', *Philosophical Review*, 175.

Hume, D. (1987), 'Of The Original Contract', in E. F. Miller (Ed.), *David Hume: Essays: Moral, Political and Literary*, Indianapolis: Indiana, Liberty Classics.

Kymlicka, W. (1990), *Contemporary Political Philosophy*, Oxford: Clarendon Press.

Locke, J. (1967), *An Essay Concerning the True and Original Extent of Civil Government* [the Second Treatise] in P. Laslett, *Locke's Two Treatises of Government*, Cambridge: Cambridge University Press.

Mill, J. S. (1962), *Utilitarianism*, Ed. M. Warnock, London: Fontana.

Nozick, R. (1974), *Anarchy, State and Utopia*, New York: Basic Books.

Plamenatz, J. P. (1968), *Consent, Freedom and Political Obligation*, Oxford: Oxford University Press.

Plato (1953), *Crito*, in B. Jowett, *The Dialogues of Plato*, Vol. 1, Oxford: Clarendon Press.

Rawls, J. (1964), 'Legal Obligation and the Duty of Fair Play', in S. Hook, *Law and Philosophy*, New York: New York University Press.

Rawls, J. (1972), *A Theory of Justice*, Oxford: Clarendon Press.

Raz, J. (1986), *The Morality of Freedom*, Oxford: Clarendon Press.

Rousseau, J. J. (1953), *The Social Contract*, Everyman edition, London: J. M. Dent.

Simmons, A. J. (1979), *Moral Principles and Political Obligations*, Princeton, New Jersey: Princeton University Press.

Political Obligation

To have a political obligation is to have a moral duty to obey the laws of one's country or state. On that point there is almost complete agreement among political philosophers. But how does one acquire such an obligation, and how many people have really done what is necessary to acquire it? Or is political obligation more a matter of *being* than of *doing* — that is, of simply being a member of the country or state in question? To those questions many answers have been given, and none now commands widespread assent. Indeed, a number of contemporary political philosophers deny that a satisfactory theory of political obligation either has been or can be devised. Others, however, continue to believe that there is a solution to what is commonly called "the problem of political obligation," and they are presently engaged in lively debate not only with the sceptics but also with one another on the question of which theory, if any, provides the solution to the problem.

Whether political obligation is the central or fundamental problem of political philosophy, as some have maintained (e.g., McPherson), may well be doubted. There is no doubt, however, that the history of political thought is replete with attempts to provide a satisfactory account of political obligation, from the time of Socrates to the present. These attempts have become increasingly sophisticated in recent years, but they have brought us no closer to agreement on a solution to the problem of political obligation than the efforts of, say, Thomas Hobbes and John Locke in the seventeenth century. Nor have these sophisticated attempts made it unnecessary to look back to earlier efforts to resolve the problem. On the contrary, an appreciation of the troublesome nature of political obligation seems to require some attention to its place in the history of political thought.

This essay begins, therefore, with a brief history of the problem of political obligation. It then turns, in Part II, to the conceptual questions raised by political obligation, such as what it means for an *obligation* to be *political.* In Part III the focus is on the sceptics, with particular attention to the self-proclaimed philosophical anarchists, who deny that political obligations exist yet do not want to abolish the state. Part IV surveys the leading contenders among the various theories of political obligation now on offer, and Part V concludes the essay with a brief consideration of recent proposals for pluralistic or "multiple principle" approaches.

1. Political Obligation in Historical Perspective

The phrase "political obligation" is apparently no older than T. H. Green's *Lectures on the Principles of Political Obligation*, delivered at Oxford University in 1879–80. The two words from which Green formed the phrase are much older, of course, and he apparently thought that combining them required no elaborate explanation or defence. In any case, there was nothing novel about the problem Green addressed in his lectures: "to discover the true ground or justification for obedience to law". Sophocles raised this problem in his play *Antigone*, first performed around 440 BCE, and Plato's *Crito* recounts Socrates' philosophical response to the problem, in the face of his own death, some forty years later.

Socrates on Obeying the Law

In 399 BCE an Athenian jury found Socrates guilty of impiety and corrupting the morals of the youth, for which crimes the jury condemned him to death. According to Plato's account, Socrates' friends arranged his escape, but he chose to stay and drink the fatal hemlock, arguing that to defy the judgment against him would be to break his "agreements and commitments" and to "mistreat" his friends, his country, and the laws of Athens. Socrates' arguments are sketchy, and Crito, his interlocutor, does little to challenge them, but they are nevertheless suggestive of the theories of political obligation that have emerged in the two and a half millennia since his death.

These arguments fall into four categories. First, Socrates maintains that his long residence in Athens shows that he has entered into an agreement with its laws and committed himself to obey them — an argument that anticipates the social contract or consent theory of political obligation. Second, he acknowledges that he owes his birth, nurture, and education, among other goods, to the laws of Athens, and he hints at the gratitude theory of obligation when he concludes that it would be wrong of him to disobey its laws now. Third, he appeals to what is now known as the argument from fairness or fair play when he suggests that disobedience would be a kind of mistreatment of his fellow citizens. As he asks Crito, "if we leave here without the city's permission, are we mistreating people whom we should least mistreat?" There is, finally, a trace of utilitarian reasoning, as when Socrates imagines "the laws and the state" confronting him with this challenge: "'do you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals?'". None of these arguments is fully developed, but their presence in the *Crito* is testimony to the staying power of intuitions and concepts — commitment and agreement, gratitude, fair play, and utility — that continue to figure in discussions of obligation and obedience.

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

8

Kinds of obligation

It is sometimes held that political obligation is to be simply identified with moral obligation. Sometimes, less simply, it is held that there are a number of completely different kinds of obligation, of which political obligation is only one. In this chapter I consider both these views. It is necessary for this purpose to look at the concept of *obligation* itself, which has been used constantly in this book but has not hitherto been examined.

The concept of obligation

1. 'Obligation', though in origin a legal term, has come to have chiefly a *moral* connotation. This being so, the effect of using expressions like 'political obligation' or 'religious obligation' is undoubtedly to call attention, whether deliberately or not, to respects in which situations referred to by these names are like typical situations of *moral* obligation. Some discussions of political obligation seem to assume almost without question that political obligation must be some aspect of moral obligation. In the question, 'Why ought we to obey the government?', the 'ought' is taken immediately as a moral 'ought'. The extent to which 'ought', 'obligation', and related words have been annexed

to ethics makes this understandable if not entirely excusable.

2. 'Obligation' is a relational term. It is used (*a*) of a relation, or one of a number of relations, between individual persons (call them *A* and *B*). One is 'under an obligation to' someone else. People are—or used to be—'greatly obliged to' one another. It is used (*b*) of a relation between a person and an institution, such as the government or a religious organisation (call this a relation between *A* and *I*).

3. Sometimes the relation of obligation is one where something is owed by *A* to *B*, or by *A* to *I*. To be under an obligation to someone may be to owe him money, or a service, or one's loyalty, etc. People of independent natures do not like to be 'obliged' to anyone, do not like to feel 'in their debt', to 'owe' them anything.

Owing money—or supposing oneself to owe money—is the most obvious kind of owing. But the ways in which one person may be, or may feel, indebted to another are numerous. Some debts are of a highly informal kind, non-quantifiable, non-enforceable by law; others the reverse. In some cases it is possible both to feel and to be in debt; in others it is all a matter of feeling—but not less real for that. In some cases where *A* owes something to *B* or to *I* it is proper to say that *B* or *I* have corresponding *rights* over *A*; in other cases it would not be proper to say this.

This last point is particularly important. In the case of many (though not all) moral obligations it would be improper to assign corresponding rights. *A* may feel under a deep sense of obligation to *B*, who has saved his life. But there is no question of *B*'s exacting payment for this from *A*, or of his having any consequential rights over *A*. (We should morally approve of *A*'s considering himself obliged to reward *B*. But we should morally disapprove of *B*'s considering that his having saved *A*'s life *entitled* him to some reward from *A*.) It seems, however, that in the case of politi-

cal obligation it would always be proper to assign corresponding rights. Whenever it is appropriate to say that *A* is obliged to do something that the government requires of him, it is also appropriate to say that the government has a right to his obedience.

4. Sometimes the relation of obligation is better described not in terms of owing something but (as its derivation suggests) in terms of being *bound*. We may be bound to perform some action without in any obvious sense owing anybody anything. This is a sense of obligation perhaps more readily applicable to legal or political obligation than to moral, which is not surprising as it is a survival of the Roman legal sense of the word. This is a metaphor; we are not literally in bonds: but enough of the literal meaning still clings to it to make it not entirely appropriate in a purely moral context. Philosophers, in their analyses of 'obligation', have more to say about 'ought' (which is a form of the verb 'to owe') than about being 'bound'. Yet we express obligations by means of the latter as well as the former.

The metaphor of binding suggests restriction. To be under an obligation in this sense is to have lost a certain amount of freedom, and that freedom is not regained until the obligation has been discharged. Restriction or loss of freedom is not a notion that we generally associate with morality. Admittedly, there are exceptions. Some situations of moral obligation seem to call for expression in the language of *bonds*. But they are, I think, in a minority. Yet in the case of political obligation it seems that freedom is either dispensable with or even sometimes actually inconsistent with it. Certainly, it is not necessary that someone be not under duress for him to be politically obliged (political obligations exist in Police States as well as in liberal democracies). Indeed, if a man's freedom were not somehow being curtailed he would no doubt not be politically (or legally) obliged at all. A legal or political obligation is some-

thing that can hurt; ideally, a moral obligation does not hurt: this is as true as most generalisations.

5. There are obligations of which we are conscious and obligations of which we are not. This was hinted at in the distinction mentioned earlier between being in debt and feeling in debt. If a man is obliged by law to pay taxes the obligation is no less real for his being unaware of it. If a man is liable for military service he is no less obliged to accept and act upon the call for his being totally unprepared for its coming. Of course, many of our political and legal obligations we *are* aware of.

How does the matter stand with moral obligations? The obligation on me that may be created by my making a promise does seem to depend in part upon my awareness that I have made it. Suppose I forget that I have made the promise. Am I still under an obligation or not? In a sense, yes; in a sense, no. What is at any rate clear is that there are moral obligations (and promises are an example) that cannot come into existence—whatever may happen to them subsequently—unknown to the persons whose obligations they are. But are there other moral obligations of which this is not true? For instance, is the moral obligation to care for one's parents in their old age one which holds for persons to whom it has never occurred that there is such an obligation? I think we generally so use the expression 'moral obligation' that a man can *not* be said to have a *moral* obligation of which he is not aware. 'Duty' is perhaps a more natural choice if we want a word that is neutral as between the type of case where we are conscious of obligation and the type of case where we are not. Perhaps 'obligation' itself is better reserved for the former type of case only. I do not myself think that there is a completely clear difference of this kind between 'duty' and 'obligation', but the distinction can nevertheless be a useful one.

What is called political obligation does not necessarily

depend upon knowledge of its existence. If, by contrast, there is something strained about the notion of a man having a *moral* obligation of which he is not aware, we have here uncovered another difference between political obligation and moral obligation.

6. It seems that obligations may be voluntarily assumed, or otherwise. Again, the examples of promise-making and of liability to tax respectively will serve as examples.

The situation here is parallel to that just discussed under 5. We should, I think, generally be reluctant to use the expression 'moral obligation' for a duty not voluntarily assumed. Some cases covered by the expression 'political obligation' by contrast are certainly cases where we have obligations that we have not voluntarily assumed. Here is again a difference between moral obligations and political obligations.

The upshot of the discussion so far is clear enough. 'Obligation' is understood by philosophers first and foremost as a *moral* term. I have called attention to several points of difference between the concepts of moral obligation and political obligation. We have seen reason therefore to doubt the simple view that political obligation just is moral obligation. I pass now to consider the less simple view that these are different 'kinds' of obligation.

Two kinds of 'kind of'

The existence of *conflicts* of obligation, it is often held, constitutes an important problem, and one that cannot be understood except in terms of different *kinds* of obligation. It is often thought that important conflicts may arise between obligations of different kinds—moral, political, legal, religious—and that the resolution of these may involve serious struggles of conscience. The moral obligation to give help to a friend in financial distress may conflict

with the political obligation to pay my taxes. The possibility of conflict between political obligation and legal obligation may seem less real. In Britain today, what the State requires is what the law requires. But in some places and at some times the situation has been otherwise. Conflicts between political and religious obligations are also, it may be said, common enough—in situations where a government is hostile to religion in general or to a particular religious body, or where a religious denomination is opposed to such government policies as compulsory vaccination.

What are we to make of all this? There can be no doubt that the simplest way of describing such situations is as conflicts between different kinds of obligation. But what exactly is meant by the notion of different kinds of obligation? There are two obvious alternatives. *Either* merely that the obligations are 'owed' to people or bodies, etc., to whom we stand in different relationships, and that different sanctions are attached to them, etc. Or that there is some different 'quality' of obligatoriness about them. In other words, either we suppose that obligations are obligations, no matter to whom we owe them or how they are enforced (though some may, of course, be more binding than others); or we suppose that not all obligations are just obligations, but that there is some vitally important difference in the 'feel' of them.

Now, the first of these is no doubt innocent enough. We have obligations to parents, to employers, to people to whom we have agreed to sell things, to our country in time of war, and so on. We can for convenience classify our obligations as moral or political or legal, etc., without intending to suggest that there is any difference in 'quality' between them. For instance, some of our obligations are formalised by our having signed a legal document, some are not. There is no harm, and much good, in calling the former legal obligations and the latter something else (non-

legal, perhaps). But the important thing is that although in the sense mentioned—the first of the two senses distinguished above—these are different 'kinds' of obligation, they are not different in the second of the two senses. Obligation is obligation. If we are obliged we are obliged.

The other alternative, however, is not so innocent. This is the notion that the difference between, say, moral obligation and political obligation lies in a systematic ambiguity of 'obligation' itself. The trouble with this is that it is difficult to see how, if this were so, there could ever be legitimate conflicts between (in this sense) different kinds of obligation. How, in this case, would obligations be comparable? What, on this interpretation, would be meant by asking whether a certain religious obligation was more binding than a certain political obligation, or either than a certain moral obligation? If there is to be any kind of conflict at all, at least the contestants must be fighting for the same prize.

It seems that if conflict between different kinds of obligation is to be possible it is necessary that what is meant by 'different kinds of obligation' be merely relatively superficial differences between sub-classes of a single class of things univocally called 'obligation'. If anyone were to insist that there are different kinds of obligation in a more fundamental sense (the second sense, above) this would be at the expense of the possibility of meaningful conflict between different kinds of obligation.

Obligation is obligation. Obligations may conflict, and we may describe such conflicts as being between, say, legal and political and moral obligations; but this way of talking can be somewhat misleading, for what are really in conflict are the obligations, not the legality or politicality or morality of them. Conflict between different *kinds* of obligation is a more theoretically trivial matter than it has been supposed. (It can still be serious practically.) Certainly, it is

not the case that the existence of conflict of obligations shows that there are, in the *second* of the senses I have distinguished, importantly different kinds of obligation.

The moralizing of politics

Our relationship to government is (at least) one in which we are *required* to do certain things. For philosophers to describe this relationship as one in which we are *obliged* to do those things is (given the predominantly moral overtones of 'obligation') to introduce a moral note—however slight—into the description. That note is appropriate in cases where we actually do—as, of course, we may—feel a moral obligation to comply with what the government requires of us: where, for instance, to repeat a point made earlier, what we are required to do is to pay taxes and we feel moral approval for the purpose for which we are told those taxes are to be used. But not all cases are of this kind. Some things may be required of us by the government of which we morally disapprove; others of which we morally approve. Is it appropriate to say indifferently of both types of case that we feel 'a political obligation'? It might perhaps be a less misleading account if we marked the difference by saying in the first case simply that such-and-such a thing is required of us by the government, and in the second that we feel an obligation to do such-and-such a thing that is required of us by the government. Here we have not used the term 'political obligation' at all; in the first case because the moral suggestions of 'obligation' seem inappropriate, and in the second because although the moral suggestions of 'obligation' are appropriate the qualifying of 'obligation' by 'political' adds nothing essential: if we feel obliged, what is really important is that we feel obliged, not that we feel politically obliged.

85

In the previous chapter we completed discussion of the so-called problem of the *ground* of political obligation—which, as I have pointed out, has probably been the main interest of political obligation theorists. After that there still remained something to be done towards the explication of the concept of political obligation itself. The present chapter and that which follows it are intended to further that explication. We have considered in this chapter the relation between political obligation and moral obligation. I have argued that there are some differences between these notions, so that it is not possible simply to identify them, as there has been some tendency to do. But how deep do the differences go? Obligation, as we saw in the previous chapter, is inseparable from social life. Obligations take various forms—legal, moral, political, religious—but the differences between them are not differences in quality of obligatoriness but are explicable in terms of their objects, whether and how they are formalized, the sanctions attached to them, etc. Obligation is obligation. If there are different kinds of obligation the differences are essentially differences within a genus.

Of these kinds of obligation, moral obligation, it cannot be denied, seems to occupy a special place. Moral obligations on the whole seem to people more important than other obligations (or, it may be: the obligations that seem to people most important are those that they class as moral). The term 'obligation', used without qualification, tends to suggest 'moral obligation'. Hence the question of the relation between moral obligation and one of the others seems a more important question than that of the relation between any two of the others. The very use of the term 'obligation' (and associated terms) suggests that moral matters may be involved. Clearly, there are moral questions about politics, but I believe that philosophers have

been altogether too ready to look at political *obligation* from a narrowly moral point of view and have consequently not understood it as well as they might otherwise have done. To the discussion of this we now turn.

Chapter 4

Thomas Hill Green's Approach Towards Political Obligation

Life and Works of Thomas Hill Green (1836-1882)

T.H. Green was born in Yorkshire on April 17, 1836. He was educated at Rugby and the Baljiol College, Oxford. While at Oxford, he come under the influence of Jowett. Besides philosophy, Green was greatly interested in the practical politics of his country. He served on the Oxford Town Council and School Board. He participated in the political life of his country as a campaign speaker for the Liberal Party though he never sought election to the Parliament. In 1882, at the early age of 46, he died.

Green was influenced by Plato, Aristotle, Rousseau, Kant and Hegel. He was engaged in the idealist revision of liberalism. He tried to combine liberalism with Hegelian idealism. T.H. Green, Bradley and Bosanquest who constituted a Neo-Hegelianism school of philosophy in England. They are known as 'Oxford Idealists.'

T.H. Green's most important work, the 'Principle of Political Obligation' explains the ethical position of the state. It studies the justification of political authority and the moral obligation to obey the law. His other works are :

(i) Liberal Legislation and Freedom of Control, (ii) Lectures on English Revolution and (iii) Prolegomena to Ethics.

Will, not Force, is the Basis of State (Conception and Basis of State)

The classical liberals like Hobbes, Locke and Rousseau had faith that government rests upon the 'consent of the people'. To them states organised with the 'social contract' whereby each man voluntarily agreed to enter into civil society. Green rejects the contractual basis of state on the ground that it is false historically and logically. He realised that most of the states hold their origin due to the process of conquest by force rather than by voluntary contract of their

87 84

members.

Green says, "Will, not force is the basis of the state'. According to him, the basis of the state is neither consent nor force, but it is will. Green agrees with Austin that sovereignty cannot be explained in terms of the coercive power, but habitual obedience from the bulk of a given society determines. The habitual obedience is a power residing in the common will and reason of men *i.e.* in the will and reason of men as determined by social relations, as interested in each other, as acting together for common ends.

Green agrees with Austin that legal sovereignty must reside in the government consisting of a number of people, but Green said that behind this legal sovereign is the 'general will' and this 'general will' determines the habitual obedience of the people. People habitually obey only those institutions which perhaps unconsciously fully represent the 'general will'. The 'general will' is the true sovereign of the community. That is why Green says that 'will, not force, is the basis of state.'

To Green, general will is that "..... Congeries of the hopes and fears of the people, bound together by common interests and sympathy or common consciousness of a common good, a sense of possessing a common interest on the part of the people." Hence Green believes that it is this 'common consciousness for common good' or 'general will' which is the basis of state and not force.

Green's concept of 'general will' differs from that of Rousseau. To Rousseau, the general will is the will of the state. It is the actual sovereign which suddenly comes into existence at the time of the social contract. But to Green the 'general will' is the will for the state and not the will of the state. It is not the actual sovereign, but the real sovereign behind the actual sovereign. Green, further believes that even before the formation of the state, family and tribal groups had a feeling for common good and thus possessed a 'general will'. Though the 'general will' was before the state, but in its most logical and correct form it is the basis of the state. This supports the statement that will, not force, is the basis of the state.

People owed allegiance to the state and to the laws of state not because of any contract or force, but because the state was an institution devoted to social good. If the laws of the state are not in accordance with the general will, it loses its claim to the allegiance of the people. He further says that over a long period of time men do pay allegiance to the state and obey the laws of the state only because they realise that

the state and the laws of the state are for the common good. Force and fear may cause men to obey the sovereign for a limited period of time, but in the long run institutions based upon force and fear crumble to pieces. Men habitually render obedience only to those institutions which are felt to be in accord with the general good as conceived by the 'general will'.

Green states that force must be present in a state to repress the anti-social elements, rebels and criminals. But for the smooth and peaceful working of its machinery the government must satisfy public. In other words, it must be based upon will. Will is the essence of the state. Force is the criterion of the state. The state needs force to repress anti-social elements only but not the ordinary common men.

Green gives an example. "William the Conqueror was able to exercise the royal power in England by force, but he and his successors were successful only because their laws had the support of the public". Green's statement, 'will, not force, is the basis of the state' is true even in the present day democratic world and applies to all types of government.

Locke thought that consent implies the idea that in each state the citizens have voluntarily consented to the state and in the Lockian system laws are valid only when they are passed by people directly and not indirectly. Green denied Locke's ideas, but he insisted that even an absolute monarchy established to last must rest upon consent. Force must be present in every state to prevent the occasional revolt but the machinery of the government to run peacefully and smoothly, must satisfy the public. Another way of saying that is that it must depend upon general will.

On Political Obligation
(On Functions of State or State Action)

Political Obligation

According to Green, the term 'political obligation' include the obligation of the subject towards the sovereign, the obligation of the citizen towards the state, and the obligation of individuals to each other as enforced by a political superior. The purpose of the subject of political obligation is to consider the moral function or object served by law, or by the system of rights and obligations which the state enforces, and in so doing to discover the true ground or justification for obedience to law. Hence under political obligation, we consider the true function of law made by the state to be and

the true ground of the moral duty of people to obey the law. For Green, state plays a dominant role through its activities of removing external hindrances for good social life.

Scope of State Action

Being an idealist, Green holds that state is a natural institution necessary for the moral realisation of the individual. For Green, state is a means to an end and that end is the full moral development of the individuals who compose it. He distinguishes moral duty from legal obligation.

Political institutions, he held, are to be judged according to their contributions to the development of the character of the citizens. For a man to live a life which he can call his own life, normally speaking he must be able to count on certain freedom of action in the attainment of his aims. This is possible only where there is a common recognition by members of the society in which he lives that such freedom is for their common good. The recognition is expressed in laws. So when an individual submits to the authority of the institutions through which laws are formulated and executed, he is simply allowing his life to the regulated by conditions without which he would be unable to live a life really his own. Thus the function of the law in state is to assist man to realise his reason, that is his idea of self-perfection by acting as a member of a social organisation in which each contributes to the better being of the rest.

He states that law can take cognizance of external acts of man only. It has nothing to do with motives. It can only remove obstacles which come in the way of the individual in the development of his personality. Also under certain circumstances an individual can resist the state.

According to Green, the function of government is to maintain conditions of life in which morality shall be possible, and morality consists in the disinterested performance of self imposed duties. The function of state is thus, limited to negative action, the removal of hindrances to freedom. The state has no positive moral function of making its members better. According to Green, action freely self-determined, in the sense of being determined by free will acting under a sense of duty owned by oneself to oneself is the only moral action.

Some Actions of State for Common Good

Green allows the state a very large field of action for the common good and the removal of hindrances to individual's

88 85

A9

self-realisation. Some of them are :

(1) In agricultural sector, Green says that the state should encourage big land-owners to break up their estates into small tenant-owned farms. He also advocates the state should prevent the wealthy land owners from throwing land out of cultivation or turning it into forest.

(2) In the educational line, the state should regulate the system of free compulsory education.

(3) Regarding alcohol consumption, Green insists that government should prohibit the selling and buying of alcohol by closing down liquor shops. State may ask its citizens to limit or even to give up the not only previous liberty of using alcohol in order that they may become free to exercise the talents which God has given to them.

(4) Regarding the right of property, Green states that the state should protect individual property because property was a necessary condition for the free play of capacity which can be exercised for the common benefit; it is a means of realising a will which in all possibility is a will directed to social good.

(5) The state should create social conditions to maintain conditions of life in which morality shall be possible and morality consists in disinterested performance of self-imposed duties.

(6) Green advocates that state should control health and housing schemes as he thought these institutions necessary for the development of one's personality.

Green's Theory of State

Barker says, "The state, according to Green, is the product of human consciousness. Human consciousness postulates liberty, liberty involves rights and rights demand the state."

I. Human Consciousness Postulates Liberty (Green on Liberty or Freedom)

Green holds that the state is the product of human consciousness. Green largely based on human nature. Human consciousness postulates freedom as the necessary condition of its growth and development. In fact, to Green it is self-conscious nature of man that differentiates him from other lower animals. Thus, to be self-conscious, man is determined to reach the goal of eternal consciousness which is the ultimate reality in this universe. In order to reach this goal, the true self of each man which is fundamentally good needs only favourable conditions to develop and express his goodness. Green insists that the chief function of the state is to create by force if necessary the requisite favourable conditions and not to do anything which may interfere with the individual's freedom to cultivate an ideal character.

Thus, to be self-conscious, consciousness of being conscious—is the privilege of man and of man alone. In view of his being self conscious man is determined to reach the goal of eternal consciousness. In order to reach this goal human consciousness demands liberty or freedom.

Green defines liberty as the power to do or to enjoy things worth doing or worth enjoying. Thus human consciousness with aims at eternal consciousness, in order to reach its goal needs liberty. Liberty is, therefore, not negative absence of restraints, but it is a positive power of doing or enjoying something worth doing or worth enjoying, and that, too, something that we do or enjoy in common with others. A society can be said to grow in freedom when its members are in a position to develop their powers of contributing to the social good, when they are able as a body to make the most and the best of themselves Green's view of liberty or freedom possesses the following qualities :

(1) It is the positive.—It is a freedom to do something which is worth doing or enjoying and at the same time to be enjoyed in common with others. It is the liberation of all the power of men for social good.

(2) It is a determinant.—Liberty is a freedom to do something of a definite character, something which possesses the quality of being worth-doing and not any and everything. It is a power to pursue those objects which make one live better.

(3) It is moral.—Green speaks in terms of worthy things. He would not allow the power to do things which are not worthy of man possessed of self-consciousness.

Thus Green imposes several limitations on one freedom to action.

II. Liberty Involves Rights (Green on Rights)

Human consciousness postulates liberty and the freedom lies in self-realisation and the self-realisation is only possible by enforcing a system of rights. To him, rights are

claims of individuals.

According to Green, no one can have a right except as a member of society and of a society in which some common good is recognised. The basis of rights was not legal recognition but common moral consciousness. Rights are recognised by the society. Green rejects the concept of natural rights. He said that there could be no rights without recognition. He makes a distinction between legal rights and moral rights. The latter are translated by the state into legal rights. He also recognises the possibility of conflict between ideal rights and legal rights. In case of such conflict, he accorded higher position to the ideal rights. It was mainly under such circumstances that he permitted the individual that right to resist the authority of the state. Green remained a radical and individualist.

III. Rights Demand or Necessitate State

The claims to pursue ideal objects recognised by the moral will of the community are rights. Freedom is only possible through a system of rights. To acquire any reality and value such rights must be enforceable. Unless they can be so enforced, they cease to be rights. So in every society there is a need of power that can enforce rights and punish those who break the rights of the individuals. So rights demand a state which can enforce these rights.

To Green, the state is a necessary instrument for the protection and enforcement of man's rights. State, however, does not create the rights; it only protects them. According to Green, it is not the coercive power as such but coercive power as exercised according to law, written or unwritten for the maintenance of the existing rights of the citizens from external and internal invasions that make a state.

The task of the state is to create conditions in which an individual finds all the opportunities necessary for the realisation of the moral end. People obey the state because it protects their rights and maintains a system of common good. It is not a state unless it protects rights. However necessary a factor force may have been in the process by which states have been formed and transformed, it has only been such a factor as cooperating with those idea without which rights could not exist. It is to these ideal realities that force is subordinate in the creation and development of states.

Thus the state is the product of human consciousness, human consciousness postulates liberty, and liberty involves the rights and the rights demand the state.

T.H. Green on Right to Resist (Disobey or Rebel) the State

T.H. Green (1836-1882) gives to an individual the right of resistance. To Green, people should have the right to resist due to the conflict between the natural rights and obedience to the rules of law. The conception of natural rights depends upon the fact that the actual and legal scheme of rights recognised by a given community at a given time is not necessarily perfect. There are other rights, other conditions necessary for the free development of a capacity actually existing in individuals or groups which in actual law are not recognised, but which nevertheless is to the common benefit to recognise, since the capacity means a capacity for doing something for the common good. To distinguish such rights from legal rights we may give them the name of natural rights. The natural rights are not the rights of primitive and solitary individuals but they are innate in the constitution of men when living in a society of other men and are the natural or proper conditions of life in such a society. There natural rights may be recognised by the general social conscience of such social and yet not be recognised by its laws. They may indeed, only be recognised by those, perhaps the merest minority, who claim their possession. Thus the natural rights are, a necessary condition of full general welfare. But when there is no implicit acknowledgment of the claim to the natural rights or there is a gap between the natural rights and the legal rights or rule of law, the resistance in the name of such rights loses its moral justification and becomes genuine or natural. The wider the gap between the natural and legal rights, the more is the scope of conflict, but the lesser the gap and the lesser the conflict.

T.H. Green believes that due to conflict, the problem of resistance is bound to rise in a democratic community where the people may readily claim to disobey the unjust law or acts of a government which is merely the law or act of an opposite party and is only based on a temporary majority which has

perhaps been gained on some other issue.

T.H. Green did not support the resisting the master's legal right to property over the slave in the name of the natural rights of the slave to be a free man. He felt that the master's right was recognised by the social consciousness. He said that the individual had no right to sacrifice the law of the land for the sake of a negro. He could not be allowed to risk social order and disturb the existing system of rights for the sake of adding a new element to that system. When the natural rights were already recognised by the society, there did not arise any question of sacrifice. However, when there was no common social consciousness the right to resist the authority of the state could not arise.

Green's right to disobey is not an absolute right. He agrees that there are occasions when one must refuse to give obedience to the law of the state. He says that if one must resist, the choice can be of no one else. He also states 'that one may not have the right to resist but one may be right in resisting. Resistance is justified only on special conditions.

Green lays down a great number of conditions for the right of individuals to resist the state. Some of them are :

(1) As the state will be speaking with the wisdom of ages, the individual resist to disobey the state as its wisdom is greater than the wisdom of an individual.

(2) He says, "There can be no right to disobey or avoid any particular law on the ground that it interferes with any freedom of action, any right of managing his children or doing what he will with his own" because whatever the state does, it is for the general good.

(3) He says that disobedience is not always preferable because it leads to confusion and anarchy.

(4) State passes many laws which people obey and if it passes one law which one wants to oppose, it is not justifiable to oppose the state for one particular law.

In the opinion of Green, resistance can be justified as a last resort. If there are no constitutional means of agitating for the appeal of bad law, or all such means have been exhausted without any use, or if the whole system of government is so bad and so perverted by vested interests, that temporary anarchy is better than its continuance, or there is no likelihood of anarchy following the resistance, then and only then the state be disobeyed. But even then all the

conditions are satisfied, it only follows that resistance is justifiable. It does not give a general right or call for resistance.

One can oppose the state if definite social good is obtainable through successful opposition and if the whole community share the same opinion of opposition.

Though he put forth the warnings of disobeying, Green ultimately agrees that there are occasions when man, if he is to be true to himself, must refuse to give obedience to the state. Green says, "If you must resist, you must, and the choice can be nobody's but yours. You will never have the right to resist, but you may be right in resisting it.

Green insists that disobedience should be based on non-violence. He gave the gospel of peaceful resistance which was later on followed by Mahatma Gandhi in India.

□□

AUTHORITY AND OBEDIENCE IN VEDANTA

BRIJ LAL SHARMA

PROBLEMS of authority and obedience are touched upon by Vedanta writers here and there, but have seldom received the attention they deserve, although in the philosophy itself directions are not wanting which, if followed, reveal a relationship of the individual and the state at once unique and comprehensive. Today, when loyalties and disloyalties are in the melting pot, and democracy and dictatorship are at grips, it may be of interest to see the problem as it stands in Vedanta.

Before we come to the subject, it is necessary to give a summary of the Vedanta[1] approach to reality. In Vedanta the individual is one with the universal, and the soul of man is identical with Brahman, the absolute. The absolute is an experience which, after due logical, ethical, aesthetic, and religious preparation, is revealed to intuition, ending man's finitude and heartache. It is described in negative terms—*neti, neti* ("not this, not this")—not because it is a void, but because it is too profound for human expression, which is a limiting process. Positively, it is knowledge, being, and freedom—a creative spirit which weaves the phantasies of its joy in space-time which is its creation. This universal spirit is immanent in the individual and the world; it is also transcendent, for it haunts them with its splendor and perfection which they struggle to realize. Human problems arise because the individual forgets this immanent and transcendent character of reality and of his own oneness with it. This constitutes Maya-Avidya complex, a subjective-objective

[1] By Vedanta is here meant Advaita Vedanta of the Upanishads and their famous commentator, Shankar. It must be distinguished from the Visastadvaita of Ramanuja, for whom the absolute is not impersonal but a personal absolute with whom the individual can enter into an intimate relation through devotion, without losing his individuality. Advaita Vedanta also differs in many important aspects from the absolute of Spinoza, Bradley, Bosanquet, and Bergson.

element in creation which finitizes the individual. To enable the individual to realize his absolute nature, which is above space-time and cause, is the task of science, ethics, aesthetics, and religion. The state and society exist that the individual may realize his inner unity with all things, that he may discover his real self. In a sense, therefore, the Vedanta state is the most individualist imaginable, although it is at the same time, as we shall see, not any the less authoritarian on that account. This is a very incomplete summary of the philosophy, but for the purpose of this article it will do.

The source of authority is the state, custom, usage, tradition, and moral sense. The individual sees himself confronted with institutions of all sorts which demand from him obedience and confer upon him rights. What is it that clothes these institutions with authority? Not the institutions themselves, which are mere forms, orders, organizations. Behind the institutions stand its members whose spirit, thought, and action make the institutions what they are. A church, a house of representatives, a reform club, does not consist of the masonry, but of men and women who inspire it and of whose ideas and dreams it is an embodiment and expression. Behind these members stand other men and women, long dead, who trained them in their ideals when they were young, and behind these in turn other individuals of the past, etc., until we come to some founder of the movement. This individual was able to move the masses because he captured a glimpse of reality, through a smoke-screen of his own personality, with its likes and dislikes, powers and limitations, and shared it with them. Thus the source of authority is something which is partly transindividual, which fired the imagination of the founder with illimitable vistas of a better order and partly the individual himself, without whom the movement could not have come into existence. In other words, it lies in the identity of the free individual and something which transcends him. The identity is limited to those who accept and share in it, i.e., to members of a given institution. The authority of the in-

stitution is therefore partial. No institution in the world exists which is armed with the sanction of all the people. Hegel's assertion, that in obeying institutions we only obey ourselves, must be radically revised, for this is not the whole truth. Institutions are brought into existence by groups, classes, sects, and communities, and may have no meaning for individuals outside these groups. Even under democracy, where the institutions are established and developed by the majority will, the minority will is forever left out in the cold. The Marxian contention, however, does not apply to democracy—and its application to other forms of government is of limited nature—for the minority is a fluctuating element so that its members are not necessarily identical down the passage of time. It is true that even as a section the members of an institution, living and dead, could not exist apart from the rest of the people of whom they form an organic part. In this indirect and roundabout way an institution may be taken as a creation of the whole people, but this is not the sense in which institutions are regarded in idealist theories of the state and society.

The problems of obedience and disobedience now fall in their proper place. Why must the individual obey? We have been told that it is because of fear, force, illusion, or contract. No one with any knowledge of social and public life will deny the truth of such a contention. Fear, force, and contract are realities which determine popular conduct as certainly and effectively as the sun makes the birds rise. Not all the obedience we render is free and spontaneous. Some of it is offered under compulsion; we would withhold it if it were not because of the pressure which is brought to bear upon us and which we cannot fight and withstand. There is such a thing as the instinct of self-preservation. Anything that threatens our security we tend to avoid. We obey because punishment fills us with fear. Whether contract was or was not the original basis of the state, there is little doubt but that it is a basis of most of our dealings today. Therefore, so far as our ordinary practical life is concerned, these factors have to

95

be reckoned with. While admitting the reality of these forces, Vedanta urges that to obey because of fear, force, and contract is to ground our obedience on the ignorance of our real nature and the nature of the world we dwell in. They ought not to govern our loyalty, because we are greater than they and can overcome them. What ought to and what sometimes does govern our loyalties is something much deeper—a something which we cannot renounce without renouncing our inmost nature. It is this fundamental something which ought to be a light unto life. Fear must be mastered, for fear implies duality, while the real is one and indivisible.[2] To be afraid of something is to deny our oneness with it, which is not the highest truth. Force can be withstood. Contract is relevant to dealings into which one has entered, but is irrelevant to those in the creation of which one has played no part whatever. As most of the institutions are bequeathed to us by the past, we can hardly be said to owe allegiance to them unless we are at one with their ideals, for a contract cannot be one-sided. Contract implies freedom of will. If our choice is not free, the obligation loses its contractual character. It may be argued that our implied acceptance of institutions justifies their demanding obedience from us. This is true in the case of those who are incapable of exercising their power of judgment and will, such as children and lunatics. If the nature of the institutions is such that it hinders the exercise of this prerogative of man, all implicit consent and the consequent obedience lose contractual value.

Vedanta offers several reasons in justification of our obedience to institutions. (1) To begin with, there are pragmatic considerations.[3] The institutions have sustained and helped the individual to survive. They demand obedience because they make our existence and well-being possible, although the well-being may not be up to the standard we would like to establish. (2)

[2] Brihadarynika Upanishad i. 4. 2; see Shankar's Bhashyas on it.

[3] Shankar's Bhashya on Brahm-sutra ii. 1. 11. The work is hereafter referred to as S.B.

Purely rational considerations never suffice. A beginning must be made somewhere. It is better to work with bad institutions than to have none at all. There is very little agreement among political thinkers and moral philosophers as to what institutions are desirable. What is suggested by one thinker as the best institution is condemned by another as the worst.[4] In the existing institutions, however, the beginning is already made and the difficulty of securing universal agreement to something is avoided.[5] What is needed is to improve them and bring them into living touch with changing needs and times. (3) Institutions are not made in a day. Institutions grow. Time is an important element in their constitution. Different generations come and nurse them, pouring their blood and experience into their frames, so that they become a reservoir of tested knowledge and tried practices. They are attempts in which the individual sees the genius of his people working out its salvation. They are a record of creative achievements, a mirror in which is reflected the trials and triumphs of the past, its strength and weakness, and they offer a firm foundation on which to build an enduring structure. To repudiate them is to repudiate our own past, which is an integral part of our life.[6] (4) The creative spirit is one, infinite, eternal. Institutions, which are its products, provide a channel through which it flows. An enduring achievement must be one with the past, present, and future. There is nothing in which the real is not immanent, and the institutions which provoke our rebellion would reveal, if sympathetically studied, a path leading through them to a better world beyond.

The nature of loyalty now becomes clearer. To be loyal to the institutions is to be loyal to one's roots which have struck deep into the past and eternity; it is to feel one's unity with all that has gone before in the universe, to see one's self existing, growing, inspiring others beyond one's span of fourscore and ten. Obedience throws into sharp relief the social and immortal part of our nature.

[4] *Ibid.* [5] *Ibid.* [6] S. Brihad. Up. i. 4. 10.

Justification in Disobedience to institutions

But this is one side of the picture, and a rather glowing one at that. Simple loyalty to the past is not enough. There must be a creative advance into the future. What has been achieved is a bagatelle compared to what the moral spirit of man can achieve. To hum round the past is to be deaf to the claims of the present and the future. Institutions must have not only survival but also creative values. This means that there must be a limit to our loyalty to them. An unthinking obedience to the state and society, family and moral codes, ossifies the creative forces in man and turns him into a machine. Forced obedience is much worse, for by resisting rightful aspirations for a better order it imprisons them in a sort of social shell, and allows them to grow within it, until their very volume and force burst open the shell, shattering institutions to bits, as so many revolutions have done in human history. Man is free to disobey anything—family, social, political, moral, or religious—and in that alone lies his salvation. But this freedom is subject to a few limitations to make it creative, to save it from becoming mere license which is slavery and chaos. In the first place, the disobedience must not be merely negative, but must have something positive in view. Our disobedience to a law or custom is justified if we have hitched our wagon to a brighter star. Absolute disloyalty is meaningless. Before you can be disloyal to one thing, you must be loyal to something else. The whole question turns on this something else to which the individual is loyal or is seeking to be loyal. What is the character of this something else? If it is superior to the object of our disloyalty, the disobedience is justified and our action free. If, on the other hand, it is merely a whim or a prejudice, the action loses its constructive element and becomes wholly destructive. The individual in such a case is not free, but a slave, who stupidly pits his small, petty experience against the collective enlightened experience of the past. In other words, before we rebell against laws, customs, codes, or creeds, it is incumbent upon us to see that there are better laws, customs, codes, and creeds which ought to be established in their place.

980

In the second place, the better order must be capable of being realized in the immediate future. To fight for millenniums and utopias is useless. If what you advocate is not practical, you are living in dreams. It does not matter if your ideal does not seem practicable to others, it must seem practicable to you; you must have full confidence in its desirability and in your capacity to bring it about. People laughed at the early efforts of Stalin, Mussolini, and Hitler, but the dictators had the last laugh. Mr. Wells advocates a world-state. The question before everyone is, Is such a world-state practicable? In the third place, the thing advocated, unless it is entirely new and does not come into conflict with the existing institutions, must be capable of being evolved out of the present order. What is wanted is evolution, not revolution. In other words, what we wish to bring about must not only be practicable but also practical. It must be capable of finding its place in the existing order with the minimum of friction and conflict. Most of the remedies current in the political and social market today leave the people cold because they do not show any appreciation of the difficulties which their acceptance involves, and because they fail to provide an easy passage from what exists to that which they seek to bring about.

Vedanta not only justifies disobedience but advocates it. A person who is convinced that certain institutions must and can be changed in the interests of his community and in the interests of the world at large has laid upon himself the responsibility of giving effect to his conviction. How else is creation possible? He must resist and disobey, even at the cost of his life. In his disobedience and rebellion is revealed the spearhead of the creative process of the world, the supreme, the Brahman. The forward impulse seeks expression in the dissatisfaction and denunciations of countless individuals all over the world who chafe at the steel ring of institutions which check, curb, and oppress them. A Vedantin must not only be a conservative, a defender of the legacies of the past, but must also be a revolutionary who has his eye fixed on the horizon which he is hoping to reach, not

When Vedanta advocates Disobedience?

alone like a fugitive fleeing from some terror, but with the entire past with him as his integral part.

Every individual is unique. There is something in him which defies measurement and standard. Unless this uniqueness is incorporated into the state and society, he has lived his life in vain. He must leave the impress of his personality on his people and institutions. The existing institutions constitute a substratum for individual contributions—a common ground on which differences can rise, remain, and enrich life and experience. Besides, there are differences and differences. There are differences which divide and differences which unite. A truly unique thing is not simply quaint, abnormal, uncommon, and strange-looking in its violence and extravagance. A truly unique thing tends to be universal. It is an individual, a whole, a completeness which by subsuming differences extends itself to several participants and so attains universality. A unique feature is different from all other features, but is not hostile to them. It is this uniqueness which every individual must contribute to his institutions. To suppress it is to suppress one's self; it is an attempt at self-extinction. But this uniqueness may be unable to blossom, owing to the repressive and oppressive character of the existing institutions. Is one, then, to defy these institutions? Evidently one must. There is no other way in which the integrity of the individual can be preserved and expressed. Social ostracism must be suffered, imprisonment courted, and death, if need be, faced. Obedience to such institutions is a crippling, crushing process; it is a leveling-down, a mass standardization, an unqualified regimentation of life; it would kill moral freedom and with it human personality. Anything, be it state, society, or family, that makes the exercise of moral freedom impossible, a moral freedom enlightened and guided by safeguards as outlined above, is a menace to human existence and must be resisted to the last ounce of one's energy. That is the only way in which the individual can make a lasting contribution to the fund of human experience. Tyranny, oppression, vested interests,

cliques and cabals, ignorance, passion and prejudice, which throw their coils round the creative founts of a people, poisoning life, suffocating thought and expression, fettering movement and activity, if not resisted and overthrown by the individual, destroy the individual, and in the end destroy themselves. Institutions under them become hard, irresponsive, and brittle, and at a touch go to pieces.

Vedanta advocates Non-Violent disobedience

A word about the nature of this resistance. Is it to be violent or non-violent? Vedanta does not justify violence and bloodshed. Violence confuses individuals and their creation, man and the system he propounds. Individuals must be educated, not killed; institutions must be changed. Although institutions are no other than the individuals who defend and support them, individuals are something over and above the institutions, since they are the creators. If we destroy them along with their work, we destroy the good with the bad. No wrong was ever righted by another wrong; only right can right a wrong. A wrong conceals in its folds hate, malice, pride, egoism, which, paralyzing thought, turn on full the tap of blind impulse. In the end we must make love triumph over hate, good over evil. If an evil man is not prepared to renounce his evil nature, why should the good renounce his good? Vedanta rules out blood-and-thunder policies, armed revolts, murders and massacres, persecutions and wars. To kill and maim men is to kill and maim an integral part of one's self. We cannot kill without hating what we kill, and hate implies a belief in duality, which in Vedanta is not the ultimate reality. That which we kill is the same self which we seek to preserve in our own life. The same Brahman which is our own self is also the self of those we would injure. The moral duty laid on us, therefore, is not to hate, but to love, for in love we realize a deeper unity which is the truth; not to kill but to preserve, for in preserving we are on the side of eternity, while in destroying we are merely on the side of time. The resistance to institutions which we do not look upon with favor must be

non-violent. Now all non-violent resistance means in the end that what the sufferers under a physical force policy would have heaped upon their oppressors is now calmly suffered by themselves. The oppressed take upon themselves the punishment they would have meted out to the oppressors; for they will be persecuted, ostracised, imprisoned, and even put to death. The resistance consists in refusing to work with the institutions in question, in withholding all assistance which the individual is capable of giving and which the institutions must have to exist. The deadlock which follows makes two things stand out: In the first place, it makes the oppressors see that society is a whole in which individuals are members of one another, that force is useless in a system in which every part depends upon some other part, that co-operation serves social and individual interests better than compulsion. In the second place, the self-imposed and self-accepted suffering not only brings moral strength, but the trust placed in the goodness of the oppressors, which it involves, is creative. Suffering not only reveals to us our own depth and arms us with spiritual strength, but it also moves others, opening their eyes through sympathy to the justice of our cause. Suffering of this sort, in which there is no malice or ill will, educates the oppressed as well as the oppressors, and it is education, or, as Mahatma Gandhi has called it, "a change of heart," which alters institutions and secures for them the necessary sanction to operate. To live in the state is to participate in a stupendous moral adventure; it is to put ourselves in touch with millions of hearts and minds which can live and live well only when they beat and work in creative unison. Suffering which others heap upon us in our docility and deadness, besides degrading us in our degeneration, makes them blind to our suffering; but suffering which we gladly invite ourselves, not because we have lost all perception of self-respect but because through a kindled sense of responsibility we perceive it only too clearly, startles the tyrant with the sharpness of its truth. Vio-

lence begets violence, and makes the blind blinder still. Suffering which originates from non-violent resistance checks this madness and brings light and guidance to unreasoned impulses.

Although force must be renounced as an instrument of policy, its use may not only be justified but necessary under certain circumstances. Man has to choose between good and evil. Violence must be resorted to if its renunciation commits us to something much worse. I see innocent women and children maltreated by the order of some organized institution. My duty in such a case is plain. Mere non-co-operation with the institution on my part will not do; if by using force I can stop the despicable deed, I must do so. I have to choose between violence, on the one hand, and the renunciation of my humanity, on the other; in other words, non-violence here becomes an attitude of cowardice and spiritual suicide. We lose much more than we gain. A heart that suffers each and every kind of oppression and outrage has become dead to the decent impulses of life—a calamity which in its nature and implications is much worse than the worst use of violence. The soul cannot be bartered for a principle, however lofty it may be. Force must be used where it is morally necessary, but never as an instrument of policy. Even morally justified force needs limitations. It must never be in excess of what is necessary to prevent the party from committing the outrage and to help the victims to escape and obtain safety. Righteous indignation is likely to explode into vindictive passion which exults in destruction. This is a danger which needs to be avoided at all cost. To maintain the law by destroying the law-giver is a stultifying process. When a fire breaks out, we put it out; when a dog goes mad, we shoot it. The moral is not necessarily applicable to human situations. A man at whose "clay-shuttered doors" the voices of love and service beat in vain nonetheless remains an integral part of the state and society which shape him and which he in turn shapes. Violence, therefore, is justified only to the extent of preventing the occur-

rence of an outrage, but never to the extent of destroying the perpetrator of the outrage, unless his destruction is absolutely necessary to the prevention of the outrage.

Rights and duties spring from self-realization, which is the only aim of human endeavor and for the fulfilment of which the state and society exist. Right is the assertion of the individual will in relation to the collective will, but not necessarily in relation to the universal will. The collective will must be distinguished from the universal will. The collective will is the will of a group of people. In democracies it is the collective will which carries party decisions into effect. The universal will is the will of the whole people. In the interests of the universal will, the will of God, Christ rose in rebellion against a collective will as embodied in the institutions of the Jews and the Gentiles. Parties, schisms, and conflict are necessary for the collective will; the universal will, on the other hand, has nothing outside to oppose it. The collective will may or may not be an expression of the universal will. It is evident that the collective will is the immediate, the universal will the ultimate, will of the people. The collective will stands between the universal and the individual will and secures willing obedience to the extent that it is an identity of the two. In all rights the universal will is asserted in the individual will. The universal will may, as we have said above, be in the form of the collective will, or a will which is higher than, and perhaps in conflict with, the collective will behind the institutions. If right is the assertion of the individual will in relation to the collective will, duty is the assertion of the collective will in the individual will. In duty we have to bring the individual will into conformity with the collective will; in right we expect the collective will to seek identity with the individual will. The universal will is both immanent and transcendent. It is immanent in the institutions and the collective will; it is transcendent in the individual will when the latter is educated. Rights and duties, therefore, are of two orders. There are rights

and duties which emanate from the immanent whole—i.e., the various institutions which make up the state and society—and rights and duties which issue from the transcendent whole. They depend upon the whole with which the individual identifies his will. The two orders may sometimes clash with one another. Thus, what is my right according to the collective will as realized in the institutions it may be my duty to denounce according to the transcendent whole which asserts itself in my free actions. This fact is often forgotten. Two distinct wholes (at times they may be one, as they certainly tend to be in the long run) make claims on the individual will—the ideal which has been realized and the ideal which is waiting to be realized. Creative progress and self-realization consist in the identity of the two wholes, for which the identity of the individual and the universal will is necessary.

The nature of the Vedanta state may now be summed up. It is a democratic state because it is grounded on the belief that authority, unless divided, tends to become autocratic. It is a socialist state because it believes that the individual does not realize his individualty except in a whole, that a good deal of human suffering and misery is traceable not to past lives and the law of Karma but to the selfishness and blunderings of classes and interests which compose the whole. It is not a "totalitarian" state, since for the state to cover all the aspects of national life is to deprive the individual of initiative and choice without which there can be no moral and spiritual progress. Even the "totalitarian" state has to be administered by individuals on whose insight, power, and character depends its success. It restrains the individual when this restraint is necessary for the moral progress of the individual. It stands aside when by doing so it saves the individual from being reduced to a standard. It believes in nationalism in the same sense as it believes in individualism; there is something unique in both which is worth

preserving. It believes in internationalism in the same sense as it believes in socialism and democracy; the individual cannot exist apart from the whole. In the end it is the state that exists for the individual so that the latter may know and realize his self. The individual exists for the state only in the sense that without the existence of the latter his own well-being cannot be attained. It is a fellowship of the individual and the whole, not a domination of one over the other.

FEROZEPORE CITY, INDIA

106

Identity and Political obligation

A member of a Polity is uniquely related to that Polity and it is this relationship which has been suggested is best understood to have as one of Political obligation. It is, however, important to understand the kind.

of relationship that this involves. As Rush Rhees in his discussion of the relationship between the citizen and the state writes:

> 'The "relation" seems to be an internal one, not like my relation to the park when I am in it. When I am not in the park, this will make no difference to the park or to me. But we cannot think of the state without thinking of individual citizens or vice-versa. But neither is "the relation of the individual to the state" at all like "the relation of the individual wolf to the pack" or "the relation of the individual to the crowd". These could be understood as quasi-physical relations and the relation of the individual to the state is not that. It has rather to be studied, apparently, in terms of obligation' (Rhees, 1969, pp. 81–2).

Rhees' point here is an important one. Being a member of a polity is not simply a matter of living in a particular geographical area, even though the facts of one's place of birth and residence, as I have indicated, play an important role in our acquiring political obligations. Nor is being a member of a polity simply a matter of living with a particular group of people, though that too has some place in explaining our political obligations. Being a member of a polity involves a specific moral relationship which needs to be distinguished, on the one hand, from duties to friends, colleagues and family and, on the other, from entirely general moral requirements such as charity and non-maleficence. In terms of its range of application political obligation is more extensive than the former but less so than the latter. It extends so far as, but no further than, the limits of the political community of which one is a member.

Perhaps it is possible to begin to make a little clearer what is involved in membership of a polity by being a little less abstract. The existence of this relationship between member and polity shows itself in many and various ways, but one of the more interesting and important is that we view the actions of the polity of which we are members, *our* polity, in distinctive ways. I do not mean that we need have especially harsh or indulgent standards by which to judge its actions but rather that, whether or not we approve of them, its actions appear to be particularly connected to us. And this connection is to be located, not so much in our judgement of their consequences as in our sense of their authorship. For there is an important, though limited, sense in which we understand ourselves as the authors of such actions, even when we oppose them: they are the actions of our polity, the polity of which we are members. They are actions performed in our name and, as members of the polity, we are related to *its* actions in a way that we are not to those of polities of which we are not members. This is the kind of relationship expressed, for instance, in the comments of the Polish film director Krzysztof Kieslowski in reflecting on capital punishment prior to his making 'A Short Film About Killing'. He said that the practice was 'being done in my name' and 'I am a member of this society' as indications of his own sense of responsibility for what he saw as a barbaric and unjustified practice. It is this sense of identification with the political community of which one is a member which is central to understanding political obligation.

It is this understanding of what it is to be a member of a polity, for example, which explains the very real difference between the relationship of British and American citizens to the United States' involvement in the war in Vietnam: a difference which was in this respect independent of attitudes of support or opposition. This might be expressed briefly, glossing over a great many historical complexities, by saying that the United States was responsible for waging that war while Britain was not. And while many Americans who actually opposed the war, perhaps paradoxically if one thinks only of personal responsibility, came to feel a deep sense of *shame* and even *guilt* about what was being done in Vietnam, British citizens could feel *anger* or even *outrage* at it, but *shame* or *guilt* only in so far as Britain was implicated through its support for American policy. Of course, nothing depends upon this choice of example and it would not be difficult to find others, if the historical interpretation of this one is regarded as unduly tendentious.

The general point is that such feelings of shame and guilt (and also pride) are readily intelligible in respect of the actions of the polity of which one is a member but they logically cannot be experienced in the same way about the actions of other polities. (The matter is a little more complicated than this suggests. It is, for example, possible to identify with the whole of humankind; as in the thought, 'it made me ashamed to be human'. This does not present any serious problems for the argument here, though it does indicate the kind of complexity which would need to be accommodated in a fuller statement of it.) Furthermore, while the extent of one's

support for, or active opposition to, the actions of one's polity may modify or qualify these feelings, such opposition or support does not exhaust the sense of an intelligible relationship of responsibility for those actions. This sense of identity and the corresponding responsibility is part of what it means to be a member of a polity and to recognise one's political obligations.

Nor, it should be noticed, is this sense of identity and corresponding responsibility just something which is experienced only from the point of view of the individual member of the polity. It is not, therefore, *merely* a subjective feeling. Both the government of the political community of which one is a member and the members and governments of other polities will in many contexts employ a similar understanding. The government of one's own polity, and indeed other members of it will characteristically expect some recognition of this shared identity and the acknowledgement of some allegiance to the community. The governments of other polities will not regard the claims on their resources of non-members in the same light as those of members. Members of a polity will often be treated as sharing collective political responsibility for the actions of that polity. For example, war reparations may be sought from another polity, regardless of the fact that many of the people who will suffer as a result were opposed to the war for which the reparations are demanded. None of this is intended to deny the importance of personal responsibility, or that there are many circumstances in which it would be wrong or inappropriate to invoke a shared identity and common responsibility. It may be correct to have held the Germans or Japanese people of 1945 collectively responsible for the war, and to impose collective sanctions and penalties upon them; but it would be mistaken to hold them similarly responsible for the particular atrocities committed by individual concentration camp guards. I wish to show only that notions of a shared political identity and collective political responsibility do function routinely in the morality of political life. The recognition of such an identity and the corresponding responsibility is internally connected to our acknowledging our political obligations.

Although an attempt has been made to show that the kinds of thoughts and emotions within which our understanding of political obligation should be situated are not merely subjective notions or feelings, this will not satisfy some critics. One reply to my claims which is likely to be made by both the philosophical anarchists and

proponents of traditional theories of political obligation is that, though it may as a matter of fact be true that we do think and feel about the polity of which we are members in the way I have described, no moral justification of these responses has been offered. Here differences about what can legitimately be expected of political philosophy are likely to be to the fore. If such thoughts and feelings are shown to be morally intelligible in the context of a shared identity, constituted by membership of a particular polity, why is more necessary? Why do such thoughts and feelings have to be shown to be justified in terms of consent, the principle of fairness, utilitarianism or some other preferred moral theory? What kind of 'justification' does political obligation stand in need of and what can political philosophy supply? Once we come to see the intelligibility and understand the appropriateness of the ways in which we think and feel about our membership of a polity, what further moral justification is required? Of course, it may be that the account offered here completely fails in its task, but that is to raise a different objection; the point at issue in this dispute concerns the nature of that task. While the scattered remarks in this book certainly do not settle the issue, nor are they intended to, my intention is to suggest a rather different way of thinking about what it might mean to give a philosophical account of political obligation than that which is generally dominant.

As an instance of the kind of issues at stake in this dispute it may be helpful to focus on one aspect of the account of political obligation which has been offered so far, and which critics may be especially inclined to reject. They will claim that what my account shows is (at best) that people have certain 'institutional' or 'positional' obligations by virtue of their membership of a polity, but it does not follow that these are morally binding (Stocker, 1970; Simmons, 1979; Green, 1988). Institutional affiliations, such as being a member of a polity, may 'have an identificatory function in showing which duties their incumbent has, but they have no justificatory function in grounding those duties' (Green, 1988, p. 211). Or as A. J. Simmons bluntly expresses the point:

> 'The existence of a positional duty (i.e., someone's filling a position tied to certain duties) is a morally *neutral* fact. If a positional duty is binding on us, it is because there are grounds for a moral requirement to perform that positional duty which are

independent of the position and the scheme which defines it. The existence of a positional duty, then, never establishes (by itself) a moral requirement' (Simmons, 1979, p. 21).

This argument is usually thought to be clinched by pointing to some unjust institution or role, perhaps slavery or a concentration camp guard, and asking rhetorically whether we really believe that the slave or the concentration camp guard are morally obligated to perform their institutional or positional duties. However, as I shall try to show, this argument proceeds altogether too quickly.

The first point to observe is simply that, at least in some instances, we do appear to regard positional duties as morally binding without reference to some further moral principle or theory. To revert once again to the example of the family: it is often sufficient to point out that a man is this boy's father to attribute certain obligations on the part of the man towards the boy. It is both unnecessary and misleading to seek some further moral justification for the obligations. But what, then, to come to the crucial question of institutions or roles which impose duties that we would think of as unjust or immoral? The important point to recognise here is that accounts of 'institutional' or 'positional' duties do not need to assume that these exist in a moral vacuum. Other moral principles or rules may indeed show a particular institution to be immoral, or a particular duty attached to an otherwise unobjectionable institution to be unjust, but this is not to concede the point of the critics of the claim that institutional obligations may be morally binding without further moral justification. It is one thing to show that a particular institution does not violate other fundamental moral principles or commitments, but quite another to have to show that the institution is *justified* by these other moral principles. Nor is this a unique feature of non-voluntarily acquired institutional obligations. Thus, for example, if Fred promises Mary to murder John, Fred acquires no obligation to murder John, for it was not something Fred was entitled to promise, and Mary has no right to its enactment. (It is a mistake in this kind of case to say that Fred has a *prima facie* obligation to commit the murder, or that his obligation to Mary is overridden by the moral prohibition on murder. Fred simply has no moral obligation to murder John, whatever he may have promised Mary.) Institutions which give rise to moral obligations also exist within a wider context

of other moral beliefs and commitments. These may set various limits to the moral obligations to which institutions can legitimately give rise, but this is not to justify those institutions or the corresponding obligations in terms of those other moral considerations. Political obligation cannot include within it the obligation to commit murder (see Anscombe, 1978), but this does not mean that a polity, or the corresponding political obligation, is, or needs to be, justified by the moral prohibition on murder. Of course if it were shown, as for example most anarchists try to, that political obligation regularly violated other fundamental moral commitments, then this would be a serious objection to any defence of it, but this is not the argument of those critics of positional or institutional moral obligations that have been considered here.

Finally, before leaving this issue, it should be observed that not all institutions or institutional obligations are on a par with each other. Some institutions play a role so fundamental in our lives that they are partly constitutive of our self-understanding, or our sense of who we are. A woman may, for example, belong to her local tennis club and this may impose certain institutional obligations on her, but those obligations, even where they are moral, will not normally be constitutive of her sense of identity. (I leave aside the different case of the woman who 'lives' for her local tennis club'.) If she disapproves of what is happening in the club or if she grows bored with tennis then she can leave and join another club or take up squash instead, without raising any questions about her sense of who she is. Other institutional involvements, however, are much more closely bound up with this sense of who we are, a self-understanding which characteristically has a fundamentally moral dimension. For example, if the woman was also a devout Catholic, leaving the Church may be practically no more difficult than leaving the tennis club, but her Catholicism will be much more deeply connected to her sense of identity and is unlikely to be jettisoned without a serious reappraisal of her moral values and commitments. It should not be surprising, therefore, that some institutional obligations, through their deep-rooted connections with our sense of who we are and our place in the world, have a particularly fundamental role in our moral being. That these kinds of institutional involvement generate moral obligations, and that these obligations rather than standing in need of justification may themselves be justificatory, is only to be expected. In the case of

political obligation, however, there are other problems to which this account might reasonably be thought to give rise.

Thus a more worrying objection to this account of political obligation might come from a more sympathetic or generously disposed critic who, while conceding that the thoughts and feelings discussed have been shown to be intelligible and plausible, may doubt that they have been shown to be in any sense necessary. It will be agreed that people *may* make sense of their membership of a polity in the manner indicated, but *must* they do so? What, for example, of someone who simply does not recognise a common identity with fellow members and correspondingly denies any political obligations? Of course, such a person may be denying different things. For example, it may be that all moral obligations or duties are being denied and we are facing that familiar figure in moral philosophy, the amoralist. In challenging all morality, though, the amoralist raises questions which, were we to pursue them, would take us too far from our present purposes. In any case the amoralist (unlike the immoralist) is to be found much more in the pages of philosophy books than in life. More interestingly, however, it may be that only specifically political obligation is being denied, and it is this interpretation of the objection which merits particular attention. The problem which this objection identifies may be thought to arise from the contention that obligations are internally related to membership of a polity and that such membership is not normally voluntarily assumed. Thus, though membership of a particular polity is not usually chosen, it does not follow that it cannot be rejected or renounced. As, for example, the facts of emigration and naturalisation attest, it is possible to cease to be a member of one polity and to become a member of another. The real problem, therefore, is not whether it is possible for a person to exchange an obligation to one polity for an obligation to another, but whether political obligation can be altogether denied: that is, can the standard conditions of membership be met, yet there be no corresponding obligations?

Membership and political obligation

The question which now needs to be addressed is that of whether people can renounce or deny their political obligations while

remaining, at least from the point of view of the other members and in terms of generally accepted criteria, members of their polity. In this context the analogy with the family is unilluminating. Parents may 'disown' their children, and sons or daughters may 'deny' their parents but, where this is more than rhetoric, relations between those concerned will more or less effectively cease. The kind of dissassociation from family life which this involves is tolerably clear. However, the relations which comprise membership of a polity are much less easy to escape, at least while remaining resident within its territory. In large part, therefore, what needs to be clarified is what counts as 'membership' of a polity, and how and under what circumstances this can be repudiated. There is a limit to what can be said about this in general terms, but certainly the presence or absence of a more or less conscious identification with one's polity and the corresponding acknowledgement of one's obligations to other members of the political community will be crucial so far as the perception of the individual is concerned.

The argument about political obligation developed so far has been basically twofold. First, there is the conceptual claim that political obligation is a feature of membership of a polity without which the very idea of 'membership' is unintelligible. Secondly, it has been argued that persons' recognition of themselves as members of a polity shows itself in certain characteristic ways of thinking and feeling about their polity; that these thoughts and feelings are clearly intelligible; and that they are neither voluntarily assumed, nor stand in need of justification in terms of some fundamental moral principle or theory. However, nothing in what has been said implies that persons *must* think and feel about 'their polity' in the manner indicated; only that if they do this is a manifestation of their recognition of themselves as members of a particular polity. In recognising themselves as members they also acknowledge themselves as having corresponding political obligations. The possibility that we must now consider is that some people do not have the kinds of thoughts and feelings associated with membership of a political community. If this is so, do such people lack political obligations?

The first point to make is that lacking these thoughts and feelings is not the same as claiming to lack them. If people do lack them this will be apparent not merely in what they say but in how they act. Indeed, it is a feature of my account of political obligation that the mere denial of political obligation, as is sometimes to be encoun-

110

tered in philosophical discussion, should not be taken at face value. Though explicitly denied, such obligations may be implicitly acknowledged through the many and various ways in which membership of a polity is recognised and observed. To participate fully and actively in the political life of a community; conscientiously to observe the rules and standards of the community; and generally, over a sustained period of time, consistently to behave in ways indistinguishable from those recognised as appropriate for a member of the political community; but then to deny that one acknowledges any political obligations lacks conviction. Rejecting political obligation requires detaching oneself from a complex web of practices, beliefs and emotions associated with membership of a political community. It is likely that when most denials of political obligation are examined it will be discovered that they are more or less disingenuous; but it must be conceded that they may not always be so, and it is not clear that philosophical argument could show that they must be.

There is, as I shall explain shortly, one very large and important class of cases where identifying and attributing political obligations is especially difficult, and sometimes perhaps impossible. What, though, of our potential dissident, who meeting the kinds of conditions specified above, denies having any political obligations to the polity which claims him or her as a member. In such rare cases we are, I believe, simply confronted with conflicting perspectives, and, though the political philosopher can usefully characterise and explore these different perspectives, there may be no way ultimately to adjudicate between them. In extreme cases – for example that of an unworldly hermit whose understanding of himself lacks any sense of identity with the political community and who exists as far as possible apart from it – it may even be that the political community should recognise that it has no authority over such a person and no reciprocal obligations obtain. In such exceptional cases the political community will have the right to protect itself against any serious infraction of its rules and standards, but it may have no legitimate claims on his allegiance and he should, by and large, be left alone. However, it is clear that these kinds of case really are exceptional, and they do not to any significant extent impugn the account of political obligation which I have given. Nor does another unusual kind of case – that where some people identify themselves as members of a particular political community but this identification is denied by at least a large proportion of the other members of the polity with which they identify. These too are a complication, but not an embarrassment, and, therefore, they will not be pursued further here.

One further possible objection to the argument which needs to be considered relates to that large and important class of difficult cases I referred to earlier. This objection might concede that the argument has some merit when applied to polities with a fairly stable and continuous existence and in which the question of who are and are not members is largely unproblematic, but deny its relevance to those not uncommon situations in which there is widespread dispute about the identity of a polity and about who should be recognised as members of it. The examples are numerous and include Republicans in Northern Ireland, Basques in Spain, Kurds in Iraq, the Palestinian question and the post-war history of parts of the Indian subcontinent, to mention only a few of the more recent cases. Any adequate account of political obligation, it might reasonably be argued, should have something more illuminating to say about these kinds of case than the account defended here seems able to supply. Perhaps in some respects this is so, but it is worth entering some caveats.

First, these cases are less of an embarrassment than might be thought, for it is surely a virtue of any account of political obligation that it has at least *some* difficulty with them. There would most certainly be something wrong with any account which found them straightforward and unproblematic, since where the integrity of the polity is itself subject to widespread and fundamental dispute, political identity and political obligation are likely to be uncertain and confused. Second, even an account of political obligation which was limited in its validity to polities where identity was not seriously disputed would be a worthwhile achievement. Third, my account of political obligation is at least illuminating about why these sorts of cases are difficult. Once we understand, for example, the importance of a shared sense of political identity, we can see how its absence will radically undermine any coherent representation of political obligations. In this way, pursuing the logic of this account helps to locate the source of what is problematic about political obligation in these difficult cases. Finally, the disputes which such examples characteristically involve are not of a nature such that the philosopher can resolve them, and

it is only if we continue to believe that this is the task of political philosophy that we shall think of our inability to do so as a failure.

Law, government and political obligation

So far the argument has attempted to show, partly through an extended comparison with the family, how political obligation can be understood as an essential concomitant of membership of a polity and that, since membership does not normally result from a voluntary undertaking, nor *a fortiori* will political obligation. Additionally, part of what is involved in membership of a polity has been elucidated through an exploration of how concepts and feelings such as guilt, shame, pride and responsibility make sense in such a context: how they enter into our attitudes and deliberations as citizens. This explanation of political obligation in terms of membership and a shared identity, therefore, also enables us to account for the particular claims on people of their own polity. It is precisely that it is *their* political community which gives them a distinctive reason for action, which they lack with respect to other polities. Of course this is not to deny that they will often have many other reasons to attend to the claims of their, and of other, polities; but it does identify what is distinctive to political obligation – which is that it is owed only to the particular polity of which they are members. However, we are now in a position to say a little more about the content of political obligation and particularly how it relates to government and law.

An especially important, and probably controversial, aspect of political obligation as it is understood here is that it is not simply a matter of obedience to the law and the government. It is categorically not an implication of the argument that political obligation always requires us to obey the law or the government. This might be thought to be a peculiarly perverse contention, for the problem of political obligation, as was indicated in Chapter 1, has often been understood to be just the problem of why one should obey the government or law. However, obedience must be distinguished from obligation, and obedience to law or government is not the only possible manifestation of political obligation; though in many circumstances it is likely to be especially compelling, and probably must be the norm. As I shall explain, not all laws or governments

are authoritative, and even when they are, it does not follow that they must always be obeyed.

What political obligation, in the most general terms, does require is that people's actions take account of the interests or welfare of their polity: a conception which is constituted through their sharing an identity as members of that polity. To be a member is to be related in a particular way to other members of the polity. Any account of the content of political obligation must be directed towards an understanding of that relationship. In very general terms, therefore, political obligation is structured through that relationship and must involve some concern for the interests or welfare of the polity of which one is a member. Again, though, it is necessary to warn against a possible misunderstanding of this point. The expression 'the interests and welfare of the polity' is open to a wide variety of interpretations and should not be taken either to imply or to require any general substantive account, philosophical or otherwise, of what the interests and welfare of the polity *must* consist in. Thus it offers no support for utilitarianism or for any philosophically preferred substantive conception of the common good. This may make the argument seem disappointingly empty, and while it must be conceded that 'having regard to the interests and welfare of the polity' is vague and lacks specificity, it is possible to say a little more about it even at this level of generality. Although political obligation does not entail any particular, precisely specifiable actions, it is not vacuous. A further comparison with the family may begin to help us to see how this is so.

The obligations people have to their parents or siblings are also indeterminate, but taking account of the interests and welfare of parents and siblings is nonetheless a real and meaningful activity. There may be much room for dispute about the extent of such obligations and whether a particular action fulfills them, but such disagreement is not infinitely open and not anything, in a particular context, can be understood as fulfilling familial obligations. Much the same is true of political obligation. Am I required to fight on behalf of my polity, to pay taxes, to seek to change an unjust law or to oppose a particular foreign policy initiative? How much am I required to do? These are not questions to which any general account of political obligation can provide a once and for all answer: both the nature of the particular polity of which one is a member and the precise circumstances in which such questions are

asked are crucial to how they are answered. There are inevitably many actions, choices and decisions, including many moral ones, in which our political obligation may quite properly play no explicit role: a host of everyday activities may be carried on to which our political obligations form no more than an unconscious background. Political obligations provide but one part of the conceptual structure within which deliberation about what to do takes place: sometimes they will be the explicit focus of deliberation or directly enter into it, but at others they will not. Again the parallel with familial obligations should be apparent.

Moreover, as should be clear from the discussion so far, all obligations exist in a context of other, often conflicting or competing, obligations. Nothing in the account offered here presumes either that all our obligations are ultimately harmonious or, equally importantly, that political obligations must have primacy over other moral obligations. Just as obligations to parents may be overridden by, for example, those to a wife or husband, friends, a business partner, the unjustly imprisoned and so on, so political obligations, too, may be similarly over-ridden. However, neither does this account deny that, on occasion, under particular circumstances political obligation may have primacy. Sometimes, moreover, a political obligation may conflict tragically with other moral obligations: one such instance is the case of Antigone, as presented in Sophocles' play, forbidden by Creon her acknowledged and rightful ruler from burying her rebellious dead brother, Polynices, as familial duty and piety required. Beyond such commonplaces it is doubtful whether philosophy can say anything useful of a general nature about the precise weight to be attached to political obligations, though the account offered here should help us to see why in many circumstances they are likely to be weighty. If our membership of a polity has the kind of place in our lives which this account suggests, then the obligations associated with it will need to be regarded with some seriousness.

So far, it might be objected, several claims have been made about what political obligation is not, but little has been said positively about its content. As should be apparent from the nature of the argument I have advanced, there is a significant limit to what can be said about its content in general terms. Political obligation is associated with membership of a particular political community, and it is the specific characteristics of each community which

determine what political obligation will require. However, it would be unsatisfactory to leave the matter quite so open, and it is surely true that more needs to be said, in particular, about the relationship of political obligation to law and to government. It is, therefore, to this task that the remainder of this section will be devoted.

In fact most of the elements necessary to characterise this relationship are already in place. What needs to be added is that the sense of identity which is constituted through membership of a particular polity is most naturally expressed through the acknowledgement of the authority of its laws and government. It is these which characteristically define the terms of association within a polity. Concern for the interests and welfare of the polity is a concern for these terms of association. To be a member of a particular political community is standardly to recognise the authority of its laws (or sometimes more informally its customs) and its government. It may involve more – a theocratic polity may, for example, effectively require its members to subscribe to a particular religious belief, not in the sense that it is a legal requirement (though it might be), but because the laws and government of that community would make little sense unless members shared those religious convictions. More problematically, as I shall go on to explain, political obligation may involve less; but paradigmatically it requires the recognition of the right of the government to rule and acknowledgement of the claims on conduct of the law. This is the core of the content of political obligation. It does not assume that all polities must conform to one generally ethically preferred constitutional structure, such as liberal democracy, but neither does it assume that people are always required to act in accordance with the law. Acknowledging political obligations does not preclude conscientious disobedience to laws, or even in some, admittedly unusual, instances the denial that the actual government is authoritative. These latter denials might be thought specially puzzling, and I shall further elucidate the relationship of political obligation to both law and government by explaining them.

To deal with the more straightforward point first; acknowledging the authority of the law does not require that all laws must be obeyed. There are at least two different kinds of circumstances in which disobedience to the law may be consistent with acknowledging one's political obligation. First, particular laws may not have been made in accordance with the established legal procedures, or

other legitimate processes, of that political community. Such laws may be unconstitutional, *ultra vires*, contrary to accepted principles of natural justice without good cause, and so on. In this way, perhaps, they might be deemed not to be laws at all, but the important point is not terminological: it is that such 'laws' or commands are not authoritative; and though a government may seek, and have the power, to enforce them, people are under no obligation to take account of them in their deliberations. Secondly, and more interestingly, the law may be recognised as authoritative, even when disobeying a specific procedurally valid law. The most familiar instance of this is the classic conception of civil disobedience (Cohen, 1971). The civil disobedient acknowledges the authority of the law and the government's right to enforce it, by willingly accepting punishment for the infraction of the law. Moreover, these two kinds of case are exemplary, rather than claimed as exhaustive of the possibilities: there may well be other ways of acknowledging the authority of laws while disobeying some of them. Additionally, and more tentatively, it may even be possible for a person to invoke his or her political obligation as a reason for disobeying this or that law. Obviously *political* obligation cannot normally consist in pervasive and consistent disobedience to the laws of one's polity, but where, for example, a particular law is demonstrably radically at variance with the prevailing structure of law, one might appeal to the integrity of the political community as itself a reason for disobedience (see Dworkin, 1986, Ch. 6). Certainly such instances are problematic, and even more certainly they cannot be the norm; but it is far from clear that they are impossible.

What though of the still more apparently paradoxical claim that political obligation may be consistent with denying the authority of the *de facto* government of one's polity? This possibility results from a gap that can arise between acknowledging the authority of the law and recognising the authority of a government. For example, what if the effective government attained power by unlawful means? This case is like that of an invalid law, but more radical in its implications. A good historical example might be that of the Vichy government in wartime France. Most French citizens did not recognise the Vichy government as having political authority, yet they can sensibly be said to have retained their sense of belonging to the French state. They could plausibly claim that their political

obligations not only implied no recognition of the authority of the Vichy government, but that it actually required opposition to it. (Of course there were other moral reasons for resistance but these are not to the point in this context.) Many French citizens recognised the authority of the De Gaulle government in exile, yet they also will have acknowledged the authority of much of the law, left unchanged by the government of usurpation. In this situation political obligation seems entirely consistent with the denial of the authority of the *de facto* government; but how long an intelligible sense of *political* obligation could survive this sundering from the effective government of the community is a moot point.

Epitaph for political obligation?

This last point, however, gestures towards a much more fundamental problem – a problem all the more disturbing because it is raised by a philosopher who might be expected to be broadly sympathetic to the account of political obligation that has been defended in this chapter. It is a problem which arises from the claim that under the conditions of modernity – conditions of pervasive ethical diversity and pluralism within polities – there is no political community because the essential precondition of moral consensus is absent. Hence there can be no political obligation since government is only a bureaucratic imposition which has no moral claims on its subjects. In the words of Alasdair MacIntyre:

> 'In any society where government does not express or represent the moral community of the citizens, but is instead a set of institutional arrangements for imposing a bureaucratic unity on a society which lacks genuine moral consensus, the nature of political obligation becomes systematically unclear. Patriotism is or was a virtue founded on attachment primarily to a political and moral community and only secondarily to the government of that community; but it is characteristically exercised in discharging responsibility to and in such government. When however the relationship of government to the moral community is put in question both by the changed nature of government and the lack of moral consensus in the society, it becomes difficult any longer to have any clear, simple and teachable conception of patriotism.

> Loyalty to my country, to my community – which remains unalterably a central virtue – becomes detached from obedience to the government which happens to rule me' (MacIntyre, 1981, pp. 236–7).

Of course in many respects this passage is entirely consistent with my account of political obligation: MacIntyre too regards political obligation as rooted in a shared identity constitutive of a political community. However, for him this has to be underpinned by a substantive moral consensus which is singularly lacking in modern societies. How serious a problem is this for my account of political obligations as it applies to the modern state?

It is, I believe, a challenge which deserves to be treated with respect, but it is not one to which it is impossible to respond. In particular there are three points to be made in reply. First, MacIntyre's claim can be partially conceded without the concession being too damaging. Political obligation probably is more unclear in modern states than in small, culturally and morally homogeneous societies. We do, indeed, live in a much more morally complex and complicated (though not necessarily morally richer) world, but this does not render political obligation meaningless, only more difficult to determine. Secondly, one can take issue with the conclusions MacIntyre appears to draw from the ethically diverse (in his view ultimately ethically incoherent) nature of modern societies. Such moral diversity and pluralism is a significant feature of these societies – a point made earlier in criticising T. H. Green's theory of political obligation – but it does not follow that from the various different moral perspectives there cannot be some agreement about the desirability of many laws, or even where there is such disagreement that there cannot be some mutual accommodation which, if less than ideal, is still generally acceptable. Some substantive disagreements will persist, and some may be serious, but such is politics. Moreover, it is interesting to observe how little, for example, in a religiously and ethnically plural society such as modern Britain, these differences translate into political conflicts. The major political divisions between the Labour and Conservative parties map very poorly on to the kind of ethical disagreements about abortion, for example, which so exercise MacIntyre. One reason for this is that one can be deeply and genuinely ethically committed on an issue and yet not seek to impose one's view through legislation.

This last observation leads naturally to the final point which is that MacIntyre greatly exaggerates the need for a deep and pervasive moral consensus to underpin political obligation. The lack of such a consensus will undoubtedly affect the broad character of a particular political community, but so long as that character is reflected in its political institutions and laws then there need be no bar to the acknowledgement of the authority of its laws and government. It is this which is fundamental to political obligation, and this need not depend upon any deep and pervasive underlying moral consensus. To borrow Michael Oakeshott's evocative expression political obligation may require no more than 'a watery fidelity' on the part of those acknowledging the authority of their government and the laws of their polity. Yet is must be conceded that the fidelity cannot afford to become too watery lest it be dissolved entirely. If it were true that the modern state is no more than a kind of Hobbesian war of all against all, as MacIntyre sometimes explicitly suggests in *After Virtue*, then political obligation would indeed be deeply problematic. Although this picture of the modern state is a caricature, it is a caricature of a recognisable reality. The process of moral fragmentation which MacIntyre so eloquently charts must have a tendency to undermine a sense of political identity, weaken the bonds of membership and hence imperil political obligation. So the threat of fragmentation and dissolution to political obligation is a real one, though MacIntyre's obituary for it is surely premature.

In summary, this chapter has argued that political obligation is conceptually connected to membership of a particular polity; that membership of a polity is not usually a matter of choice or voluntary commitment; that neither membership nor the corresponding obligations normally require further moral justification; that the connection between membership and obligation is mediated through a sense of (partial) identification with the political community; that political obligation requires taking account of the interests and welfare of one's polity; that political obligation is particularly closely connected to acknowledging the authority of the law and

115 #68 169

government of one's polity which is the kernel of the terms of political association; and that recognition of this authority is consistent with particular acts of disobedience. Several objections to this account have been considered, but none has been found sufficiently compelling to require its rejection. It has been a particular concern to provide an account which dispenses with the claims of voluntarism without succumbing to philosophical anarchism. It is, however, acknowledged that the account of political obligation defended in this chapter is no more than a sketch, requiring further elaboration both in general and, more importantly, in the context of specific political communities.

The argument has further sought to exemplify a rather different approach to and interpretation of the problem of political obligation from that which is common in most of the philosophical literature. Finding the standard theories of political obligation and the scepticism of the philosophical anarchists equally unsatisfactory; building in part upon a genuine insight of proponents of the conceptual argument while seeking to avoid their errors; a somewhat different way of thinking about political obligation has been set out. No doubt the articulation of this approach has introduced difficulties of its own, and I shall return to some of the methodological questions to which it gives rise in the Conclusion; but, whatever the defects of execution, it might be useful to mention at least some of its virtues. It avoids what now appears to be the blind alley of many of the more traditional approaches to the moral justification of political obligation. It directs our attention to a rather different set of questions, such as the nature of a polity and the meaning of membership and to a more interpretative, yet not necessarily uncritical, way of thinking about our moral and political experience. It recognises both the complexity of political affairs and the limits of what it is reasonable to expect from political philosophy; and it seeks an account of political obligation which relates it not to some ideal world only distantly connected with our world, but to our recognisable experience of political life with its attendant imperfections and complexities. It represents a move away from that 'atomistic individualism' which has been the bane of so much contemporary political philosophy and offers scope for an account of political phenomena, such as political obligation, which is more hospitable to our actual experience of them. However, in all these respects what has been set out here is no more than a

beginning; hopefully, a beginning which others may find sufficiently interesting to want to take further, and in the process correct and revise the errors which this preliminary account no doubt contains. In the Conclusion, I shall briefly offer some tentative reflections on alternative conceptions of moral and political philosophy.

should be overridden. In the same way, the obligation to obey the law can be genuine and powerful, if it exists at all, even though it is a prima facie or defeasible obligation.

Obligation, Political and Legal

What does this prima facie or defeasible nature of political obligation imply by way of an answer to the second question, which concerns the distinction between political and legal obligation? If those who have a political obligation have a duty to obey the law, *ceteris paribus*, then why not call it a *legal* obligation? Or why not conclude, with Bhiku Parekh (1993, p. 240), that the question of whether we have a duty to obey the law is really a matter of *civil obligation* — that is, "the obligation to respect and uphold the legitimately constituted civil authority" — that entails *legal obligations* "to obey the laws enacted by the civil authority" rather than political obligation? "Political" is the broader term, according to Parekh, and someone who has a truly political obligation will owe her polity more than mere obedience to its laws. Such a person will have a positive duty to take steps to secure the safety and advance the interests of her country. Following Parekh's distinction, then, we may say that someone who pays taxes discharges a legal obligation, no matter how grudgingly she pays them, but someone who pays taxes *and* contributes voluntarily to public projects fulfills a truly political obligation.

Other philosophers also distinguish political from legal obligations, but not in the far-reaching way that Parekh does. Indeed, it seems that we already have a term, "civic duty," that does the work he wants to assign to "political obligation." Exhortations to do our civic duty typically urge us to do more than merely obey the law. These exhortations would have us vote in elections and be well-informed voters; buy government bonds; limit our use of water and other scarce resources; donate blood, service, or money (beyond what we owe in taxes) in times of crisis; and generally contribute in an active way to the common good. Whether we really have a civic duty to do any or all of these things may be a matter of dispute, but appeals to civic duty are certainly quite common, and it is hardly clear that there is something to be gained by reclassifying them as appeals to political obligation.

How, then, do others draw the distinction? In general, the idea seems to be that political obligations are *systemic* and legal obligations *specific*. Among political philosophers, as previously noted, the problem of political obligation is the problem of determining whether there is a ground or justification for obedience to the law — not this or that law in particular but the law as such. This is the sense in which it is a systemic obligation, and that is why political philosophers have worried less about whether this or that law is binding than about the conditions under which one has an obligation to obey the laws in general. They look upon the system of laws as an aspect of the polity, albeit a vital one, and their question is what kind of polity can rightly claim that its members have a moral duty to obey its laws. Their answers have varied, of course, from Hobbes at one extreme, insisting that there is an obligation to obey the dictates of anyone who can maintain order,

to anarchists at the other. Yet their concern has been the general or systemic one of establishing the grounds for obeying the laws as such.

For legal philosophers, however, the binding nature of laws in general is something to be assumed. The law claims ultimate or exclusive authority within its domain, and anyone who acknowledges that a legal system is in place must also acknowledge that its laws are binding. The obligation, though, is a legal obligation, or an obligation from the law's point of view. It need not be a moral obligation. According to legal positivists, in fact, a law will be morally binding only when it requires those subject to it to do what morality independently requires. Thus the laws that prohibit robbery, murder, and other acts that are *mala in se* — that is, inherently evil — are laws that people have both a moral and a legal obligation to obey; while laws that prohibit acts that are otherwise morally indifferent, such as driving on the left-hand side of the road, are merely legal obligations. Legal obligations are specific rather than systemic, then, because legal philosophers are concerned with the question of what counts as a law (or a valid law) with binding force, not with the moral justification of political systems that claim a right to be obeyed.

For political philosophers, the value of this distinction is that it allows one to hold that a person may be subject to a legal obligation even though she has no political obligation to obey the laws of the regime in power. There are at least two kinds of cases in which doing so can prove helpful. In the first, the regime is tyrannical, inept, or simply so unjust that only a Hobbesian would maintain that those subject to its commands have a moral obligation to obey. Nevertheless, people in this unhappy country manage to drive cars on roads that the regime maintains and marry according to its rules. In this situation we can acknowledge that people have legal obligations to obey certain laws — those that govern traffic and marriage — despite the absence of a political obligation to obey the laws as such. In the second, happier kind of case, we can acknowledge that the citizen of one country, to which she owes a political obligation, has a legal obligation to obey the laws of another country that she is visiting. This legal obligation lapses, however, when she returns to her own country, whereas the political obligation to her country is something she carries with her. If she is truly under a political obligation, she may be morally bound to pay taxes to her polity while abroad, and perhaps even to be recalled to perform military or some other kind of duty.

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

To appreciate the value of this distinction, and of this way of drawing it, it may help to reconsider §119 of Locke's *Second Treatise of Government*. There Locke insists that the obligation to obey the laws of a political society extends not only to those who have

expressly consented to obey but also to anyone who owns property in that society, lodges within it for a week, or travels freely on its highways — indeed, "it reaches as far as the very being of any one within the territories of that government." If the obligation in question is a political obligation, then Locke would find himself in the embarrassing position of holding that the person who sneaks into a country with the aim of subverting it nevertheless has a moral duty to obey its laws. Such a position may not be absurd, but it is difficult to see how the "very being" of someone within the boundaries of a country can place him under a *political* obligation to obey the laws of a regime that he abhors. If Locke were to distinguish political from legal obligation, however, he could say that the subversive is under a legal but not a political obligation while within the territory of the regime he seeks to destroy. While he is there, in other words, he will be subject to its laws, at least in the eyes of those who enforce them, and thus under a legal obligation to obey the laws that apply to him. But he will not be under a political obligation, for he will have no moral duty to obey the laws of the political system he seeks to subvert. Indeed, Locke may have had something of this sort in mind when he distinguished "perfect members" of a political society, who expressly consent to place themselves under an obligation, from those whose tacit consent made them merely temporary subjects (§§119–22).

119

THOMAS MAY

ON RAZ AND THE OBLIGATION TO OBEY THE LAW[1]

INTRODUCTION

A popular project in political philosophy has been to test conceptions of justice and obligation against the requirements of rationality. Do subjects have reasons to comply with the demands of justice or authority? Can political obligation be grounded in the subject's own reasons for action? These tests of consistency with the subject's reasons for action are thought important if political systems are to be said to be more than purely coercive. In this paper, I will be concerned primarily with legal systems, and the reasons which subjects to a legal system might have to recognize an obligation to comply with its demands. In particular, I will be concerned with the question of whether an obligation to obey the law grounded in the subject's reasons for action can adequately capture the purposes and conceptual structure of a political legal system.

Joseph Raz provides the leading contemporary analysis of legal systems in terms of reasons for action. Over several works,[2] Raz examines the concept of authority and a variety of arguments for why a subject to a legal system might have reasons to comply with its demands. Raz concludes that these arguments fail to justify the authority of law for most people. Furthermore, he argues that because of the conceptual nature of law's claim to content-independent appeal for compliance, it is unlikely that the authority of a legal system could be justified for more than a small portion of society. Because of limited space, I will not go into detail here concerning all of Raz's

[1] I would like to thank R.G. Frey, James Child, Loren Lomasky, Christopher Morris and Joseph Raz for comments on earlier drafts of the ideas presented in this paper.

[2] See Joseph Raz, *The Concept of a Legal System* (Oxford University Press, 1970); *Practical Reason and Norms* (reprinted by Princeton University Press, 1990); *The Authority of Law* (Oxford University Press, 1979); *The Morality of Freedom* (Oxford University Press, 1986).

Law and Philosophy 16: 19–36, 1997.

arguments against subjects having reasons to appeal to law, other than to say these are related to the fact that law claims an appeal for content-independent compliance, by *all* subject, to *all* laws, at *all* times (unless the law *itself* identifies exceptions). I refer the reader to Raz[3] for the specific arguments.

Of particular interest to this paper is Raz's argument against prudential reasons to obey the law, for it is this type of reason wherein I believe a rational justification of an obligation to obey the law lies. In *The Authority of Law*, Raz examines prudential reasons that people may have for adopting an obligation to obey the law.[4] To assess in each case whether a law should be obeyed would incur great costs in time, effort, and calculation. In addition, because we live in an imperfect world, we are likely to make mistakes in judgement. Thus, one might adopt a policy of always obeying the law rather than determining in each case whether one should obey that law. However, Raz believes this will not give people reasons to adopt the type of all-embracing obligation to obey which the law claims:

> So far as prudence is concerned, almost everyone, though he has reason to follow a conformist policy in most areas, is free to exempt certain very low-risk areas from them: minor offenses against the property of one's employer, minor violations of tax law, etc.[5]

Prudence would seem to indicate that we not adopt an all-embracing general obligation to obey the law, but retain the ability to not adopt this policy in those cases where the costs of case-by case assessment are not greater than the benefits. Thus, an argument of this sort will not justify the type of obligation to obey the law Raz envisions, even though it may establish a policy of obedience in some areas (which may be "trumped" by the agent's assessment that the costs do not warrant adopting such a policy).

However, as we shall see below, the very reasons we adopt law are tied to the fact that it does not allow for reassessments, and in this way provides stability, security, and a confidence in predicting our circumstances which allow us to engage in projects from which we might attain the goods to be attained through life in society. We are still faced, however, with the worry that prudence would require

[3] See Raz, *The Authority of Law*, pp. 234–245.
[4] See Raz, *The Authority of Law*, p. 243.
[5] Raz, *Authority of Law*, p. 244.

HOS 121

that we have adequate "checks" upon what law might require, if we are to rationally submit to such an all-embracing authority. And the type of content-independent authority Raz envisions for law does not seem to provide these "checks" (as we shall see below).

I will argue that Raz's conclusions concerning the reasons subjects have (or, for Raz, lack) to comply with the directives of a legal system are tied to a specific feature of his model of reasons for action and authority. Specifically, his conclusions are tied to his formulation of the "dependence thesis" (which we shall examine in detail below). However, Raz's formulation of this thesis focuses on the wrong set of "reasons" which apply to the subject. Namely, it focuses on the "reasons for action" which the directives of a legal system is meant to replace, rather than the reasons the subject has to appeal to the legal system. When the dependence thesis is revised according to this distinction, it becomes possible for an agent to have reasons to comply with the legal system, though she might not have reasons to comply with certain specific laws within that legal system.

Most interestingly, this model of reasons for action and authority is perfectly consistent with our conceptual understanding of authority as obligating compliance in a content-independent manner. Indeed, I shall argue that this revised understanding of the dependence thesis is more consistent with the content-independent nature of an obligation to comply with authority than Raz's original formulation.

Before we examine Raz's model of the authority of law, however, let us look more closely at the prudential reasons we have for adopting an obligation to obey the law. Having established these, we can then examine the nature of the obligation to obey to see if such an obligation would be justified by these reasons.

PRUDENTIAL REASONS TO OBEY THE LAW

The authority of a legal system, and the obligation imposed by the particular laws which are its directives, is vital at a practical level if we are to attain the goods which we value from living in society. Thomas Hobbes described life devoid of societal authority as a "state of nature", and graphically conveyed the problems which might arise from such a state. War of all against all, and the precarious nature of survival are accentuated through the fatal threat which even the

122

weakest among us pose to even those most capable of defending themselves. Life in such a state would be "solitary, poor, nasty, brutish and short".

While Hobbes' description of the state of nature is surely a worst-case scenario, contestable in its extreme portrayal of the hardships of such a state, even much less harsh portrayals of a state of nature offer a far less attractive picture of life than that offered by "civilized" society. Though in practice the violent war of all against all would probably be far more limited than Hobbes would have us believe, it would still likely be far more pervasive than in a society subject to rules of conduct. For one, the ability to seek recourse to such violence would certainly be less available.

Living in a society subject to authoritative rules of conduct provides security from violence, even if this security is not perfect. Recourse toward those who violate the standards of conduct is provided to all, not just those who are able to mount this on their own behalf. In addition, the violation of the rules of conduct provides a ground for social criticism (and punishment) which is simply not available in society devoid of these rules of conduct. In short, a society subject to authoritative rules of conduct at the very least establishes the conditions in which security from violence might be attained. But as we shall see below, this security can only be accomplished if the rules of conduct are not followed informally, allowing subjects to constantly balance conformity with the gains of violating the standards. The rules must pre-empt this balancing if we are to feel secure. That is, the rules must be *authoritative*.

In addition to security from violence, life in a society subject to rules of conduct allows people living in that society to attain positive goods which would be unattainable in a society devoid of such rules. This is true in two respects. First, the rules of conduct established by society provide people with a stable environment in which to pursue projects. F. A. Hayek describes law as follows:

> The law tells (an individual) what facts he may count on and thereby extends the range within which he can predict the consequences of his actions . . . the law thus serves to enable the individual to act effectively on his own knowledge.[6]

[6] F. A. Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960), pp. 156–157.

123

This stability can only be provided to the extent that we can count on others to conform to the rules. As we shall see below, this again requires that the law be *authoritative*.

Thirdly, the rules of society allow people to attain goods through cooperative action. These cooperative actions require that people disarm themselves in a variety of ways, and be able to *trust* others to reciprocate. By establishing *authoritative* rules which facilitate this trust, society enables individuals to broaden the range of projects which they might only undertake through cooperation with others.

By providing conditions in which people may "drop their guard" secure from violence to pursue projects other than mere survival, by providing the conditions of stability in which people can viably pursue projects and act effectively on plans, and by providing the conditions under which cooperative projects may be undertaken, the authoritative rules of society enhance the lives of people living in that society. These "goods", however, can only be supplied if the rules of society are *authoritative*. But how absolute must this authority be? It is to this question we shall now turn our attention.

ON THE OBLIGATION TO OBEY THE LAW

There are two fundamental approaches we might take concerning the obligation to obey the law. The first holds that the obligation to obey is a "general" obligation to obey the legal system. This approach obligates one to obey the law *because the law demands it*, and thus the obligation to obey does not hinge in any way upon the content of a specific law (which might be called into question). If it is required by law, one is obligated to comply. If one questions the "rightness" of a specific law, one might attempt to have that law changed. But the obligation to obey holds at a general level, and so until this specific law in fact changes one remains obligated to comply.

The second approach to the obligation to obey the law holds that the obligation to obey is a *prima facie* obligation, and as such the specific content of certain laws may call into question the obligation to comply. While the *prima facie* obligation to comply places the burden of argument upon the person who would maintain there is no obligation to comply, it does allow that some laws should not obligate compliance on the part of some people. It also allows that

HB 124

laws which are not "right" might not obligate compliance, even if these laws remain on the books.

The strength of the first approach is that it captures the conceptual character of "binding" law. Because the obligation to obey is not subject to case-by-case review, it obligates compliance to the law *because it is the law*, and does not attach the obligation to obey to the specific circumstances or content of law. In this, a "general" obligation to obey the law can establish an obligation to obey the law *qua* law which an obligation that is subject to case-by-case review cannot.

If the obligation to obey is established in each case only after considering the merits and demerits of obedience, it is difficult to imagine how the law *qua* law contributes to an obligation to obey. It seems that it is the merits and demerits of obedience in each case which impose the obligation (or lack thereof) to obey. This would undermine the very reasons we have for adopting a legal system. As Chaim Gans has recently pointed out, the advantage the law offers is the "concretization of the reasons on which we should act",[7] and this requires that the law provides reasons for our actions *because it is the law*, above the reasons that apply to our actions independently. For example, there may be very good independent reasons (reasons independent of the fact that the law requires it) for me not to murder my companion to the movies. But the obligation to obey the law requires that we not murder our companion even if these independent reasons do not hold *because it is forbidden by law*. In this way, the obligation imposed by law does not appear to be subject to assessment on a case-by-case basis.

It is this concern with the authority of law *qua* law which leads Raz to reject the possibility of a *prima facie* obligation to obey the law.[8] The problems Raz sees with an obligation to obey which is *prima facie* can be traced to his model of obligation to authority, in which the only "trump" over the obligation to obey is described in what he calls "The Dependence Thesis".[9] Here, Raz describes the directives of an authority as obligating compliance so long as the

[7] Gans, Chaim *Philosophical Anarchism and Political Disobedience* (Cambridge University Press, 1992), p. 39.

[8] See Joseph Raz, *The Authority of Law* (Oxford University Press, 1979), pp. 234–237.

[9] See Raz, *The Morality of Freedom* (Oxford University Press, 1986).

125

directive is meant to reflect the "balance of reasons which it is meant to replace".

On the Razian view of authority, authority obligates compliance because "...The alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reason which apply to him directly."[10] Raz dubs this "The Normal Justification Thesis". The dependence thesis stems from this justification of authority: the authoritative nature of the directive depends upon its being meant to reflect the reasons which (on the normal justification thesis) we are better off appealing to the authority to balance than acting on our own attempts to balance. So long as the authority's directive is *meant* to reflect the reasons which apply to the subject independently, these reasons cannot be used to question the directive of the authority, because the very reason we appeal to authority (on the normal justification thesis) is that the reasons which apply independently are more likely to be complied with if we follow the directives of the authority, rather than acting on our own determination of what these reasons require. We shall discuss this in even greater detail below, when we examine the problems facing Raz's formulation of the dependence thesis.

The strength of the *prima facie* approach is this: to eliminate the possibility of a *real* check on the content of law imposes an obligation to obey which is far too strong. There are times when we feel people should *not* obey the law, and times when we even feel that people should *disobey* the law. A plethora of examples of this attitude can be found by examining our reactions to the laws of Nazi Germany concerning Jews, or laws in the deep south of the United States in the 1950s concerning Black people. A strong general obligation to obey the law cannot provide *real* checks on the content of such laws through their questionable *content*. The characteristic feature of such an obligation is that it is *content-independent*.[11]

For example, consider Raz's position on the binding nature of an authority's directive. The only check on authority is provided

[10] Raz, *The Morality of Freedom*, p. 53.

[11] See H. L. A. Hart, *Essays on Bentham* (Oxford University Press, 1982); Joseph Raz, *Practical Reason and Norms* (Princeton University Press, 1990).

126

by what Raz dubs "The Dependence Thesis". As the nature of an authoritative directive is such that it is meant to reflect a balancing of reasons for action, the normative obligation imposed by a directive is dependent upon its authoritative nature (its being meant to reflect a balance of reasons for action). Limitations on the bindingness of the authority, then, derive from this basis:

> It is not that the arbitrator's word is an absolute reason which has to be obeyed come what may. It can be challenged and justifiably refused in certain circumstances. If, for example, the arbitrator was bribed, or was drunk while considering the case, or if new evidence of great importance unexpectedly turns up, each party may ignore the decision. The point is that reasons that could have been relied upon to justify action before his decision cannot be relied upon once the decision is given.[12]

One can see here the elimination of the seemingly inconsistent evaluation of the authority's directive on the basis of an assessment of the very reasons we acknowledge are better assessed by the authority when we appeal to authority. This seemingly inconsistent position is avoided because the "reasons that could have been relied upon to justify action before his decision cannot be relied upon once the decision is made". The "check" that Raz offers in its place is based solely upon the authority's *attempt* to assess the reasons we appeal to him to assess. Raz maintains that the authority's directive is meant to reflect the balance of reasons for action, and is dependent upon them. Accordingly he requires that the arbitrator not be drunk, or bribed, etc. (her directive thus not reflecting a balance of reason for action). But the *content* of the law *per se* cannot call the legitimacy of the law into question; the only thing which can call the legitimacy of the law into question is whether the law is *meant* to reflect the "balance of reasons upon which it depends".

However, as we shall see, the "check" upon authority provided by the dependence thesis is not really a "check" so much as it is a test of "proper pedigree". For Raz, the obligation the authority imposes is based upon the fact that the authority's directive is meant to reflect the balance of reasons which apply independently. The Dependence Thesis allows the subject to appeal the authority's decision only when the subject can show that the authority's decision did not reflect this balance; Either new information indicates that the arbitrator's decision was not based upon this new "balance of reasons", or it

[12] Raz, *The Morality of Freedom*, p. 42.

127

can be shown that the decision was not meant to reflect the "balance of reasons" at all (e.g., a bribe). Even then, it is not the fact that the arbitrator's decision does not reflect the balance of reasons that undermines his authority, but the fact that the decision did not attempt to determine the balance of reasons:

> Notice that a dependent reason is not one which does in fact reflect the balance of reasons on which it depends: it is one which is meant to do so.[13]

So long as the arbitrator's decision *was meant* to reflect the balance of reasons upon which it depends, it is binding. To undermine authority, one would need to show that the decision was not meant to reflect a balance of reasons (the arbitrator was bribed, etc.). This is tantamount to undermining the obligation to comply by showing that this is simply not an authoritative decision, because an *authoritative* decision is meant to reflect the balance of reasons upon which is depends.

Thus, we are left with only one question in regard to whether we should comply with the directives of authority: "Is this in fact an *authoritative* directive?". In the context of law, this question becomes "Is this in fact a *legal* requirement?". In our society, a *legal* requirement is one which reflects the balance of interests as determined by the vote of our representatives in Congress (given certain Constitutional limitations in the United States, but not in Great Britain). If the law is meant to reflect the vote of Congress, it is properly law. In this, the question posed by the dependence thesis is simply one of "Is this law *meant* to *reflect proper pedigree*?" (this is the Positivist element of Raz's theory of law). If the answer is yes, one is obligated to comply whatever the content of the law. If the answer is no, it is not a legal requirement at all and so the question of compliance does not arise (at lease in the context of the obligation to obey the law). From the above, we can see that the check Raz provides on the binding nature of law is nothing more than a "Positivist" question of pedigree. This will not allow for disobedience to "wrong" or immoral laws which do pass proper pedigree, like the laws of Nazi Germany for example, and so cannot capture our belief that such laws should not be obeyed (we shall discuss this in greater detail below).

[13] Raz, *The Morality of Freedom*, p. 41.

We are left, then, with a traditional "Legal Positivism/Natural Law" debate concerning the obligation to obey the law. The Positivist, like Raz, believes that, conceptually, the binding character of law cannot be sacrificed for the sake of our intuitions against laws like those of Nazi Germany. The Natural Law theorist believes the moral repugnance of laws like those of Nazi Germany are too high a price to pay for a strong obligation to obey. The debate concerning the obligation to obey the law seems to cash out at this point, and bog down in the perennial debate between these schools of thought.

However, the debate need not, and indeed *should not*, stop here. The strength of each school is that it seems to capture an element of law we hold dear: The Positivist camp provides a strong obligation to obey; The Natural Law camp captures our intuitions that law should be at least consistent with morality. The major drawback of each school is that it seems incompatible with the strength of the other. I shall argue below that this last point is not the case. If we adopt a two-level model of the obligation to obey the law, we can capture the strengths of both the Positivist and Natural Law camps, in a way which is coherent and logically consistent.

A TWO-LEVEL MODEL OF THE OBLIGATION TO OBEY THE LAW

The purpose of a legal system is to provide stability and to secure conformity in certain cooperative areas of life, particularly those areas in which we interact with others in society. Certain goods can only be achieved through social interaction. This interaction requires that we "trust" others to cooperate in joint ventures, even if these "joint ventures" only consist in the observance of certain standards of conduct (such as not engaging in behavior which might place others in significant danger). For these joint ventures to be viable, we need assurances that others will cooperate in the venture, otherwise we disadvantage ourselves in vain.

The advantage law offers is that it makes it more likely that these cooperative ventures will not be in vain, and in this makes social goods achievable, and *rational*. For example, Chaim Gans uss the payment of taxes. In order for us to have a reason to pay taxes we must believe that certain advantages will result. For this to happen, we must be assured that enough other people will also pay their taxes. The law provides this guarantee. States Gans:

When the legal authority commands us to pay taxes, then, it helps us to do what we should, not by informing us about an act of which we weren't aware, but by creating the conditions under which there is reason for doing what we knew anyway that we should do.[14]

The purpose of law is to promote certain structures of interaction between people, and in this way facilitate the goods which can be achieved only through living in society.[15] The way in which the law facilitates these goods is by providing a "concrete" set of rules which we can count on others to observe.[16]

Let us stop here to consider why Raz is so adamantly against the idea of a *prima facie* obligation to obey the law. For Raz, the obligation to obey authority must be content-independent. This means that the obligation to obey is not contingent upon the specific content of the authority's directive. If the content of each particular law might call into question its ability to obligate compliance, our ability to count on others to observe particular laws is significantly weakened. For example, consider the laws regulating traffic. We need to be able to count on others to drive on a consistent side of the road. If each other driver is entitled to constantly assess their obligation to drive on a particular side, the "good" achieved through traffic law is undermined. Likewise, the safety we gain from living in a society governed by laws is undermined if people retain the ability to constantly assess their reasons not to kill us. The function of law can only be achieved if we can count on a general observation of laws by the general population.[17] Thus, Raz establishes qualifications upon the obligation to obey authority only through the dependence thesis. As we have seen, the dependence thesis supports a "strong" obligation to obey laws which pass the test of "proper pedigree"; If this test is passed, law is content-independently binding.

Recall that the dependence thesis was derived from what Raz dubbed "The Normal Justification Thesis". This stated that the normal way one establishes an obligation to obey authority is to

[14] Gans, *Philosophical Anarchism and Political Disobedience*, p. 39.

[15] See my paper, "The Concept of Autonomy", *American Philosophical Quarterly* (April, 1994).

[16] F. A. Hayek believes the predictability of the behavior of others which the law provides to be vital if people are to "control" their own lives. See *The Constitution of Liberty* (University of Chicago Press, 1960), p. 157.

[17] See H. L. A. Hart's discussion of the "rules of recognition" in *The Concept of Law* (Oxford University Press, 1961), pp. 97–107.

show that the subject is more likely to comply with reasons which apply to him independently if he obeys authority. The dependence thesis then requires that the authority's directive be meant to reflect these reasons which apply to the subject independently if the subject is to be obligated to obey.

We saw above how Raz's version of the dependence thesis does not really serve as a limitation on authority so much as it serves as a test for *authoritative* obligation. To fail the dependence thesis (to issue a directive which is not meant to reflect the reasons which apply to the subject independently) does not override or undermine the obligation to obey authority, but rather serves to establish that this directive is not an *authoritative* directive, and thus does not obligate obedience. For Raz, then, the only test by which to qualify the obligation to obey authority involves establishing that the authority's directive is not actually authoritative, and thus no obligation to obey exists. Disobedience based upon the dependence thesis, then, would not be *prima facie* wrong, as there would exist *no* obligation to obey.

Raz, then, must be against the idea of a *prima facie* obligation to obey the law. A law is either authoritative or it is not. The only legitimate assessment of a law is the dependence thesis. If the law passes this test, it is authoritative and thus functions as a second order reason which *excludes*[18] other considerations from the determination of action. In this way, the authority of law *excludes* the very considerations which might override a *prima facie* obligation to obey the law from the subject's determination of action, and thus is not properly *prima facie*.

However, this opposition to a *prima facie* obligation to obey the law can be addressed if we make certain changes to Raz's dependence thesis. Rather than requiring that the authority's directive be meant to reflect the reasons which apply to the subject independently, the dependence thesis should require that the authority's directive reflect those reasons for which the subject appealed to authority. In this way, the authoritative character of the directive may be undermined by those reasons which formed the basis of the obligation to obey authority. Let us look at this more closely.

[18] See Raz, *Practical Reason and Norms*.

THE DEPENDENCE THESIS REVISED

Where I think Raz went wrong is in attempting to maintain that the authority's directive may be undermined only through its dependence on the balance of reasons it is meant to reflect. Raz does not need to maintain this in order to recognize the limitations he wishes upon authoritative directives. In fact, I will argue that it is more consistent with Raz's theory of authority (in terms of content-independent obligation) to maintain that the directive does not need to be meant to reflect the balance of reasons for action, but rather needs to reflect the reason(s) one has for appealing to authority.

In this case, the foundation of authority is again the fact that the reasons a subject has independently are more likely to be complied with if one appeals to authority, rather than acting on her own evaluation of these reasons. This justification of authority is what then serves to undermine the authority: The purposive nature of such authority provides a ground upon which the directive of the authority may be evaluated, regardless of its "content-independent" imposition of obligation. If the authority's directive fails to reflect those things for which one appeals to authority, then it fails to impose an obligation to obey.

Because this second evaluation operates at a different level than the assessment of "reasons for action" which apply independently, this assessment does not threaten the "content-independent" nature of the authority's directive. The assessment which the authority's directive is meant to replace in a content-independent fashion is the assessment of "reasons for action". The assessment which serves as a "check" on authority is an assessment of reasons for assessing "reasons for action" in a particular way (namely, through appeal to authority).

Let us examine this more closely, using the model of second order reasoning within which Raz works. On the intuitive model of practical reason and action,[19] one should do that which is indicated by the balance of reasons. This is a direct determination of what one's action should be. The second order reason provided by the presence of a binding authoritative directive is meant to preempt such a weighing of the balance of reasons for action, and instead

[19] Joseph Raz, "Reasons for Actions, Decisions and Norms" in Raz, Joseph Raz, ed., *Practical Reasoning* (Oxford University Press, 1978), p. 130.

appeal to the authority as the proper way to assess these reasons. However, while the second-order reason provided by the presence of a binding authoritative directive *does* preempt a weighing of the balance of reasons for action, it does *not* preempt a weighing of the balance of reasons *to take the authority's utterance as a second order reason for action*.

Whereas the balance of reasons for action inherent in the intuitive model of practical reason and action is concerned with the determination of what action one should engage in, the reasons for taking a second order reason for action are concerned with the determination of *how* one should determine the proper "balance of reasons for action". This is important, because when I discuss the "reasons for taking the authority's directive a sa second order reason for action", this does not change the content-independent nature of the authority's directive. Although the content of the authority's directive *does* affect the balance of reasons for taking the directive as a second order reason for action, this is not the same as the balance of reasons the directive (if taken as a second order reason for action) is meant to replace in a content-independent fashion. The content of the directive affects only the balance of reasons for taking the authority's directive a sa second order (content-independent) reason for action (the reasons to appeal to authority rather than attempting to balance the "reasons for action" oneself).

The second order reason derives its normative force from the fact that one should *not* determine (directly) what one's actions should be by weighing the balance of (first order) reasons. Rather, it indicates that one should take the authority's evaluation of the balance of reasons as content-independently binding. It also requires that, once the directive is issued, the balance of reasons continues to indicate one should take the authority's evaluation as binding. For example, we might begin with the assumption that one reason we appeal to law is to assure appropriate conduct toward others in the sense that people not be subjected to violence or torture. The laws of Nazi Germany which sought to systematically exterminate a particular race of people, then, clearly do not reflect these reasons to adopt a legal system. Likewise, laws in the deep south of the United States in the 1950s might be found to clearly violate the types of standards of conduct toward others which we adopt a legal system in order to

assure. When the particular law in question violates the very reason for which the legal system was adopted in this way, it does not obligate compliance.

Let us look more closely at this example. Suppose one is a black citizen in the deep south of the United States during the 1950s. The laws of the south-ar such that they prohibit me from benefiting from interaction in society in the way that justified my appeal to the authority of the state in the manner of the Normal Justification Thesis. The laws of the state are meant, however, to reflect the majority opinion (or Congressional vote or whatever is required . . .) that they were supposed to reflect in order to qualify as authoritative under the original version of the dependence thesis (Raz's version). Since the only limitation allowed by the original dependence thesis is satisfied, one cannot override the obligation to obey the law and maintain the content-independent, second-order character of law.

On the revised dependence thesis, however, my obligation to obey is undermined by the fact that the law keeps me from benefiting from interaction in society in the manner which justified my appeal to the authority of the legal system. On the revised dependence thesis, the subject may assess the obligation to comply on the basis of the reason for adopting the law as a second order reason.

In addition, shifting the focus of the dependence thesis away from the balance of reasons which the authority's decision is meant to replace, to the reason(s) for which one appeals to authority, more consistently recognizes the content-independent nature of an authoritative directive. On Raz's version of the dependence thesis, the authority's normative force was dependent on the authority's decision being meant to reflect the balance of first-order reasons for action (the very balance of reasons it is meant to replace). On my version of the dependence thesis, the authority's normative force is dependent on the reason(s) for which one appealed to the authority. If the normative force of an authoritative directive is dependent on its being meant to reflect some balance of (first-order) reasons, the legitimate content of an authoritative directive is quite restricted. On the other hand, if the normative force of the authoritative directive is dependent on the reason(s) for which one appeals to the authority, the directive may have any content whatsoever so long as the direc-

tive does not undermine the very reason for which one appeals to authority.

To illustrate this point, let us consider a Hobbesian sovereign. On Raz's version of the dependence thesis, it would seem that the sovereign would have to issue directives that are *meant* to reflect the balance of reasons, etc. If the sovereign makes arbitrary decisions, they are invalid. But this seems to miss the point of the Hobbesian sovereign. We appeal to the sovereign in order to avoid the evils of the state of nature; *any* authority is better than the state of nature. This is our reason for appealing to the sovereign. He can make arbitrary decisions, etc. as much as he wants (we hope he is more responsible, but have no guarantee), and we are still obligated to comply. So long as his directives do not fail to take us out of the state of nature (and in this way fail to reflect the reason for which we appealed to the sovereign), the directives are authoritative. It is this limitation which my version of the dependence thesis places on the sovereign.

Furthermore, this limitation captures what Gans refers to as "the concretization" of reasons for action. Consider the example of traffic law, and in particular the laws governing which side of the road we should drive on. We need to know which side of the road others will drive on, so we appeal to an authority's directive so that we can count on other people driving on a particular side. We do not care *why* the authority chooses a particular side of the road. We care only *that* he choose a particular side of the road. In this way, so long as he chooses one side of the road and so facilitates our driving, the reasons for appealing to authority are reflected by his directive, no matter what reasons his directive is meant to reflect.

THE REVISED DEPENDENCE THESIS AND THE OBLIGATION TO OBEY THE LAW

Let us return now to our argument concerning the obligation to obey the law. The need for rules in a civilized society provides a presumption in favor of obedience to the law. Applying the "Normal Justification Thesis", we find that the authority of law is justified by the argument that the subject is more likely to attain the goods of civilized life if he accepts the laws of society as authoritatively binding. The obligation to obey the law, then, is established through

135

the goods one can achieve only through society. On the revised dependence thesis, this obligation must then be subject to review by way of this basis of obligation.

Each law, then, may be assessed by the subject on the standard provided by the normal justification thesis. If the law fails to reflect the purpose for which it is adopted, it does not obligate compliance. In the above discussion, this would mean that if the law threatens the goods one achieves through interaction in society, it is not binding. It is not that this law "is not the best reason . . . ", but rather that this law "is not justified by the idea that we're better off appealing to law . . . " that undermines its ability to obligate compliance. In this, those cases where "concretization" is needed are not undermined, for we would still be "better off appealing to law . . . " (consider the example of traffic law). But cases of laws (like racial laws) which don't reflect this justification are illegitimized.

The model of the obligation to obey the law I have presented operates on two levels. First, there is the level of establishing the obligation to obey in the manner described by the normal justification thesis. Second, there is the level of assessment which is made as to whether the law reflects the reasons I had for adopting this obligation at the first level. The first level (establishing the obligation through the normal justification thesis) operates from the perspective of the legal system as a whole. When we adopt obedience to the law as a second-order reason, we adopt this as a strategy for determining action. This means we look at reasons for adopting the second-order strategy for determining action, which is done at the level of the legal system. The second level (assessing the obligation on the basis of the reason established at the first level) operates at the level of particular laws. When we assess the law according to the reason established at the first level, we do so on a case-by-case basis. It is this case-by-case assessment of the obligation to obey the law (an obligation established at the first level) which makes the obligation *prima facie*.

In this way, the obligation to obey the law can be seen as both *prima facie* and general. In the manner described by the normal justification thesis, I adopt an obligation to obey the law as a second-order reason for action. However, this obligation to obey may be overridden by an evaluation that a particular law in question does

not reflect the justification I had for adopting the obligation to obey the law as a second-order reason for action. In this sense it is a *prima facie* obligation.

Under the model of the revised dependence thesis, then, we may establish a two-level model of the obligation to obey the law which makes the authority of law limited in significant respects, and is able to retain a sense in which the law *qua* law imposes an obligation to obey. This two-level model is important, for it allows us to retain a "check" on laws passed without threatening the function of the legal system.

Center for Biomedical Ethics
University of Minnesota
221 University Avenue S.E.
Minneapolis, MN 55414-3074
U.S.A.

Fundamental Rights, Directive Principles and Fundamental Duties of India

The **Fundamental Rights, Directive Principles of State Policy** and **Fundamental Duties** are sections of the Constitution of India that prescribe the fundamental obligations of the State to its citizens and the duties of the citizens to the State. These sections comprise a constitutional bill of rights for government policy-making and the behavior and conduct of citizens. These sections are considered vital elements of the constitution, which was developed between 1947 and 1949 by the Constituent Assembly of India.

The *Fundamental Rights* are defined as the basic human rights of all citizens. These rights, defined in Part III of the Constitution, apply irrespective of race, place of birth, religion, caste, creed or sex. They are enforceable by the courts, subject to specific restrictions.

The *Directive Principles of State Policy* are guidelines for the framing of laws by the government. These provisions, set out in Part IV of the Constitution, are not enforceable by the courts, but the principles on which they are based are fundamental guidelines for governance that the State is expected to apply in framing and passing laws.

The *Fundamental Duties* are defined as the moral obligations of all citizens to help promote a spirit of patriotism and to uphold the unity of India. These duties, set out in Part IV–A of the Constitution (under a constitutional amendment) concern individuals and the nation. Like the Directive Principles, they are not legally enforceable.

History:

The Fundamental Rights and Directive Principles had their origins in the Indian independence movement, which strove to achieve the values of liberty and social welfare as the goals of an independent Indian state.[1] The development of constitutional rights in India was inspired by historical documents such as England's Bill of Rights, the United States Bill of Rights and France's Declaration of the Rights of Man. The demand for civil liberties formed an important part of the Indian independence movement, with one of the objectives of the Indian National Congress (INC) being to end discrimination between the British rulers and their Indian subjects. This demand was explicitly mentioned in resolutions adopted by the INC between 1917 and 1919. The demands articulated in these resolutions included granting to Indians the rights to equality before law, free speech, trial by juries composed at least half of Indian members, political power, and equal terms for bearing arms as British citizens.

The experiences of the First World War, the unsatisfactory Montague-Chelmsford reforms of 1919, and the rise to prominence of M. K. Gandhi in the Indian independence movement marked a change in the attitude of its leaders towards articulating demands for civil rights. The focus shifted from demanding equality of status between Indians and the British to assuring liberty for all Indians. The Commonwealth of India Bill, drafted by Annie

Beasant in 1925, specifically included demands for seven fundamental rights – individual liberty, freedom of conscience, free expression of opinion, freedom of assembly, non-discrimination on the ground of sex, free elementary education and free use of public spaces. In 1927, the INC resolved to set up a committee to draft a "Swaraj Constitution" for India based on a declaration of rights that would provide safeguards against oppression. The 11-member committee, led by Motilal Nehru, was constituted in 1928. Its report made a number of recommendations, including proposing guaranteed fundamental rights to all Indians. These rights resembled those of the American Constitution and those adopted by post-war European countries, and several of them were adopted from the 1925 Bill. Several of these provisions were later replicated in various parts of the Indian Constitution, including the Fundamental Rights and Directive Principles.

In 1931, the Indian National Congress, at its Karachi session, adopted a resolution committing itself to the defence of civil rights and economic freedom, with the stated objectives of putting an end to exploitation, providing social security and implementing land reforms. Other new rights proposed by the resolution were the prohibition of State titles, universal adult franchise, abolition of capital punishment and freedom of movement. Drafted by Jawaharlal Nehru, the resolution, which later formed the basis for some of the Directive Principles, placed the primary responsibility of carrying out social reform on the State, and marked the increasing influence of socialism and Gandhian philosophy on the independence movement. The final phase of the Independence movement saw a reiteration of the socialist principles of the 1930s, along with an increased focus on minority rights – which had become an issue of major political concern by then – which were published in theSapru Report in 1945. The report, apart from stressing on protecting the rights of minorities, also sought to prescribe a "standard of conduct for the legislatures, government and the courts".

During the final stages of the British Raj, the 1946 Cabinet Mission to India proposed a Constituent Assembly to draft a Constitution for India as part of the process of transfer of power. The Constituent Assembly of India, composed of indirectly elected representatives from the British provinces and Princely states, commenced its proceedings in December 1946, and completed drafting the Constitution of India by November 1949. According to the Cabinet Mission plan, the Assembly was to have an Advisory Committee to advise it on the nature and extent of fundamental rights, protection of minorities and administration of tribal areas. Accordingly, the Advisory Committee was constituted in January 1947 with 64 members, and from among these a twelve-member sub-committee on Fundamental Rights was appointed under the chairmanship of J.B. Kripalani in February 1947. The sub-committee drafted the Fundamental Rights and submitted its report to the Committee by April 1947, and later that month the Committee placed it before the Assembly, which debated and discussed the rights over the course of the following year, adopting the drafts of most of them by December 1948. The drafting of the Fundamental Rights was influenced by the

adoption of the Universal Declaration of Human Rights by the U.N. General Assembly and the activities of the United Nations Human Rights Commission, as well as decisions of the U.S. Supreme Court in interpreting the Bill of Rights in the American Constitution. The Directive Principles, which were also drafted by the sub-committee on Fundamental Rights, expounded the socialist precepts of the Indian independence movement, and were inspired by similar principles contained in the Irish Constitution. The Fundamental Duties were later added to the Constitution by the 42nd Amendment in 1976.

Fundamental Rights in India

The Fundamental Rights, embodied in Part III of the Constitution, guarantee civil rights to all Indians, and prevent the State from encroaching on individual liberty while simultaneously placing upon it an obligation to protect the citizens' rights from encroachment by society. Seven fundamental rights were originally provided by the Constitution – right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to property and right to constitutional remedies. However, the right to property was removed from Part III of the Constitution by the 44th Amendment in 1978.

The purpose of the Fundamental Rights is to preserve individual liberty and democratic principles based on equality of all members of society. They act as limitations on the powers of the legislature and executive, under Article 13, and in case of any violation of these rights the Supreme Court of India and the High Courts of the states have the power to declare such legislative or executive action as unconstitutional and void. These rights are largely enforceable against the State, which as per the wide definition provided in Article 12, includes not only the legislative and executive wings of the federal and state governments, but also local administrative authorities and other agencies and institutions which discharge public functions or are of a governmental character. However, there are certain rights – such as those in Articles 15, 17, 18, 23, 24 – that are also available against private individuals. Further, certain Fundamental Rights – including those under Articles 14, 20, 21, 25 – apply to persons of any nationality upon Indian soil, while others – such as those under Articles 15, 16, 19, 30 – are applicable only to citizens of India.

The Fundamental Rights are not absolute and are subject to reasonable restrictions as necessary for the protection of public interest. In the *Kesavananda Bharati v. State of Kerala* case in 1973, the Supreme Court, overruling a previous decision of 1967, held that the Fundamental Rights could be amended, subject to judicial review in case such an amendment violated the basic structure of the Constitution. The Fundamental Rights can be enhanced, removed or otherwise altered through a constitutional amendment, passed by a two-thirds majority of each House of Parliament. The imposition of a state of emergency may lead to a temporary suspension any of the Fundamental Rights, excluding Articles 20 and 21, by order of the President. The President may, by order, suspend the right to constitutional remedies as well, thereby barring citizens from approaching the Supreme Court for the enforcement of any of the Fundamental Rights, except Articles 20 and 21, during the period of the

140

emergency. Parliament may also restrict the application of the Fundamental Rights to members of the Indian Armed Forces and the police, in order to ensure proper discharge of their duties and the maintenance of discipline, by a law made under Article 33.

Directive Principles in India

The Directive Principles of State Policy, embodied in Part IV of the Constitution, are directions given to the State to guide the establishment of an economic and social democracy, as proposed by the Preamble. They set forth the humanitarian and socialist instructions that were the aim of social revolution envisaged in India by the Constituent Assembly. The State is expected to keep these principles in mind while framing laws and policies, even though they are non-justiciable in nature. The Directive Principles may be classified under the following categories: ideals that the State ought to strive towards achieving; directions for the exercise of legislative and executive power; and rights of the citizens which the State must aim towards securing.

Despite being non-justiciable, the Directive Principles act as a check on the State; theorised as a yardstick in the hands of electorate and the opposition to measure the performance of a government at the time of an election. Article 37, while stating that the Directive Principles are not enforceable in any court of law, declares them to be "fundamental to the governance of the country" and imposes an obligation on the State to apply them in matters of legislation. Thus, they serve to emphasise the welfare state model of the Constitution and emphasise the positive duty of the State to promote the welfare of the people by affirming social, economic and political justice, as well as to fight income inequality and ensure individual dignity, as mandated by Article 38 in order to ensure equitable distribution of land resources.

Article 39 lays down certain principles of policy to be followed by the State, including providing an adequate means of livelihood for all citizens, equal pay for equal work for men and women, proper working conditions, reduction of the concentration of wealth and means of production from the hands of a few, and distribution of community resources to "subserve the common good". These clauses highlight the Constitutional objectives of building an egalitarian social order and establishing a welfare state, by bringing about a social revolution assisted by the State, and have been used to support the nationalisation of mineral resources as well as public utilities. Further, several legislations pertaining to agrarian reform and land tenure have been enacted by the federal and state governments, in order to ensure equitable distribution of land resources.

Articles 41–43 mandate the State to endeavour to secure to all citizens the right to work, a living wage, social security, maternity relief, and a decent standard of living. These provisions aim at establishing a socialist state as envisaged in the Preamble. Article 43 also places upon the State the responsibility of promoting cottage industries, and the federal government has, in furtherance of this, established several Boards for the promotion

of khadi, handlooms etc., in coordination with the state governments. Article 39A requires the State to provide free legal aid to ensure that opportunities for securing justice are available to all citizens irrespective of economic or other disabilities. Article 43A mandates the State to work towards securing the participation of workers in the management of industries. The State, under Article 46, is also mandated to promote the interests of and work for the economic uplift of the scheduled castes and scheduled tribes and protect them from discrimination and exploitation. Several enactments, including two Constitutional amendments, have been passed to give effect to this provision.

Article 44 encourages the State to secure a uniform civil code for all citizens, by eliminating discrepancies between various personal laws currently in force in the country. However, this has remained a "dead letter" despite numerous reminders from the Supreme Court to implement the provision. Article 45 originally mandated the State to provide free and compulsory education to children between the ages of six and fourteen years, but after the 86th Amendment in 2002, this has been converted into a Fundamental Right and replaced by an obligation upon the State to secure childhood care to all children below the age of six.[52] Article 47 commits the State to raise the standard of living and improve public health, and prohibit the consumption of intoxicating drinks and drugs injurious to health. As a consequence, partial or total prohibition has been introduced in several states, but financial constraints have prevented its full-fledged application. The State is also mandated by Article 48 to organise agriculture and animal husbandry on modern and scientific lines by improving breeds and prohibiting slaughter of cattle. Article 48A mandates the State to protect the environment and safeguard the forests and wildlife of the country, while Article 49 places an obligation upon the State to ensure the preservation of monuments and objects of national importance. Article 50 requires the State to ensure the separation of judiciary from executive in public services, in order to ensure judicial independence, and federal legislation has been enacted to achieve this objective. The State, according to Article 51, must also strive for the promotion of international peace and security, and Parliament has been empowered under Article 253 to make laws giving effect to international treaties.

Fundamental Duties:

Any act of disrespect towards theIndian National Flag is illegal.

The Fundamental Duties of citizens were added to the Constitution by the 42nd Amendment in 1976, upon the recommendations of the Swaran SinghCommittee that was constituted by the government earlier that year. Originally ten in number, the Fundamental Duties were increased to eleven by the 86th Amendment in 2002, which added a duty on every parent or guardian to ensure that their child or ward was provided opportunities for education between the ages of six and fourteen years. The other Fundamental Duties obligate all citizens to respect the national symbols of India, including the Constitution, to cherish its heritage, preserve its composite culture and assist in its defense. They also obligate all Indians to promote the spirit of common brotherhood, protect the environment and public property,

142

develop scientific temper, abjure violence, and strive towards excellence in all spheres of life. Citizens are morally obligated by the Constitution to perform these duties. However, like the Directive Principles, these are non-justifiable, without any legal sanction in case of their violation or non-compliance. There is reference to such duties in international instruments such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, and Article 51A brings the Indian Constitution into conformity with these treaties.

Criticism and analysis:

Fewer children are now employed in hazardous environments, but their employment in non-hazardous jobs, prevalently as domestic help, violates the spirit of the constitution in the eyes of many critics and human rights advocates. More than 16.5 million children are in employment. India was ranked 88 out of 159 countries in 2005, according to the degree to which corruption is perceived to exist among public officials and politicians. The year 1990–1991 was declared as the "Year of Social Justice" in the memory of B.R. Ambedkar. The government provides free textbooks to students belonging to scheduled castes and tribes pursuing medicine and engineering courses. During 2002–2003, a sum of Rs. 4.77 crore (47.7 million) was released for this purpose. In order to protect scheduled castes and tribes from discrimination, the government enacted the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, prescribing severe punishments for such actions.

The *Minimum Wages Act* of 1948 empowers government to fix minimum wages for people working across the economic spectrum. The *Consumer Protection Act of 1986* provides for the better protection of consumers. The *Equal Remuneration Act* of 1976 provides for equal pay for equal work for both men and women. The *Sampoorna Grameen Rozgar Yojana* (Universal Rural Employment Programme) was launched in 2001 to attain the objective of providing gainful employment for the rural poor. The programme was implemented through the Panchayati Raj institutions.

A system of elected village councils, known as Panchayati Raj covers almost all states and territories of India. One-third of the total number of seats have been reserved for women in Panchayats at every level; and in the case of Bihar, half the seats have been reserved for women. The judiciary has been separated from the executive "in all the states and territories except Jammu and Kashmir and Nagaland." India's foreign policy has been influenced by the Directive Principles. India supported the United Nations in peace-keeping activities, with the Indian Army having participated in 37 UN peace-keeping operations.

The implementation of a uniform civil code for all citizens has not been achieved owing to widespread opposition from various religious groups and political parties. The Shah Bano case (1985–86) provoked a political firestorm in India when the Supreme Court ruled that Shah Bano, a Muslim woman who had been divorced by her husband in 1978 was entitled to receive alimony from her former husband under Indian law applicable for all

(Mistake to Mark Page No. 144 please omit that Number) Next Number is 145.

Indian women. This decision evoked outrage in the Muslim community, which sought the application of the Muslim personal law and in response the Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 overturning the Supreme Court's verdict. This act provoked further outrage, as jurists, critics and politicians alleged that the fundamental right of equality for all citizens irrespective of religion or gender was being jettisoned to preserve the interests of distinct religious communities. The verdict and the legislation remain a source of heated debate, with many citing the issue as a prime example of the poor implementation of Fundamental Rights.

Relationship between the Fundamental Rights, Directive Principles and Fundamental Duties:

The Directive Principles have been used to uphold the Constitutional validity of legislations in case of a conflict with the Fundamental Rights. Article 31C, added by the 25th Amendment in 1971, provided that any law made to give effect to the Directive Principles in Article 39(b)–(c) would not be invalid on the grounds that they derogated from the Fundamental Rights conferred by Articles 14, 19 and 31. The application of this article was sought to be extended to all the Directive Principles by the 42nd Amendment in 1976, but the Supreme Court struck down the extension as void on the ground that it violated the basic structure of the Constitution. The Fundamental Rights and Directive Principles have also been used together in forming the basis of legislation for social welfare. The Supreme Court, after the judgment in the *Kesavananda Bharati* case, has adopted the view of the Fundamental Rights and Directive Principles being complementary to each other, each supplementing the other's role in aiming at the same goal of establishing a welfare state by means of social revolution. Similarly, the Supreme Court has used the Fundamental Duties to uphold the Constitutional validity of statutes which seeks to promote the objects laid out in the Fundamental Duties. These Duties have also been held to be obligatory for all citizens, subject to the State enforcing the same by means of a valid law. The Supreme Court has also issued directions to the State in this regard, with a view towards making the provisions effective and enabling a citizens to properly perform their duties.

---

1. Introduction : The Crisis of Legitimation of Law

On the Notion of Crisis

The word 'crisis' is currently the most fashionable word. It dominates not just the works of academics but also the public mind. Thus we hear, for example, concerning the "coming crisis" of western sociology (Gouldner, 1976), the "legitimation" crisis, (Habermas, 1973); "the crisis of democracy" (Crozior *et. al.*, 1975), "the crisis of republic" (Arendt, 1969). The law too is in crisis (Werramantary, 1972) : there is the "crisis of legal liberalism" (Trubek and Galanter, 1974) and that of "legal ideas and ideology" (Kamenka, 1978). The word crisis characterizes quite suitably any serious state of affairs: thus we have, almost permanently, the crisis of 'identity', 'energy', 'sovereignty', 'world order politics', 'economy' and a host of other human domains.

Obviously, the whole world is, in one form or another, in crisis. But it is of the essence of all fashions that new words or styles must, over time, replace the old. There is already some talk of going "beyond the crisis" (Birnbaum, 1977). As suddenly as the word 'crisis' caught on in the seventies, replacing the word 'revolution' or 'challenge' so fashionable in the fifties and the sixties, it would wear off in the eighties. Some old-fashioned words such as 'transformation' or 'revolution' or even 'change' may take its place. But it is idle to prophesy.

An Indian lawman using the word 'crisis' is, therefore, in good company, even though he may be, characteristically, somewhat late in joining the global bandwagon, and indeed may seem to be catching it just when it is to be abandoned for another. But the book in your hands is intended to be more than an endeavour to keep-up-with-the Joneses. We here use the word 'crisis' with, as lawyers often say, 'malice aforethought'.

Such 'malice' requires that we define stipulatively the very notion of crisis. This is also necessary as the word has been overworked,

and has as a result become merely an attempt to catch the attention of the reader and the relevant policy-maker. But the overuse of the notion has, more or less, defeated even this limited objective, as it is the case of crying wolf too often. We use the word crisis in the sense which Habermas gives to it : "*crises arise when the structure of a social system allows fewer possibilities for problem solving than are necessary for the continued existence of the system*". (1973 : 2, emphasis added). Crisis represents a state of affairs when "members of a society experience structural alterations as critical for continued existence" but at the same time feel that the state of affairs is a kind of "an objective force" that deprives them of "a part of their normal sovereignty". In other words, when people see the need for critical changes, but feel unable to initiate or attain these changes, there arises a perception of crisis. (*Id.* : 1-3). There is a more vivid description of this state of affairs: "We are being threatened with the loss of our capacity to *imagine, prepare and build the future. A crisis is not a situation: it is incapacity to act*" (Touraine, 1977 : 45, emphasis added).

Crises thus represent a "state of consciousness" as well as serious disturbances in the structures of a society, which may have a disintegrative potential. From this standpoint, another benchmark of a crisis state is that

> the consensual foundations of normative structures are so much impaired that the society becomes anomic—crisis states assume the form of disintegration of social institutions (Habermas, 1973 : 3).

Of course, we must accept the fact, even as we talk about crisis in the foregoing sense, that "the notion of crisis is a part of the ideology of the ruling forces". Being so, moving beyond the crisis situations implies only "a reorganization of society from the top down". Perhaps, one should shift the focus from crisis to "transformation" :

> When we speak of transformation, we imply that we are studying the formation of a new cultural field, new relations and new social conflicts. This directs our attention not only to the birth of new social movements but also to the shaping of new forms of power (Touraine, 1977 : 44).

It is possible to study, particularly in India, such "transformation" in relation to law and legal institutions, such a study will focus on interrelations of people's law with the state law in the contexts of justice and development (see, e.g., Baxi, 1976, 1979, 1979). But that is a subject-matter for another essay. Here we prefer to speak of the crisis, in the stipulated sense, of the Indian legal system (ILS).

It should be clear that the notion of crisis is apposite to the ILS. Quite clearly, the ILS, as a normative, cultural, and social system, has repeatedly shown that there are within it "fewer possibilities for problem solving" than are necessary for the continued *legitimate* existence of the system. Equally clearly, people feel that there is a critical need to transform the ILS but they themselves feel unable to initiate or attain such transformation. The ILS clearly shows the "loss of our capacity to imagine, prepare and build for the future" : it symbolizes our incapacity to act. Every chapter of this book reiterates the experience of this pervasive incapacity, whether the substantive domain is that of higher judiciary and the so-called problem of arrears (chapter three), of reform of the police or of prisons (chapters four to seven) or of law reform (chapter nine).

Are there any underlying reasons for the crisis of the ILS? Do they lie within the relatively autonomous domain of the ILS, be it lawmaking, judicial intepretation, or law enforcement? Or, do the basic reasons for the crisis of the ILS relate themselves to the distinctive legal ideology of legal liberalism? Or, shall we look for the symptoms of collapse and the crisis of the ILS in the overall configurations of the polity and the economy? Or, further still, should we look, for an understanding of the crisis of the ILS, to the changing perceptions and fluctuating political consciousness of the people affected by the law?

It is not easy to identify any single cluster of factors as responsible for the crisis of the ILS. The fact remains that many factors have produced the result that we describe as the crisis of the ILS. Chapters 2 to 11 examine the factors distinctive to the Indian law as a relatively autonomous system. In this introductory chapter, it may be worthwhile to look at the broader interfaces between law and political system and law and the economy with a view to deriving some systemic understanding of the crisis of the Indian law and society.

A Crisis of Legitimation of the Law?

Underlying a crisis in the substantive domains of the law is a more pervasive crisis of legitimation. The values and institutions of the law are being continually and expansively challenged. Legality is not legitimacy anymore for the masses of Indian people. The "consensual foundations" of the law as a normative structure are under stress. Both the lawmakers and custodians of the law and the subjects of the law have engaged in what might loosely be termed as the "politics of delegitimation".

The idea that legal rules are binding upon all sections of society has been rejected in practice by the governing elite of the country. Modern India seems to have at least two parallel legal systems: one for the rich and the resourceful and those who wield political power and influence and the other for the small men without resources and capabilities to obtain justice or fight injustice. Normatively, the law is the same for all citizens of India. In practice, the incidence of enforcement of right and liabilities varies depending on the location of persons involved in the socio-economic structure. The evidence for the dual legal system in India is simply overwhelming and some of it is presented in the subsequent chapters of the book. But we may quote extensively Arun Shourie to capture the feeling of the way in which the dual system actually operates:

> Observe how many of these fellows (the powerful and the rich) get the *Hyderabadi goli*. Observe how they get anticipatory bail for the asking. Observe, once the cases start, the innumerable clauses and sub-clauses these fellows are able to invoke in their favour. And contrast all this with the helplessness of the simple tribal who is dispossessed of his land by *sahukar* from the plains, who retreats in the forest and clears some land to keep himself from starving, and who is then arrested for violating the Forest Act.
>
> Contrast the clauses that come to their aid with the helplessness of those who have been languishing in jails for seven years as undertrial prisoners.
>
> Contrast the way in which the law works for them with the way it works for these who, having been acquitted on the charge of having committed a crime, are now facing trial for conspiring to commit the crime for which they have been acquitted.
>
> And while you are at it, count the number of landlords in our vast country who have been sentenced for not paying minimum wages or for exacting a higher-than-legal share of the crop from their tenants.
>
> What does all this tell us about the judiciary, about the legal system? Is he not right then who tells us that "Law is nothing but the convenience of the powerful"? (And incidentally the one who said this was not Mao nor some raving Naxalite, but Gandhi) (1978: 210-11).

It is only to be expected that in a highly unequal society the exploiters will always have an edge over the exploited and that the legal system will, more or less, act as a resource for the dominant interests as a pliant agency of repression of the vulnerable people. Furthermore, it is equally clear that beneficial legislation for the weaker sections will generally be unable to deliver goods for the beneficiary population, and that, at least initially, the dominant interests will distort the channels and goals of redistribution in their favour. All these features are associated with legal liberalism which is an ideology of the law, as we shall see later, eminently suited to a growth-model of development as distinct from a redistributive model of development.

But what is truly striking about India is the lack of respect for rules of law, not just by the people but also by those who make and enforce them. Legalism in the sense of a moral or ethical attitude prescribing that the legal rules ought to be followed because they are rules of conduct is not a dominant characteristic of Indian behaviour and culture. It is not that the Indian people, as distinct from their governors, are unable to develop a strong commitment to legalism. It is rather that both the rulers and the ruled collectively feel that most legal rules do not set any genuine moral constraints to behaviour motivated by strong personal or group interests. Rather, for the most part rules are seen to provide occasions for discretionary manipulation in a complex process of social interaction which is genuinely instrumental or result-oriented. Individual or group self-interest predominates over the value of following rules because they are rules, even if justified and justifiable ones.

The general expectation of people whose pursuit of self or collective interests is jeopardized by legal rules (in a broad sense) is that the rules can be mended in terms of people's specific existential

situation. Of course, the need, desirability and morality of rule-following is conceded but only at a very general and abstract level. At this level, rules are conceded a moral claim to obedience only in so far as they do not affect the pursuit of these kinds of interest. Or, to put it more sharply, the ethic of rule-following is insisted upon in so far as it applies to *other* people, not to oneself or one's group. People who are adversely affected by rules are often heard to say that the particular authority which follows the rule in their cases is arbitrary or corrupt or unhelpful, or more charitably, a freak. An aggrieved individual in India often feels that an administrative action grounded upon legal rules is itself an act of unfairness or injustice; he is ready always to convert the situation as one of *principle*. He usually tries to make his grievance into a sectional or a group grievance, if not a national one. There is, generally speaking, a feeling that those who make and implement rules honestly are strange people: for, the power to bend the rules in their operation is perceived as the *real* power, rather than the power to make rules.

There is no doubt that those who hold power themselves often see their own power in these *very* terms. And the behaviour of those whose authority it is to make rules, and of those whose duty it is to enforce them, reinforces this image almost every day and in every sphere of life.

This phenomenon or state of affairs is itself very complex and the foregoing description of it, even at an impressionistic level, is also rather general and tentative. By the same token, any attempt at explaining it must also be many-sided and complex. So also must be any attempt at describing the results of this state of affairs and at offering prognoses and prescriptions for change in this regard. We endeavour in what follows to generally deal with these aspects.

Clearly, any attempt to understand this phenomenon in terms of single categories will be inadequate, whether it is in terms of Gunnar Myrdal's "soft state" (1967, 1118) involving rather nebulous notions of discipline and community obligations or in terms of 'corruption' or in terms of failing of national 'character', 'integrity', or 'values'. All these elements are relevant; but none of them by itself can explain adequately the low commitment to legalism by the rulers or the ruled. What then are the salient factors to which one may have recourse in understanding

Factors responsible for the Crisis of Legitimation of Law in India

and if possible, explaining this state of affairs?

First, it is quite clear that the Indian political elite and the upper middle classes have not internalized the value of legalism. Most people regard legal rules as irritating inconveniences to be followed only if other alternatives are more irritating, more costly or unavailable. This generates a demonstration effect. If people, who are at the helm of affairs or are rich, resourceful or affluent, do not follow rules when these adversely affect their interests, other people who have to follow rules are likely to do so not because that the rules themselves are justified or legitimate but because they are powerless. They follow rules, which hurt their self-interest, because they have no choice. They too then fail to internalize the value of legalism, even where there is obedience which is mostly not volitional. If a senior Union cabinet minister "forgets" to pay income-tax for a decade, without any corresponding legal action, those who are subjected to legal procedures for comparatively routine delays and defaults are unlikely to appreciate the logic of tax law and administration. If the sons, daughters and relatives of ministers and top executives can jump the queue because of their ascribed status, others less fortunately situated are unlikely to regard the rule-systems relevant to the context as just—whether it is admission to medical courses, or access to jobs or contracts, or quotas or licences or priorities in any facilities. If politically patronized student leaders can walk through university rules and regulations to attain their immediate interests, other students are unlikely to see much justification in the university rule-system and administration. If members of parliament and VIPs can jump the the rail or air reservation queues not just for themselves but for their distant relatives and friends, other commuters (depending on their power) may follow suit, crushing in the stampede the helpless citizen with more genuine needs. When no action is taken against people whom commissions of enquiry have declared *prima facie* liable for corruption in high offices, and when prosecutions are regularly withdrawn on grounds not publicly accessible or debatable, civil servants who are suspended for breaches of conduct, big and small, are unlikely to acquiesce in the justice of the system. (So they clog the courts!) It is pointless to multiply examples.

149

Second, all this has the effect of convincing a large segment of the Indian people that rule-following is not *merely unjustified* but

counter-productive in terms of their interests. The system of behaviour and underlying attitudes and values seem to provide a *disincentive*, rather than an incentive, to follow rules. People are often heard to say that if one is honest in India, one would neither be rich nor powerful nor influential. Rather, one would add to one's own stock of miseries. This often actually happens. And when this does happen, such instances are cited as examples of how the system operates on the unwise, the lack of "wisdom" being adherence to legalism! No doubt, incentives are often provided but these tend to legalize the behaviour which is initially illegal. For example the voluntary tax disclosure schemes, the most recent being the 1976 emergency legislation, assure all tax dodgers a kind of amnesty if they declare their past incomes and pay taxes on them. This produced in the city of Bombay such massive rush that the time limits fixed for such disclosures had to be frequently extended. It was reported that hitherto only eleven medical practitioners in Bombay city had declared their taxable income as one lakh of rupees! (I quote the figure from memory; in any case the number was quite small.) Such incentives are not readily available to those who pay taxes at the very source, through their salary bills! Immunity from the full rigours of law, and its violations, is considered as incentive! How then can a sense of legalism develop?

Third, there is corruption. It is simply a way of getting things done. And this way of getting things done violates on all sides the values of legalism. Corruption, in the sense of illegal monetary gratification, contradicts the very basis of legality; on the other hand, if you have the resources to effect a 'barter', breaking the law is in the short run more worth-while than following it. Corruption of course need not be always monetary. Political influence, promised patronage, coercion and intimidation (e.g., transfer of officials who dare to follow rules rather than dictates), or rank exploitation are all forms of what is generally known as 'corruption. We return to this theme later.

Fourth, and related immediately to the last point, is abuse of power. This erodes the very foundations of legalism, as power is (from an analytical standpoint) nothing but complex of legal rules, principles and standards. Power is conferred by law for specific purposes, within specific boundaries of procedure and substance. It is a basic principle of the rule of law that power can only be

exercised for the purposes for which it is conferred and for no other. And it is a settled rule of judicial interpretation of statutes that the mere possibility of abuse of power by those in whom it is vested cannot be a ground for the denial of the conferral of that power. Surely, abuse of power can be detected and curbed by judicial process, but in nine cases out of ten, judicial process is simply inaccessible for the common man. The problem of access to law is one of the principal themes of this book and is elaborated later in concrete contexts. Here the more general assertion should suffice. In such a context, submission to arbitrary will of the power-wielder or its overcoming by countervailing power or sheer violence is all that remains; in either case, the law takes a back seat in terms of both social consciousness and social organization.

Fifth, the countervailing power—the manner of its organization, the kinds of interest it represents and aggregates, the strategies that are adopted—leads to a further weakening of the logic of legalism. In other words, countervailing power is used either to bend the law to serve group interests (howsoever rationalized) or to change it normatively as well. This last includes not just creation of new legal norms but often also the repeal altogether of certain norms. The typical form which the articulation of countervailing power takes is direct action in all its various Gandhian and neo-Gandhian modalities (e.g. *satyagraha*, procession, strikes, *bandhs*, *gherao*, *dharna*, picketing, fast unto death, etc.) While manifestly non-violent, such articulation very often involves a degree of violence—either on the side of protestors or on the police or on both. Symbolic violence (that is, destruction of or damage to public property) is present in a much greater degree. This kind of protest becomes quite occasionally 'agitational politics'. What is striking about protest as organization or mobilization of countervailing power is that 'agitational politics' is not really confined to trade unions and other associational interest groups; it is beginning to become even a regular feature of the very activities of political parties, including those in power and those in opposition.

There is a fair degree of incidence of participation in protest movements by legislators and political leaders, including nowadays even senior ministers of the Union Cabinet. But even when such legislator politicians are not too often directly involved, it is

now customary to have association of legislators and politicians with citizen group protests. The supreme embodiment of this general trend could be seen in 1974-75 in the Jayaprakash Narayan movement.

We cannot even embark most generally on any analysis of the wide variety of non-institutionalized (and occasionally ephemeral), protest movements. But one thing seems clear. In a sense, such politics of protest often aspires to a politics of delegitimation, even if the delegitimation is not for the political-legal system as such. Rather, what is being called into question is particular policies or legitimacy of persons holding political power or espousing these policies at any given time. One would think that this is the essence of countervailing power in operation. In this sense, it may be true to say that the politics of delegitimation is not radical or revolutionary, barring perhaps that of certain fringe groups, such as the extreme left. Rather, it is in essence only an "expression of subjective discontent and non-class parochial interests within the value-frame of traditional authority structures". Such expressions of power do not constitute "any serious threat to the present political authority except in the form of a law and order problem" (Seth, 1975: 333).

This may indeed be so. But from the present standpoint it is quite clear that the values, ideologies and institutions of the legal system are under constant strain and become more vulnerable in course of time. If the weakening of the law and legal system, and with it of the ethic of legalism, thus arising, is at the same time not accompanied by corresponding structural changes in society (as Professor Seth's analysis tends to suggest) the crisis of Indian law must reflect the pervasive crisis of Indian society and polity.

Civil disobedience movements, as Gandhi proved beyond doubt, delegitimate the power of the makers and sustainers of law. In pure jurisprudential terms, Gandhi's struggle was to replace the colonial *grundnorm*, as a source of validity of all law, by free India's *grundnorm*. But in free India also the struggle continues, and with it the overuse of Gandhian techniques. Unlike Gandhi, those who claim to emulate him are not quite sure as to what they precisely want. The enormity of the consequences of their action goes therefore unappreciated. For example, direct action has brought into question the very legitimacy of liberal parliamentary

structure and processes adopted by the Constitution. It has substantially weakened the claim of the legislators that they represent the people (in any significant sense) and that they are the custodians of the public or national interest. It has not merely influenced the course of legislative and executive action but also often nullified such action. The period 1973-75 saw a culmination of the challenge through civil disobedience movement to the institutions of liberal parliamentary democracy. The response to this challenge was equally fatal to these institutions. We shall examine this aspect more closely later.

But here it is important to stress that the legitimacy—as a relational notion for the rulers and the ruled, (a right-to-command and a duty-to-obey relation)—of the legislative and executive institutions has suffered rather grievously. This trend of erosion of authority marches on inexorably to the third branch of national government, namely, the judiciary. The post-emergency politics (1977-80) is already exposing courts, including the Supreme Court, to pressures of direct action.

Sixth, direct action or politics of protest has sharply exposed the *arbitrariness* lying at the root of law and social policy decisions. Such arbitrariness is clearly manifest to the masses, if not to the theorists of law and legitimation. At the level of theory:

> The law of a society is positivized when the legitimacy of *pure legality* is recognized, that is, when law is respected because it is made by *responsible decision* in accordance with definite rules. Thus, in *a central question of human coexistence, arbitrariness becomes an institution* (N. Luhmann, quoted in Habermas, 1973: 98, emphasis added).

The idea that the law embodies responsible decisions, and therefore, it is legitimate even when it hurts or frustrates one's short-term self or group interests, is naturally not accepted as a *matter of course* in India or anywhere else. But it does not seem even to have been accepted at a general level, even as a matter of principle. For the affected groups, law itself represents an experience of *injustice* in most situations. Hence, they resort to direct action. And protest is no longer limited to the proletariat. Middle farmers and high-caste Hindus have also begun marching in streets in post-emergency India, claiming that redistributive legislation

and policies are *unjust* because they affect their life interests adversely! Doctors, lawyers, and even judges are increasingly resorting to direct action. Usually, such protests pay off: a policy or law is changed as a result, not always, but quite often. Such events recurringly demonstrate that the original policy and law conceptions were *arbitrary* and it is only the politics of protest which injects a belated but massive dose of rationality to policy and law-makers. In all this, what really happens is that the arbitrariness of these in power becomes replaced by the arbitrariness of those who have *superior* countervailing power. The result is that for groups which do not possess superior countervailing power, imposition of law appears a starkly arbitrary exercise. They then obey it when they must; but do their best to disregard it when they can!

Seventh, agitational politics or protest has led to distinctive types of structure for political action. In Clause Offe's terms, "preventive crisis management" (using the word 'crisis' here in a non-structural sense, which we give to it) increasingly becomes the hallmark of political action. The agenda for political action is governed by the danger quotient (DQ) of the problem areas. If a group of demands presents a high DQ for the stability of a system, it will receive priority action; if it does not, demands will receive, in the bureaucrat's idiom, attention in "due course". Offe puts the situation thus:

> In this system, the more gravely the violation of any claim or principle of intervention compromises the basic prerequisites for stability, the higher the level of priority that will be assigned to the corresponding problem area. Conversely, social needs that cannot present a credible case for the dangerous consequences that would ensue (or that they could precipitate) if their claim was ignored lie on the periphery of state action (1976 : 416).

Indian politics offers a paradigmatic case of such type of crisis management. People know that in order to secure political responsiveness to their due claims, they must resort to direct action, and resort to it *dramatically*. Drama arises, given the nature of the media (and conceptions of what is newsworthy), only through defiance of law and order and through deft creation and manipulation of situations of potential or actual violence. Ronald

Segal diagonses this syndrome clearly:

> When fifteen million peasants quietly petition, the Congress leadership cannot hear, and when fifteen hundred rioters loot ships and fire trams, it stirs to respond. Thus, when it should attend, it ignores; when it should measure, it resists; when it should resist, it succumbs (1965: 244).

This vicious spiral gives each regime of government a repressive character, and generates, over times, authoritarian trends in polity, and in relations between the ruling and the opposition political groups. This in turn has its own consequence:

> Because the Opposition is weak, it is ineffective; because it is ineffective, it may resort to direct action; because it resorts to direct action, it may be repressed (Bayley, 1962: 119).

In a sense, the 1975-77 emergency, and the events preceding it, manifested an extreme culmination of this trend.

Be that as it may, the model of politics, conceived and practised as "cautious crisis managment", leads to neglect of "vital areas, social groups and categories of needs that are incapable of generating dangers to the system as a whole". They present, therefore, "a less weighty claim to political intervention" (Offe, 1976 : 417). This must explain the lack of radical legislation, or inadequate implementation of such legislation, in areas which concern groups of people who are unable to generate credible threats of instability (women, unorganized labour, adivasis, low-caste untouchables—as distinct from high-caste untouchables—prisoners, children, the mentally and physically disabled). This may also further explain why *generalized* interests (environment and consumer protection, compensation for injuries caused by state, legal services, etc.) do not capture urgent political attention which is indubitably needed. Despite the command of the Indian Constitution in Article 23, a fundamental right, it took the Indian state twenty-seven years, and a traumatic occasion of internal emergency, to legislate a nationwide elimination of bonded labour, a euphemism for slavery. And it has taken as many years now to focus on the fact that half of Indian villagers, a vast segment of humanity, does not have access to clean, hygienic drinking water! It is unnecessary to provide further, actually dramatic and poignant, examples.

Eighth, the causes for the emergence of this model of political management are many and complex. These have been carefully and imaginatively explored by Rajni Kothari (1976). His account of the reasons for emergence of what he calls the "politics of manipulation" is worth recalling in our context:

> This convergence of the greater edge of legislative and ministerial over the party organization in the distribution of power and the centrality of the bureaucratic apparatus in the system, both being parts of Westminster model of politics, slowly produced a politics of manipulation in which elections became a means more of defining the composition of the elite in an administrative state than of mobilizing the people in an expanding framework of the party system in which more and more people could participate (p. 27).

The politics of manipulation marches along the politics of protest and the politics of preventive crisis management. In this process, genuine tasks of redistribution through law and plan go, by and large, unattended. Law then is seen more and more as a system through which such power-grabbing and sharing is sought to be legitimated. It is increasingly perceived as an instrumentality for the preservation of the *status quo* rather than change, of reinforcing inequalities rather than promoting redistribution. Such general perception may be too gross but it exists as a predominant social impression about the law among the people who are denied a place in the sun for generations, despite constitutional and legislative assurances.

Ninth, and this is rather crucial for a grasp of low commitment to legalism, is the point that the failure of redistribution of resources to meet the basic needs leads also to a situation where the ethic of rule-following is rather hard to inculcate. Where needs, as against wants or interests are involved, legal rules often tend to be irrelevant. One is not here content with the Jean Valjean syndrome, of desperate need for survival which leads to theft of a loaf of bread. Destitution and pauperization, caused by planning and failures in planning as well as by *other* calamities, physical or social, takes myriad forms. Needs, even the basic needs, are socially and culturally conditioned. An enormous range of deviance from rules is in this sense need-based. Begging, prostitution, child-selling, creation

of unauthorized slums, ticketless travelling, pickpocketing, cheating, and even minor violence are all manifestations of *need*. They are also examples of *deviance*! The law, in the lamented Lon Fuller's terms, prescribes the *morality of duty* and *morality of aspiration* (Fuller, 1969). But in India the question is also one of *morality of survival*. A degenerate political and legal system, which fails even to meet the basic needs of the people, and provides a rather impressive account of neglect of distributive tasks (Kurien, 1977) thus invites its own crises. The Indian law must learn to enforce the morality of survival, not by making penal the behaviour of the destitute but rather by imposing the moralities of duty and aspiration on people who are resourceful in order to protect the interests and the dignity of the destitute and the *near-poor* (this expression is necessary since poverty lines are so arbitrarily fixed!).

This does not happen. What happens is this. Every fourth textile worker in Ahmedabad is liable to serious respiratory disease, despite the "safety" standards. No employer in India is under any credible threat of prosecution if he does not pay minimum wages as prescribed. Provisions regarding safety at work in factories lie unimplemented, by and large. Death and injuries because of unsafe conditions of work continue. Money-lending, interest, and debt-relief legislations embellish the normative legal system whereas thraldom continues. Rank and almost genocidical exploitation of adivasis continues under the very panoply of the protective discrimination legislation. Whole populations of the poor are forcibly relocated—this is not a peculiar emergency phenomenon. The plight of the low-caste untouchable is well known. Lynch-justice by caste Hindus and police abounds in the countryside. All this is not journalistic exaggeration. Enough empirical materials exist.

What is poignant is the government's own weak or low level of commitment to the rule of law. The Chasnala mine disaster involving substitute labour, a practice forbidden by law, occurred in the nationalized sector. The Contract Labour (Abolition) Act does not apply to the public sector. The government goes right up to the Supreme Court protesting against compensation awarded to the widows of people killed in accidents while performing government duty and pleads the defence of sovereign immunity! Recently, the State of Haryana appealed to the Court against the decision of the High Court liberating the widow of a person run over by a Haryana Roadways bus from paying court fees (she could not afford this)!

A law passed by the Kerala legislature to provide certain benefits to casual and temporary workers two years ago is still awaiting Union government's clearance. It is not forthcoming because of the apprehension that if this law is extended to central employees a high financial liability would arise, which may be particularly aggravated if this 'contagion' spreads to other States! It took a long time for the employment guarantee scheme of Maharashtra to receive Central clearance. The conditions in Indian jails are a national scandal. It is pointless to go on multiplying examples. (Concrete situations are analyzed in some later chapters.)

But the central point remains. The State and the law will penalize the deprived, the destitute, and the disabled with severity in the title of the ethic of legalism. It would not seriously attend to the tasks of distribution which create the need for deviance in the title of survival.)

The Twilight of the Legitimacy of Law-making Institutions?

We have noted generally the constant questioning of the 'logic' of legislative institutions, includingp arliament. The events of 1974-1977 saw a massive onslaught on the presuppositions of the liberal political order. The movement, spontaneously arising in Gujarat in 1974, and adopted in Bihar under the banner of total revolution, represented a frontal denial of the "consensual foundation" of the liberal institutions. The assertion of the right of the people to summarily recall legislators during the lawful term of the legislatures, as practised and preached, struck at the very roots of the legitimacy of the constitutional and legal order in India. So did the assertion that the then government of India, duly elected under a system of electoral laws, was, a minority government (having secured only 40 per cent of the total national vote) and had, therefore, no title to govern. The demand that the police and the army do not obey illegal orders, perfectly proper though *it was* (and it *is*), introduced an intrinsically anarchic variable in the para-military organization of an essentially colonial police organization (see chapter four), without seeking at the same time any fundamental transformation of that model. The attempt to set "janata sarkars" and "janata police thanas", although quite ineffective, was based on the idea of "parallel government". Underlying all this was a kind of rejection of the basic presuppositions of the liberal constitutional polity and law. The political sovereignty of the people was

now to be converted into a legal sovereignty. *Lokshakti* and *Lokniti* were to be the basis of statecraft; the assumptions relating to the balance of power between the governors and the governed were rudely shaken.

The context in which the foundations of the polity were thus revisited and sought to be recast is of prime importance (see Kothari, 1976; Shah, 1977; Seth, 1975; Segal, 1965). We will not however, burden this chapter with a detailed account of the context, which is now readily available. But it is clear that the crisis of "representational democracy" had its roots in the Indian political economy since 1965 (Kothari, 1976). This crisis had grown with the growing disenchantment of some politicians and people with the Congress and its policies and programmes. Jayaprakash Narayan's programme for total revolution included major transformations of the system, involving a reform of electoral law, of education system, of the executive (total elimination of corruption, people-oriented efficiency), and other related items (decentralization of power, people-oriented planning, etc.). How all this was to be accomplished was not clearly spelt out but the demands were voiced with escalating stringency, and impatience, backed by credible threats and performance, of direct action and protests.

The tensions involved found expressions not just on the streets but also in parliament. Morarji Desai was led to deliver a threat of civil disobedience within the Lok Sabha if the documents in the Tul Mohan Rao case were not disclosed, disregarding the government's claim of privilege and secrecy concerning the Central Bureau of Investigation reports. This kind of move was new and unparalleled; and it marked the culmination of disenchantment with parliamentary processes in a one-party democracy. But in the process the very bases of parliamentary functioning were exposed to a serious symbolic challenge.

Coupled with this was the claim concerning the minority status of the Indira Gandhi government. This claim altogether disregarded the existing positive law. The election law, valid under the Constitution, had (and still does) produced a situation in which a party that secured less than 51 per cent of the national vote could form a national government. But in parliament and outside of it the charge was indefatigably raised that the government was a minority government and had, therefore, no title to rule. This claim was not limited to the opposition groups. Even such coordinate branches

of the national government as the Supreme Court of India withheld legitimation from the government and parliament. In denying parliament (quite rightly in the present opinion, but for other reasons) the power to altogether rewrite or alter the Constitution, some justices of the Supreme Court went so far as to say:

> . . . our Constitution was framed on the basis of consensus and not on majority votes. If the majority opinion is taken to be the guiding factor then the protection given to the minorities may become valueless. Therefore, the contention on behalf of the Union and States that two-thirds of members in two houses of Parliament *are authorized to speak on behalf of the entire people of this country is unacceptable.* (Kesavananda at 481; per Hegde and Mukherjee, JJ, emphasis added).

What is being said here in plain prose is that the Congress (R) which won 350 seats in the Lok Sabha was in effect not representative of the people since it won only 43.04 per cent of the total national vote, and in this sense it was a minority government (see for further analysis, Baxi, 1980). It is doubtful whether any summit court in the world has ever gone thus far in challenging the legitimacy of the elected majority in parliament.

The second critical component of delegitimation of the basis of legislative institutions was the attack on the electoral law and system. Jayaprakash Narayan sought a new system of elections for India. Such a system will have as its aim making it *impossible* for "unscrupulous persons to deceive people again and again, to misguide them by monetary inducements, by arousing caste and communal prejudices and such other means". He sought the scaling down of expenses on elections drastically so that "poor men—labourers, kisans and such others" can "compete as candidates". He even wanted freedom for the electors to *sponsor* their own candidates. It would be, he said, "a considerably more democratic method if people's candidates are sponsored by the mass meetings or by the students' and people's Action Committees in the context of the current Bihar movements" (quoted in Nargolkar, 1977: 34-35). Thus, the challenge here was not to the electoral system alone but, in a sense, to the *party* system. In the event, not just the then ruling party but the political components of JP's movement were lukewarm towards some of his basic ideas. Yet it is clear that

these ideas provided the symbolic (and emotive and to some extent even radical) potential. The demand was clear: "We have, here and now, a right to recall our legislators as a body." To this extent, then, a right or power denied to the people by the Constitution was the very basis of the movement; if the Constitution did not provide for it, it should be amended to provide for it.

Obviously, this demand struck at the very roots of parliamentary democracy as constitutionally conceived. In that vision, people have a right to periodically elect their representatives on the basis of adult franchise and then if governments become repressive, to protest against them. In other words, people are given the right to choose their representatives, and to *influence* them. They can *mend* them in between two elections; but they are forbidden to *break* the institutions of legislature. The movement denied this logic. It insisted that people's representatives are not merely so because they have been *initially* returned in an electoral contest. In order that they continue to be representatives, they must seek continually legitimation from their electors and the latter could at any time withdraw it.

The 'right' to recall had its policy and moral justifications. The central idea was that the title to govern came from the consent of the people, that people give their consent on the basis of the belief that their representatives would pursue the common good in a morally justified manner (in the sense of means-end relationship), and that the representatives were, in effect, representing the power of the people (*lokshakti*), not the power of political parties or their own. This was a very fundamental challenge to the inherited ethos of the system of parliamentary democracy embodied in the Constitution. It challenged the very system which produced law; it threatened the existing system, with its justification, of distribution of power, and its management.

To all this was added a peculiar historical twist, involving the judicial process. The Allahabad High Court verdict in Indira Gandhi's election case exposed dramatically the fact that the law was no respecter of persons or offices. It demonstrated that the judiciary in India was capable of considerable immunity from political pressure. The law has been called "draconian" and the breach of it by Mrs. Gandhi "technical" and "venial", not just by her and her supporters but also by the Supreme Court in the hearing of her stay petition (see for a detailed account, Baxi, 1980).

On this point opinions might vary. But the central point here involved commitment to legality by no less a person than the Prime Minister of India. In a system which generates a very low level of everyday commitment to legality by the governing elite this was certainly a situation in which one was not really entitled to a display of valorous regard for the requirements of the law.

The imposition of emergency in 1975 was justified by Mrs. Gandhi and the government in the name of democracy, which here must mean representational democracy. Of course, a mid-term election would also have served the same cause and much better; obviously, the dynamics of the will to power cannot be minimized in this context. But what is important is the perception by both the opposition and the ruling party that the liberal democratic institutions were fast losing their legitimacy. This perception, as we have tried to show, was at the very base of total revolution; paradoxically, it was also at the very base of the imposition of emergency.

It was during the emergency that the negative face of the law became menacingly clear to the middle-class urban Indians, including the intelligentsia and the politicians. The negative face of the law confronted and haunted millions of impoverished Indians ever since and even before, the advent of independence. The urban middle classes began to realize for the first time, and rather vividly, that the dominant institutions of the state—legislatures, parliament, bureaucracy, and even the judiciary—had become subservient and marshalled to reinforce the power of a few, which come then to be used for a variety of ends, and with a variety of means, and to produce some good and some bad, some sensible and some sinister, results. It was during the emergency that the Indian Constitution came increasingly to be called a "statute" and was treated as such, rather than as a basic law immune from volatile changes; for twenty-five years the votaries of parliamentary sovereignty in matters of basic constitutional changes (which included *all* shades of political opinion) had paved the way for this symbolic and real demotion of the Constitution to, more or less, a mere heap of paper. The institutions of detention and prison which the liberal legal order had permitted, with active political and public opinion in support (certainly in the case of Naxalites, and generally the poor), to centres of sub-human existence and variegated torture for political opponents and downtrodden people came handy during the

emergency regime. Theorists who mouthed borrowed wisdom of Gunnar Myrdal and incessantly talked about the "soft state" in the sixties and the seventies, now suddenly saw, and even suffered, the silhouette of the "hard state" emerging. And they did not like what they saw. People who earlier felt that judicial review was undemocratic, and in any event urged the Supreme Court to exercise judicial self-restraint, now suddenly turned to it and the judiciary for succour in the hour of their distress. In other words, there arose a yearning for the revival of a liberal democratic utopia. That is the paradox of the emergency: the very failure of the liberal democratic system which brought India to the doorstep of an era of an authoritarian regime was the very era in which most people yearned for the order of the things which they were incessantly dissatisfied with and critical about. While it is in a sense a tribute to the deep spread of liberal ideology that the sixth general elections were called and held with such politically spectacular results, it also remains necessary to note that the underlying crisis of law and state which led to all this recent history continues unabated. If by development we mean social learning, the potential of law as a legitimator of authoritarianism and even tyranny should become an important, and even a central aspect, in thinking about alternatives in development. The events since March 1977 provide a massive testimony of reversion to the old order conceptions and presuppositions of liberal democratic order. But reinstitutionalisation of representational democracy is unlikely to be anything more than a happy interregnum to another era of a "hard state", if it is unaccompanied (as is the case now) without any serious thought on the crisis of the political and economic systems (see Kothari, 1976; Kurien, 1977). To these, we add the need for serious thought on the models of legal liberalism and their disfunctionality for redistributive change (that is what development means, or ought to mean). We conclude this chapter with a general analysis of the legal liberalism model in the context of the crisis of Indian law to which the rest of the book is devoted. But a preliminary note on governmental lawlessness is in order.

Governmental Lawlessness

The state's weak commitment to the rule of law values (or substantial justice values) is one aspect of the problem. The other is the state's own inability or unwillingness to obey the rules that it itself

makes. This latter may well be called "governmental lawlessness". Obviously, the duties imposed by law on the government in general and specific agencies in particular are so vast and varied that one may expect considerable governmental deviance from rules as a structural property of the ILS. But even conceding this (a concession not made, in strict law, either for the state or for the citizen), it remains important to stress that high visibility governmental lawlessness contributes to weak sense of legalism among the people.

Governmental lawlessness may take many forms. Governmental lawlessness in the shape of corruption, nepotism, and abuse of power provides a category so large and varied that it might well be a subject-matter of close analysis, even in terms of our present concerns as having an adverse impact on legality. But some broad features and areas need to be mentioned here. Corruption weakens the sense of legality of the Indian people at two distinct levels: at the level of what Myrdal calls the "folklore of corruption" and at the level of "facts of corruption" (1968 : 940-41). The "folklore of corruption" refers to "people's beliefs about corruption and the emotions attached to those beliefs, as disclosed in public debate and in gossip". How these beliefs, and emotions affect both the manner in which "people conduct their private lives and how they view their government's efforts to consolidate the nation and to direct and spur development" should, Myrdal recommends, be an important area of study. From our present point of view, it remains exceedingly important to empirically examine how such beliefs and emotions affect the institutionalization of legalism (as ethic of rule-following) as an integral aspect of development. But in view of the facts of corruption which we now broadly survey, it may be said, even without the benefit of such research, that corruption is generally perceived as an aspect of governmental lawlessness. When the givers of the law, the holders of legal power and authority, and the dispensers of the law are *apperceived* by the bulk of the affected as well as by the general populace to be themselves lawless in their everyday interaction with the affected people, how can one expect strong commitment to legality among the subjects of a legal order?

We conceptualize corruption in the broad sense as involving abuse of public power for individual and for political gain. As early as 1964, the Santhanam Committee highlighted the massive corruption prevalent in all areas of governmental activity. These

included executive corruption at all levels—particularly in matters relating to "all contracts of construction, purchases, sales, and other regular business on behalf of the Government", and "transactions relating to obtaining of quota certificates, essentiality certificates, licences and their utilization". Even in routine matters of transport of goods by railways rampant corruption was found in such matters as "allotment of wagons and booking of parcels, particularly perishables" (1964: 254). The Committee also noted that corruption played a large role in tax avoidance and evasion and that tax "so evaded and avoided is kept as unaccounted money", one of the uses of which was to bribe further the executive agencies in all contexts (p. 271). The Committee was deeply distressed to have to record the possibility, on the basis of available information, that "corruption exists in lower ranks of judiciary all over India and in some places it has spread to the higher ranks also" (p. 108). What is known as "speed money" is now an aspect of daily relationship between citizens and holders of public power in all domains because of the "dilatoriness" and "delay" in the "procedures and practices in the working of Government" (*Id.*, 2-10).

Raising of election funds for political parties, especially the ruling parties at the Centre and the State levels, involves a variety of mechanisms which directly violate relevant laws and rules. To some extent, the existence of what is called "black money" or "parallel economy" (as identified, for example, by the Wanchoo Committee) must, by definition, involve more than a failure of the relevant agencies to cope with individual and organized deviance, self-conscious and "authorized" breaches of complex sets of legal rules. There is mounting evidence of abuse of power in the various commissions of enquiry against holders of political power and ministries (see, e.g., Noorani: 1974).

Of course, corruption is a complex socio-economic phenomenon, with its structural causes, consequences, and cures, even a preliminary review of which is beyond the scope of the present work. It is sufficient for our purposes to note that this aspect of governmental lawlessness is so widespread and structured as to contribute to the process of the growing tendency of erosion of the notions of legality and the rule of law, both in the sense of lawyers' law and in that of substantive justice (see Stone, 1966: 621, for this distinction).

(2) The second aspect of governmental lawlessness is manifested often in governmental directions to the bureaucrats that, the provisions of enacted law may be disregarded, sometimes even at the point of sanctions within the bureaucratic structure. While the law is categorical on the point that "an administrative instruction cannot be permitted to interfere with, or prevail over, statutory provisions" (Jain and Jain, 1973: 90), such directions are quite frequently issued and they quite effectively prevail over the statute for the simple reason that not all these can be brought for judicial scrutiny. The governments are not fully conscious that they are *under* the law, not *above* it. It is, for example, well known to students of agrarian relations that directions which are contrary to the law have been issued to suspend the operation of the relevant land reform laws. One dramatic example of this should suffice. Wolf Ladejinsky has quoted the directive issued by the Bihar Revenue Secretary on 12 August 1964:

> Reports have been received that in spite of clear instructions some field officers and staff have started recording under-raiyats (tenants). *This should stop at once.* Until further orders no work relating to recording of under-raiyats should take place during the Drive (special drive for the recording of tenants) period. Even preliminary work . . . should be kept into abeyance.
>
> Circle Inspectors and Karmacharis (village accountants) should be specially *warned* to follow these instructions closely. Persons found violating these instructions will be seriously dealt with. Treat as most urgent (1969: A 159; emphasis added).

The use of administrative direction to statutory authorities is common in the routine governmental contexts. Even officials who are entrusted with the task of deciding disputes between the state and the citizen are required to act under departmental directions, often not wholly consistent with the letter and spirit of the law, and sometimes even in contradiction to the law declared by the courts including the Supreme Court of India. For example, the revenue department of the governments—especially sales and income-tax as well as excise and customs—often receive circulars from the ministries requiring them to place favourable interpretations on specific provisions. Such directions frequently extend to senior officials

such as assistant commissioners in particular departments. Administrative directions affecting revenue administration in the countryside appear to be the rule rather than the exception.

Such directions also operate at the level of law enforcement, especially in the police organization and the executive magistracy. But this was a fact which was realized by the middle-class Indians sharply only during the 1975-77 emergency. Police arrested people on blank and standardized warrants, and very often without them. Magistrates refused to grant bail or sureties and unreasonably delayed the process too. They (in these, and a host of related matters) acted under directions that are contrary to the law of land. The "weaker sections of society" (as the constitution so solicitously describes the majority of Indians) have been long aware of the facts of motivated law enforcement before, and since, independence.

The power to act outside of the law can be used for good causes as well as for bad causes. An example of the former is the Chambal valley dacoit operation, first led by Acharya Vinoba Bhave and later, almost ten years after, by Jayaprakash Narayan. The dacoits who ultimately surrendered (in what still remains the most important and sadly neglected sphere of Indian criminology) were "proclaimed offenders" and wanted by the police. The Vinoba mission had no basis in law, and in effect violated several provisions of the Penal Code and the other laws. The law, as it stood, would have required Vinoba's prosecution on several counts. Obviously, this would have been absurd even to contemplate. But as the then Inspector-General of Police for the State of Madhya Pradesh, K. K. Rustamji, used to point out, the whole of the proceedings not merely violated the law of the land but also confused the entire police organization as to its proper role (see Bhaduri, 1972: 85). The entire operation violating at many points the principle of legality was based on a series of administrative directions and understandings. Neither the government nor parliament thought of providing a statutory basis for the Vinoba operation in Chambal. Instead, the law was suspended by agreement among the government and the party leadership. The fact that the results turned out to be so spectacularly good (in the very short run) cannot in itself justify the extraordinary departure from the principle of legality and notion of legalism. That all this occurred in Nehru's India also testifies to the general trend of belief that ends justify the means, even if the means

158

84

involved entail departure from legality. This trend began quite early in independent India.

The third dimension of governmental lawlessness in India is to be found in the systematic discriminatory law enforcement practices and policies. While selective law enforcement is a structural property of all legal systems, since no set of laws can ever be enforced 100 per cent, it remains true to say that there is considerable arbitrariness in the matter of exercise of investigatory and prosecutorial powers of the enforcement authorities. The incidence of being caught in the network of law enforcement is high for the penniless and the poor as distinct from the rich and the resourceful. We have already referred in this chapter to some aspects of this situation. But some additional everyday examples should suffice. It is common knowledge that the incidence of prosecution for adulteration of foodstuffs falls unevenly on small vendors and traders compared to manufacturers, wholesalers, and organized retailers. The milkman is more likely to be caught for mixing water with milk than the organized retailers in Connaught Place or Karol Bagh of Delhi! Even the Supreme Court of India, and many High Courts, have often referred to the dual standards of law enforcement in these matters. In excise and prohibition offences, as well as in anti-smuggling drives, the bulk of the people who get caught and convicted are the middlemen: that is, unemployed youth and often young children who out of need or intimidation are conscripted into a life of bootlegging and smuggling. The barons and tycoons are rarely caught. The captains of flourishing parallel economy, which finances elections and looks

Year	*Number of successful searches*	*Number of prosecutions launched*	*Number of convictions*
1965-66	293	1	-
1966-67	186	4	1
1967-68	106	8	3
1968-69	79	31	7
1969-70	169	27	6

(See Roy, 1973: 74).

after the occasional needs of the political parties and individual politicians, are more or less immune from harsh legislation. The Wanchoo Committee disclosed the information in the preceding table in regard to the administration of tax laws, which speaks for itself.

On the other hand, law enforcement is rather vigorously active on thieves, pick-pockets, vagrants, beggars, ticketless travellers, slum dwellers, rickshaw pullers, hawkers, *adivasis*, untouchables, and landless labourers. In order to get a vivid impression of differential justice in action one has only to observe for a while any central intersection at peak hour traffic in the capital city of India. Cyclists daring to go across an amber light are slapped and beaten for violating the traffic lights; in addition, more often than not, the tyres of the cycle are deflated. All this happens while fiats and ambassadors, trucks, and Delhi Transport Corporation's buses rush through with comparative immunity in amber to red light change. What happens to such cyclists is anybody's guess—they may get late for office or work, exposing themselves often to disciplinary action for habitual late-coming. The same cyclists, when they follow the rules of traffic, may be run over by speeding trucks and cars, without any compensation and without, by and large, exposing the drivers and owners of the offending vehicles to any credible risk of prosecution.

Even the judiciary has dual standards of justice. It has been frequently demonstrated in High Courts and also the Supreme Courts of India that sentencing varies with the class background of the offender (see Raizada, 1975). Justice Krishna Iyer of the Supreme Court of India has in his judgments and extra-judicial utterances often called this as a "soft justice syndrome" (1980). Quite recently, Justice M.P. Thakar of the Gujarat High Court issued a *suo moto* process to the State when he read a newspaper report of how a rickshaw puller was fined Rs 300 for the offence of wrong parking! The facts were startling. The man was initially fined one hundred rupees. When he protested at the stiffness of the penalty, it was raised by a like amount. When he protested further, and implied that he could not get justice at the court, his fine was raised to Rs 300! Justice Thakar reduced the fine to five rupees and directed the lower court to refund the balance to the rickshaw puller and in the process lamented on the dual standards of justice for the rich and for the poor. This was indeed commendable. But one can count on one's fingertips the number

of appellate justices who read their newspapers so carefully as to discover the incidents of such injustice and use their wide judicial powers to rectify them.

(4) From the third feature of governmental lawlessness arises the fourth one: namely, the emergence of a privileged class which is virtually beyond the law. This class includes not just the rich and the resourceful but also those who belong to the political parties and to certain sections of the bureaucracy. This class is almost impervious to law enforcement. Of course, there are prosecutions for the members of this class but they happen only when they fall out of political grace or power. The privileged class publicly repudiates legality and the rule of law. They are people who are virtually above the law. What is striking about the composition of the privileged class is the fact that incumbent ministers, representatives of the people at the highest policy-making level, also claim immunity or exception from the law and the rules. A union minister refused in 1977 to be quarantined when he returned from abroad without the necessary health documents. More recently, another union minister refused to be 'frisked' at the airport security checkpost, perhaps on the thesis that ministers represented the security of the state. Ministers frequently owe huge sums to the telephone department with their telephone connections intact. Houses for legislators are frequently sub-let contrary to rules. Similarly, the captains of industry and of 'parallel economy' enjoy immunity from the legal system; when, by adverse political climate they happen to be state guests in Indian prisons their treatment is royal compared with the treatment which the ordinary prisoners get (see chapter six). Certain national leaders also enjoy immunity from the law. When they resort, for example, to fast unto death they are not force-fed by the police at public hospitals as happens with small men daring to invoke this technique to get their grievances heard or settled! The existence of such a privileged class is by itself the negation of legality and the rule of law.

(5) The fifth kind of governmental lawlessness is rather peculiar to India. This involves default by the governments in the implementation of their statutory obligations. For example, many states have inadequate or skeletal staff for the enforcement of the Minimum Wages Acts; the requisite number of factory inspectors who will achieve the objectives of safety at work under the Factories Act is almost always absent in all states. Very few vigilance and rehabilitation committees have been created under the Bonded Labour (System) Abolition Act, 1976: nor have the powers of the government under the Civil Rights Protection Act, 1976, to levy collective fines or to proclaim certain areas where untouchability is practised at its virulent worst, have yet been exercised, despite recurrent 'atrocities'. Sometimes, the very operation of the laws made by the duly elected legislatures is stayed: this is often the case with the agrarian reform laws and also the urban land ceiling legislation, to mention but two prominent examples. As if all this were not enough, the executive retains and abuses its discretion to bring certain legislations into force paradigm case in point is the abeyance for well over seven years of the Hire Purchase Act, which has received the assent of the President, and which has yet not been brought into force! (see chapter nine). Very often, the central executive, which has to consent to some state bills, takes a very long time, extending to one to two years! All this is scarcely conducive to the growth of legalism and the rule of law values.

Structural Antinomies and Contradictions in the Indian Legal System

All legal systems embody and manifest antinomies and contradictions in their normative, institutional, and cultural dimensions. These arise not just from the opposition between legal rationality and substantive justice, a feature which is fairly universal to law. Rather, the legal systems of post-colonial societies manifest certain distinctive antinomies and contradictions. These are inevitably built into the 'original position' of constitution-makers in an ex-colonial context. They have to choose between historical continuity and revolutionary breaks with the past. Problems arise when clear choices are avoided in favour of constitutional eclecticism. The Indian Constitution is a case in point.

First, normatively, the Constitution envisages a revolutionary break with the past. It projects a vision of the desired social order based on the values of equality, fraternity, liberty, dignity, and justice. But in all vital matters of the architecture of the legal and administrative institutions of the state (including law-making, law enforcement, and adjudication) the ILS retains considerable continuity with its colonial past, as we have tried to demonstrate in subsequent chapters. *Second*, in the ordering of principles of distri-

80

bution of political power, the Constitution stresses decentralization of political power through the principles of federalism. But in actual practice, the institutional operations of the ILS are pre-eminently marked by centralization of political power inimical to the growth of genuine federalism or even a genuine two-party system. These are totally frustrated by the inability to develop any set of restraining conventions on the constitutional power of the Union of India to declare President's Rule in the states and to impose emergencies. While the Constitution assures mechanisms of decentralization of power to local self-government and village institutions, the normative law and the institutions of law in operation ensure subordinate and low status to the grass-roots institutions of politics, administration, and adjudication as is tragically illustrated by the history of panchayati raj institutions and nyaya panchayats (see chapter ten). *Third*, the Constitution and the law have generally strong redistributive thrust; the orientation of the major institutions of the ILS is towards maintenance and even aggravation of the *status quo*. The legal institutions generally decelerate and even prevent the inherent dynamism of constitutional aspirations towards a just social order.

Fourth, while basic model of the Constitution and the ILS is legal liberalism, the ILS in its institutional dimensions displays weak adherence to legalism and the justice values of the rule of law. Indeed, in its operational aspects, the ILS betrays the broad conception of a socialist society in India by being continuously instrumental in promoting the values of the bourgeois legal order.

Fifth, the constitutional values of equality, fraternity, liberty, justice, and dignity have all been to some extent overrun by the culture and the working habits and styles of the major institutions of the ILS. The contradictions and antinomies that arise, in effect, represent the symptoms of the overall malaise. The institution of preventive detention itself authorized by the Constitution provides a good example. The ILS has managed the coexistence of preventive detention system (PDS) over a long period of time with the fundamental right to personal liberty. In fact, the preventive detention legislation has been increasingly used not just to deny fundamental rights to political opposition but also as a parallel legal system in aid of the criminal justice system (CJS). To the extent that the CJS is supported by the PDS, it proclaims its own bankruptcy. People who ought to be tried and punished in the

CATEGORY	CJS	PDS
Object	*Social Defence : Repression*	*Repression : Social Defence*
Models of Justice	Due Process : Maximal and Optimal	Minimal due process
Strategies	Investigation, Prosecution, Appellate Judicial Review	"Jurisdiction of Suspicion", executive satisfaction, peripheral judicial oversight
Models of Adjudication	Professional	Lay; at best mixed professional (i.e., executive) adjudication, with advisory boards
Patterns of Power-sharing and Dominance	Court pre-eminent. At best, courts strictly legalistic, and pro-accused. At worst, courts engage in "politics of accommodation" with other branches of the state	Executive pre-eminent. Legislative (i.e., executive) nullification of prolibertarian aspects of judicial decisions. Politics of co-option (judges on advisory boards).
Style and Attitudes	Balancing of interests, consciousness of social visibility of decisions.	Short-term problem-solving by the executive. Low social and political visibility in normal times.
Justice Costs	Miscarriage of Justice, class bias, Social Defence cost	Freedom costs (double jeopardy), Political costs (vendetta, repression), Blunting the sense of justice
Benefits	Retention of structural *status quo*. Marginal achievement of social defence.	The same
Values pursued	Justice within the logic of bourgeois legal order	Efficiency within the same order

normal course of law enforcement tend increasingly to be preventively detained. These practices continued almost for three decades at the level of an all-India law. We have a temporary respite with the repeal of the Maintenance of the Internal Security Act (MISA) which played an important role in the subversion of constitutionalism during 1975-77. But some states have preventive detention legislation; there is also a Central statute on preventive detention for smuggling. Before long, unfortunately, preventive legislation is likely to be revived also at the national level. The chart delineates a general description of the salient features of the two systems.

Sixth, the Constitution and the normative law allow and structure articulation and aggregation of demands, the institutional aspects of the ILS restrict and even prevent the elementary forms of access to law : access to legal information, to courts, and to law-making bodies. Access in the more refined sense of community participation, structures of securing accountability in the exercise of power is, more or less, systematically denied, save through massive eruptions of direct action or politics of protest.

Seventh, there has been a marked failure to develop an unwritten Constitution in furtherance of the aspirations of the written one. Conventions, which play a large role in supplementing the Constitution and its underlying assumptions, have just failed to develop. Although over-written, the Constitution is necessarily silent on matters which can only properly develop through a framework of tacit conventions. The failure to develop conventions in regard to such matters as appointment of the Chief Justice of India and appointment and transfer of judges, the imposition of President's Rule in states, declaration of emergencies and their continuance, defections, and election expenses tend to create continuing uncertainties and dilemmas in the ILS and in the political system. Even the convention that the supreme document setting the broad outlines of the distribution of power and the mechanism of the polity should be amended only through political and national consensus has not taken any roots in India. The result is that there are very few set rules of the political game.

Eighth, the symbolic use of the law far outweighs its instrumental use to achieve social change. It is often assumed that the demands of redistribution, in pursuit of constitutional values, are fully met with the enactment of a law and creation of some, even if not fully supportive, structures of bureaucracy. This has the

tendency to create a profusion of legislative assurances and promises with only minor tangible and concrete ameliorative change.

Ninth, the talismanic use of the law produces complex results. Notoriously, most change-oriented laws designed to further social and economic transformation turn out to have rather limited efficacy, at least in the not-too-short-run. They do not bring about optimum behavioural compliance, much less changes in attitudes and values. This, in turn, affects the symbolism of the law and its processes generally; and erodes, in the long run, the legitimacy not merely of the law but of its makers and upholders as well.

Tenth, a related aspect, the attempt to use the law to initiate and accomplish planned change is, in basic respect, a 'bootstrap operation' for the developing societies. Glib talk of the potential of law for development simply overlook that substantial economic and social costs have to be borne in order to make the law an effective instrument of social change. Resources have to be constantly and consciously allocated to the making of law (which is not just a matter of copycat drafting but of relating change aspirations to obdurate social realities by a painstaking grasp), its dissemination, creation of supportive structures (mobilization through public opinion), favoured interpretation systems (courts, tribunals), adequate implementation/enforcement systems, continuing social audit of the operation of the law and ongoing repair and reform jobs. All this requires a rather substantial investment of manpower and money. Noticeably however, the net outlay of national budgets for administration of justice, legal enforcement and supportive structures is low, if not miniscule.

Very often, political elites want just this: a veneer of change over the substance of the *status quo*. Most changes sought to be ushered in the law are such that they only nominally, if at all, affect the dominant patterns of distribution, and management of distribution, of power in society. But even for elites, who somehow manage to transcend their class base, and for whom recourse to law for social change may not be chicanery and ritualism, the problem of the use of law for developmental purposes *may well be an aspect of underdevelopment itself*. In other words, even where the fundamental drive of developmental effort may be to reduce poverty, such effort itself continues to be affected by the very context of poverty and scarcity at every level (Baxi, 1976a : 38-94). We thus have to ask in contexts like India not merely whether the

182

86

law can affect changes in the lives of the poor but also how far poverty itself affects initiation and accomplishment of ameliorative legal changes.

Legal Liberalism

Understandably, the polity of a liberal state adopts liberal criteria of legality. The model of legal liberalism, evolved in the West over centuries, was extended in a piecemeal manner to India during the colonial period. And independent India has preferred to rely on and to some extent even to rework, this heritage.

The basic components of liberal legalism have been seminally elucidated by Max Weber. These are as follows: *First*, legal liberalism is essentially positivistic in the sense that it postulates that whatever is promulgated as a norm by those having legal *competence* to do so, and in accordance with prescribed procedures, is law. *Second*, the legal norm may be established "by agreement or imposition, on the grounds of expediency or rational values or both". But howsoever established, on whatever principles, legal norms "lay a claim to obedience" from those subject to political authority. *Third*, "every body of law consists essentially in a consistent system of abstract rules . . . ". Administration of law consists in "the application of these rules to particular cases". *Fourth*, the norms of law bind the authorities as well the subjects of law. The law-maker is subject to an impersonal order of norms which will structure and confine his authority. *Fifth*, obedience to law is also impersonal: that is, the person who obeys it does so as a citizen (in his capacity as a member of a 'corporate' group) and "what he obeys is only 'the law' ". Obedience is owed not to persons in authority but to the "impersonal order". Hence, it follows "that there is an obligation to obedience only within rationally determined authority" which has been conferred "in terms of that order" upon certain persons (Weber, 1947: 324-36).

The model of legal liberalism also stresses the relative autonomy of the legal order from politics, economy, and administration. Weber sees clearly that the law is autonomous at four distinct levels, now sharply formulated by Unger. Law is substantively, institutionally, methodologically, and occupationally autonomous. It is substantively so when its norms "cannot persuasively be analyzed merely as a statement of any identifiable" set of economic, political, or religious beliefs. Law is institutionally autonomous "to the extent

that its rules are applied by specialized institutions whose main task is adjudication". Methodological autonomy of law can be seen in the special types of reasoning and justification adopted by legal institutions compared with the other institutions. Finally, law is occupationally autonomous when a specialized group of people ("legal notables", as Weber calls them) "defined by its prerogatives and training manipulates the rules, staffs the legal institutions, and engages in the practice of legal arguments". (Unger, 1976: 53).

This conception of the law and legality contains key elements of liberal legalism (see, for a different description, Trubek and Galanter, 1974: 1062). It stresses the impersonality of power and obedience. It seeks to confine and structure this power of the state over individuals and groups through the notion of abstract formal rationality of law; the law prescribes concepts and procedures through which only the authoritative legal decisions could be arrived at.

The antinomies between the formal and the substantive rationalities of law need to be 'managed' somehow by governing elites of every society. It is clear, as Weber emphasizes, that the propertyless classes, in particular are *not* served, in the way bourgeoise are, by formal 'legal equality' and 'calculable' adjudication and administration. The propertyless demand:

> that law and administration serve the equalization of economic and social opportunities vis-a-vis the propertied classes, and judges and administrators cannot perform this task unless they assume the substantively ethical non-formalistic character (Weber, 1947: 354-55).

But if substantive rationality (ideologies or theories of justice of specific decision-makers), is followed, and dictates of formal legal rationality are disregarded, there arises the "likelihood of absolute arbitrariness". The very point of formal legal rationality, however, is to avoid arbitrariness from the exercise of power, to structure and constraint the power of the state. That is why the formal legal rationality is prized not only by the bourgeoise, whose political and economic interests are furthered through it, but also by the interest groups who on "ideological grounds attempt to break down authoritarian controls" (*Id.*, at 229).

The manner in which legal liberalism attempts to cope with the antinomies between formal and legal rationality of law is, basically, by attempting to convince the propertyless that the legal order is fundamentally *just*. This is sought to be done by several means.

First, legal liberalism is characterized by progressively equal distribution of legal rights to people. This is essentially achieved by declarations of fundamental rights. But the political and economic systems carefully structure and limit the effective pursuit of these rights. For example, property qualifications for contesting elections are removed by the Constitution but the electoral system and the party organizations ensure, by and large, that the propertyless are not in a position to contest elections. In the liberal experience, it has been increasingly demonstrated that a *de jure* unequal distribution of rights (*e.g., apartheid*, slavery, franchise restrictions, etc.) leads, ultimately, to attacks on the legitimacy of law, and on the authority of its makers. But a *de jure* grant of equal right coupled with a *de facto* regime of inequality helps also to depoliticize consciousness (Balbus, 1973: 6). The stable 'neutral' framework of legal rights helps the "bourgeoise class interests in capital accumulation to flourish by constantly creating a *conviction* among the propertyless that they have the legal right and hence the real opportunity of rising into bourgeoisie. When the rights of economic entrepreneurial activity are open to all, and are tied to the legal right of expressing economic grievances politically, it is indeed difficult to persuade the aspiring workers and other poor that the system is *fundamentally unjust*" (Balbus, 1973: 8, emphasis added).

Second, the liberal legalistic ideology propagates the notion of the rule of law, a notion of enormous symbolic impact. This notion is an important legitimation input in the liberal order. In one sense, it simply means conformity with the lawyer's law, that is, due observance of the procedures prescribed for making a valid decision. Underlying this is the idea that power should become impersonal and be constrained through rules; and the application of constraints should come from an independent judiciary and autonomous legal profession. But all these requirements for the provenance of formal legal rationality may still produce conditions which promote the grossest inequity as in India. In other words, the formal idea of the rule of law does not always constrain *arbitrary* exercise of state power; rather, it often helps to *camou-*

flage it. The abstract notion of the rule of law in this sense, as has been demonstrated by historical experience, serves the interests of the capitalists and other groups who can effectively use political power, through guaranteed freedoms and rights, as a resource for their own well-being and dominance. Rule of law notion, as conformity with lawyers' law, thus legitimates both inequality and exploitation on a *systemic* scale.

As distinct from a purely formal conception of the rule of law, the other and the more important aspect of the notion "imports both a minimal justness of rules and a dynamic responsiveness of substantive law to the needs of social and economic development" (Stone, 1966: 621). In this sense, the rule of law signifies a complex of standards of redistribution and justice; and in *this sense* it is a highly *variable achievement*. Such, however, is the symbolic appeal of the notion of rule of law that it prevents fundamental questions concerning justice from arising at all: For *whom*, and for *what* purposes, and to what *extent* does the rule of law (conceived primarily as an attainment of a modicum of justice through legal processes) exist? Can it be claimed with integrity that it exists for most, let alone all people in society? Indeed, by solely addressing its constraints to the exercise of public power, the rule of law notion diverts attention from the very real violations of minimal justice in social relations by those who wield extensive "private" power. Moreover, is the "critical premise" of the doctrine of rule of law that "rule can make power impersonal and impartial" not "fictitious"? (Unger, 1976: 180) Indeed, as Unger points out,

> Thus the very assumptions of the rule of law ideal appear to be falsified by the reality of life in liberal society. But, curiously, the reasons for the failure of this attempt to ensure the impersonality of power are those that inspired the effort in the first place: the existence of a relatively open, partial rank order, and the accompanying disintegration of a self-legitimating consensus. The factors that make the search necessary also make its success impossible. The state, a supposedly neutral overseer of social conflict, is for ever caught up in the antagonism of private interests and made the tool of one faction or another. Thus, in seeking to discipline and justify the exercise of power, men are condemned to pursue an objective they are forbidden to reach.

And the repeated disappointment accentuates still further the gap between the vision of the ideal and the experience of reality (1976: 181).

And yet this experience of "gap", which is a structural property of the legal system, does not serve to delegitimize power. Balbus has recently argued that "the legitimation of the legal order is not primarily a function of its ability to live up to its claims" but "rather of the fact that its *claims . . . are valued in the first place*". Thus, for example, the notion of equality of men before the law has been so firmly entrenched as to make unproblematic the substantive equal treatment of unequals. The law of theft and the punishment for theft is the same, for example, for the rich and the poor; and in fact the punishment actually awarded may be much less stringent for the former than for the latter. The equality before the law argument does not countenance the claim that the rich, who should have no reason to commit the crime, should be more severely punished than the poor. To allow such questions would be to initiate delegitimation of the legal order, a "fundamental break with the values and (formal) mode of rationality of the legal form itself". Balbus urges that an adequate theory of "legitimation and/or delegitimation would have to explain why the *logic* of the legal order . . . . is ordinarily accepted as unproblematical, and is not called into question in the name of a radically different logic" (Balbus, 1977: 82).

One possible reason why the 'logic' of the liberal legal order is not called into question sharply is that it is not merely not manifestly repressive, as most non-liberal orders are but also that it permits, of necessity, creation of new *aspirational frontiers* among the propertyless. The latter in turn demand changes in the social structure which would put them in a more advantageous position in course of time. It is, in other words, a noted feature of liberal legalism that it allows, though over long periods in time, demands of substantive rationality or justice to be articulated and met, as the experience of the United Kingdom and the United States shows. But history also shows that redistribution of power does not quite genuinely occur without struggle and conflict. The struggle on the part of the people to win new rights and statutes (for example, the right to adult suffrage, the right to form trade unions and to strike, or minimum conditions of well-being) involves a good deal of

repression by the state, within and without the law. This repression occurs typically through the use of criminal law sanctions. When struggle or repression entails credible threats to the stability of the systems of management of distribution of power, 'concessions' and 'compromises' emerge and these are usually formalized through the mechanism of the law.

But in most situations normative law does not produce basic structural changes. In such situations, normative law becomes a statement of aspirations which social reality daily disproves. The law is then reduced to the role of articulating and sharpening of social contradictions. Its role is not to resolve and transcend them (*contra* Trubek, 1977: 529). There is thus no escape from the inherent dilemmas of legitimation of law and power in liberal societies.

Many Marxists, including the Indian ones believe that manifestation of contradictions in the normative legal order is a necessary, though not a sufficient, condition, for mobilizing class consciousness and fostering class conflicts. Indian Marxist thought began over the debate between Lenin and M.N. Roy on Marx's "minimum" and "maximum" programmes of political action. The minimum programme proposes the removal of all obstructions "to the maturation of 'bourgeois democracy' and the capitalist system", since the latter was considered essential to "the advent of communism". The maximum programme envisages that "while working for the development of the bourgois democracy in its purest form, communists were to strive to weaken the bourgeois order by making ideological attacks on the capitalist system and by encouraging rebellions" (Haithcox, 1971: 16). But real life does not follow theories. The liberal legal order, instead of collapsing under its own contradictions, seems to thrive on it; the gap between reality and ideal is now justified as the very *raison d'etre* of having ideals in the first place. Contradictions mirrored in the legal order, thus carry their own 'justifications' because the very generalized values of equality, autonomy, and the rule of law make contradictions legitimate.

The peculiar complexities of the legal liberalism model lie at the very roots of the crisis of Indian law. Until further refined development of the "eclectic critiques" of legal liberalism (Trubek and Galanter, 1974) yields a new paradigm for legal order, one has only to suggest sub-systemic alternatives of development and the

role of law within it, more or less as an act of faith. It is in this spirit that we now proceed to delineate the crisis of the Indian legal system in some of its salient dimensions.

2. The Colonial Nature of the Indian Legal System

Introduction: Juristic Dependencia

The Indian legal system (ILS), in its cultural, normative, and institutional aspects offers a vignette of Indian development in the last quarter century. Although the constitutionally desired social order makes radical, and indeed in some respects revolutionary, normative departures from its pre-colonial and past colonial, it is, in its operations, still very much burdened with its colonial past.

It is astonishing, but true, that there has been no real debate in independent India on the nature and the future of the ILS. The only impulse towards sustained discussion has arisen in terms of "revivalists" and "modernists", between neo-Gandhians and neo-liberals, on the eve of the Constitution-making (see e.g. Austin, 1966: 26-46; Baxi, 1967: 339-44; Galanter, 1972: 53). Large, and unproductive, questions have been raised concerning the suitability of the western legal system for a peasant Asian society and these too have mainly focussed on the restoration of some supposed aspect of the "genius of the Indian (mostly, Hindu) society and people". The genius, it has been argued, required a wholesale transformation of the ILS going back to some kind of communitarianism which prevailed in ancient (Hindu) India. Naturally, it has been possible for the 'modernists' to give a short shrift to all this by saying that history has, if anything, Indianized and socialized colonial legal system, indeed to a point that it suits the genius of the Indian people (Law Commission, 1958). It would perplex, if not shock, a future historian of India to find that there was comparatively a far more sophisticated and solicitous debate concerning the introduction of the western legal system in India in *colonial* times among the British administrators (see Stokes, 1959; Guha, 1963; Dhagamwar, 1974) than the state of debate in India, on and since independence, concerning its retention. The fact that in so many of its normative, institutional, and cultural aspects, the ILS

remains burdened with its colonial past, even after nearly thirty years of independence, constitutes an indictment not of our past colonial masters but of the elite of independent India, who have over the years been content with the colonial mould and mode of law.

The word 'colonial' is a somewhat treacherous one and a fairly useful one for polemical purposes. We endeavour to use it here with a degree of clarity as regards its meaning. Historical continuities with the past are perhaps ineluctable; we should, therefore, expect to find certain features which were predominant in the British Indian Legal System (BILS) to be so in the legal system of independent India. Institutional, normative, and cultural continuities may, however, be of three types. The first type is where the norms, ideology (or values), and institutions of the BILS were consciously examined, accepted, and adapted to the needs of independent India (e.g., the structure of adjudication, adversary mode, *laissez-faire* structure of legal professsion, vast bodies of legal norms). The second type of continuity arises out of sheer inertia. The third type is one where change away from the BILS is frequently demanded but the change is opposed, and the *status quo* defended, by political and professional elites of independent India through arguments and justifications which are either reminiscent or very much the same as were advanced by the operators of the BILS. The rhetoric and 'logic' of justifications for the *status quo* (or continuities between the BILS and the ILS) which almost regards the attainment of political independence as *immaterial* or *irrelevant*, deserves to be characterized as distinctively colonial rhetoric and logic. If this third type of continuity is substantially manifested, perpetuating the same element of colonial governance through the law, one should have no hesitation even in characterizing the entire legal system as colonial. We highlight in this chapter some marked continuities between the BILS and the ILS. In the chapters to follow we demonstrate further the colonial nature, in some contexts overwhelming, of our major legal institutions.

Of course, the notion 'colonial' can be used more extensively to signify a number of wider states of affairs. For example, one might wish to use the epithet 'colonial' to denote a state of dependency on the 'mother' country, even long after the liquidation of the historical phase of actual colonization. Continuous reliance on western legal systems (particularly the common law culture of

Legal Dependence

England and America) by judges, legislators, administrators, and jurists could be tellingly documented in support of the view that the ILS in this sense is colonial. Thoughtless transplants of legislative models, inapposite borrowings of western institutional blueprints and the underlying ideologies, excessive judicial dependence on Anglo-American legal materials, and many other similar factors are easy enough to document. All this manifests the juridical counterpart of what Latin American theorists of development and underdevelopment have identified as *dependencia*, as a "situation in which the economy of a certain group of countries is conditioned by development and expansion of another economy which is subordinate to the first" and involves a " 'historical condition' which affects a given structure of economy in such a way that few countries can derive advantages to the deteriment of other countries" and thereby restrict "the subordinate economy's opportunities for development" (Hellwege, 1978: 48). For the word 'economy' we have only to substitute the words "law" or "legal systems and cultures" to arrive at the situation of juristic *dependencia*.

The phenomenon of juristic *dependencia* manifests itself most strikingly in planning or initiating through legislative or judicial processes, evident in copycat drafting of laws or reliance on obsolescent Anglo-American decisional law (or legislative models) *which have undergone drastic changes even in the countries of their origin*. In 90 per cent of the cases, the legislative draftsmen follow the model and language of English laws; judicial interpretation continues to rely heavily on Anglo-American decisional materials. Examples of all this would be found in the substantive parts of this and other chapters of this book. The point is that through these processes legislative and judicial development remains conditioned by development and expansion of 'overseas' models (mainly Anglo-American) and the ILS became a subordinate, almost a *vassal* legal system, thereby only *occasionally* serving the needs of Indian society.

We do not further elaborate or use the notion of *dependencia*, or cognate forms of new colonialism in the wide ranging contemporary sense. The main reason for this denial in intellectual self-indulgence is that the Indian reality is far too complex to be captured by a mere invocation of the notion of *dependencia* which is itself not entirely unproblematic conceptually. For example, the demarcating line between 'copycatism' and cross-cultural diffusion

167

is susceptible to confusion as well as to clever manipulation for specific ideological or political purposes. This is *not* to deny that the operators of the ILS (judges, legislators, administrators, or jurists) *are* excessively oriented to an Anglo-American legal culture. They *are*. But to call this situation colonial is, in the present opinion, unproductive of scientific understanding of the problems and processes which give rise to this phenomenon, which deserves to be studied on its own terms. As a general maxim, we have to remember that Indocentrism by itself is no answer to Eurocentrism.

Nor do we use the term colonial in a wider sociological sense to signify the relationship of domination and subjugation between the rulers, whether alien or indigenous, and the ruled. This state of affairs was clearly the core of colonialism as a historical phenomenon but it is doubtful whether denial of freedom to large masses of people by indigenous rulers after decolonization can be fruitfully looked upon simply as a colonial process, though in the literature on self-determination as an aspect of contemporary international order this is precisely how the term is used (e.g., in the case of Bangladesh or Biafra). Once again, we do not deny the possibility of the use (or abuse) of the legal system as an instrument of denial of freedom and subjugation of vast masses of people. Undoubtedly, it is possible to design and use a legal system to sustain favoured constellations of power distribution in such a way as to ensure the hegemony of certain ethnic or caste groups over others, or that of the proprietariat over the proletariat or of the privileged few over the grossly deprived masses. Undoubtedly, too, the legal histories of colonial regimes do actually supply the normative and the institutional models which are 'apt' for such uses of the law. It is certainly possible, and some would say even desirable, to accentuate such features of the ILS in its critique from a 'radical' standpoint. But it remains doubtful whether the already overworked label helps much, except providing polemical wealth, in a sharp formulation and clear handling of the problems.

The ILS follows broadly the normative and the institutional features of the BILS. Let us look at some of the persistent colonial features (in the sense defined by us) of the ILS.

The Non-Participative, "Top-Down" Models of ILS

During the British Indian period, participation by broad masses

of people, or even by the interests immediately affected by it, in the process of the making and implementation of laws was virtually unknown; unless, of course, we regard protest and disobedience as forms of group participation in law-making. The British Indian model of law-making was a top-down model : it was a paradigm of Austinian type. There was a group of determinate human superiors which issued commands, the political inferiors had the option either to comply or to risk the application of sanction.

The model of law-making adopted in free India is not much different, unless again you wish to regard periodic participation in the electoral processes by masses and collective protest as forms of participation. By and large, only the bureaucrats and legislators participate in law-making; the former predominate in any case as a large mass of rule-making is in effect delegated to the executive. Occasionally, other elite groups participate. The Law Commissions at the Centre (and in some states) attempt to offer guidance and elicit informed public opinion. These and other specialist law reform bodies tour sometimes throughout India (that is, *the capital cities of various states*) and collect opinions and views. The Select Committees of the legislatures also receive the evidence of interested groups and citizens. In the sphere of delegated legislation, there is no insistence, either in law or in policy, on prior consultation with the affected groups, a procedure considered to be both just and efficient (Jain & Jain, 1973 : 77). We do not as yet know whether, and how far, Indian legislatures function in response to "lobbies" converting policy into law; nor do we know as yet as to the interests which such groups represent, although it would be relatively safe to say that they would represent the resourceful and not the vulnerable and underprivileged groups of society.

Thus, law-making remains, more or less, the exclusive prerogative of a small cross-section of elites. This necessarily affects both the quality of the law enacted and its social communication, diffusion, acceptance, and effectivity (see, e.g., Chatterjee, 1971). It also reinforces the highly centralized system of power. It is time that we considered the desirability and feasibility of building into the law-making processes a substantial amount of public participation. For example, there is no reason why the state may not require that major changes or new legislative proposals be discussed and debated in all dominant institutions of society and that the

substance of deliberations be reported to the legislative bodies. There is no reason why the *Gaon Sabha* (in so far as these exist) under the panchayati raj system may not be asked to discuss at their meetings the proposed legislation affecting agricultural credit or investment, ameliorative legislation concerning agrarian reforms proposed from time to time in relation to the general body of law such as changes in the family law, penal code, procedure, etc. The panchayati raj institutions as well as other dominant social institutions (universities, bar, media groups, voluntary bodies, etc.) should be given the fullest scope for structured participation in important legislative proposals. As regards delegated legislation, the requirement of consultation with the affected groups should be mandatory. The argument that this will take time and consume resources is misconceived; passage of legislation is in any case costly and time consuming. And the overall gains—in terms of mobilization of mass consciousness, accessibility of legal information, social acceptability—will far out-weigh the costs. But so strong is the hold of the colonial model of law-making that such ideas have never been articulated with any degree of vigour. Even the neo-Gandhian thought, including *Sarvodaya* 'school' has not moved beyond the inspiring but programmatically sterile grandiose conceptions of *lokshakti* (people's power) or *lokniti* (people-oriented politics). (That is why the proposed method of amendment of certain parts of the Constitution through referendum at which at least 51 per cent of people should vote, constitutes an important innovation; after all, people should have a say in such a vital matter. The opposition by intellectuals and other elite groups takes on a subtle form. It is argued that in a vast country like India this is not just feasible. People, 80 per cent of them living in villages, would not understand the complexities of amendment. The Constitution will then remain ultimately inflexible. This kind of argument betrays a non-egalitarian and even authoritarian approach: 'people' are not to be associated or involved in changes of the basic rules of the game of power. Only the 'enlightened' groups should have a say in the process. This is colonial logic.)

People's participation in the enforcement and implementation of the law is also not actively sought, sponsored, or structured by the state. Once again it is assumed that such tasks are, more or less, the exclusive prerogative of the state. There are occasional sermons that people should help the state make the laws effective, that they

should not withhold active cooperation from the law enforcement agencies, that they should develop a civic competence, a stake in the maintenance of social control and promotion of social change. All this rhetoric is no doubt nobly inspired but the legal systems as structured provide little or no effective scope for public participation in the implementation of legislation. The idea that the beneficiaries of ameliorative legislation should have a role in the implementation of laws favouring them is still a new one: it was only at the stage of the formulation of the Fifth Five Year Plan that the proposal was seriously made, for example, that tenants should be involved through committees in overseeing the implementation of agrarian tenancy legislations. The Sixth Plan, ushered in after the "revolution" and the democratic "restoration" of 1977, is equally anemic in emphasis on its beneficiary participation in the implementation of redistributive legislation. Equally new is the idea that there should be a "social audit" of major legislations by the beneficiaries or, more generally, the consumers of legal justice.

Broadly, the ILS also follows the colonial model of reactive mobilization of the law rather than pro-active mobilization (see Black, 1973). In the former, the citizen is left to initiate the legal process by filing a complaint; in the latter the state agencies initiate the legal process. Laws that attack certain segments of the social structure in the title of justice and equity obviously need proactive mobilization; this, however, is not the case in major areas of legal innovation in independent India despite the very obvious and stark fact that the vulnerable groups are in no position, by themselves, to activate the redistributive legislation (e.g., agrarian reform measures, protection of rural and urban unorganized labour, laws for socially and economically vulnerable populations). This may be due to resource constraints; but one does not know whether this is so simply because the patterns of mobilization of law have not engaged any systematic attention of the law-givers and the lawmen generally. The resource constraints could be somewhat offset by the organization at the local levels of the beneficiary groups and consumers of law: again this important beginning can only be made if participation in law-implementation as well as in law-making is accepted in the first place as an important social value, and as a crucial component of human and social development in India.)

1990

Access to Legal Information

The colonial model is also perpetuated in terms of access to law by citizens. Access to law means not just access to courts as the lawyers generally think about it. It means, in a broader and socially more relevant sense, access to law-makers, to dispensers of legal services (legal profession) and to normative and to institutional information concerning the legal system. In all these dimensions of access value, we find that the ILS is based on rather clear violations of democratic legality. We have already seen how non-participation, which is a *preferred value*, renders the actual operation of the ILS, for a whole variety of situations, almost identical with that of the BILS. We now briefly turn to some other aspects of the problem.

One major way in which the Indian legal system violates the principles of democratic legality is that information concerning the norms of law is not accessible easily even to those who are affected by the law. The notorious axiom that "ignorance of the law is no excuse" casts a *duty* upon the citizen to know the law on the pain of sanction; however, there is no *right* conferred upon the citizen to have access to legal information. Even the most generally formulated directive principle of state policy will not easily yield the proposition that the state is under a duty to make law accessible, even in bare terms of normative information, to the citizen. It would require several generations of juristic effort to, similarly, produce by sheer exegesis the proposition that the chapter on fundamental rights *necessarily* imports a fundamental right of the citizen to have access to legal information.

The requirement that Acts of legislatures be notified through the official gazettes ensures, theoretically at least, that the laws made by Parliament and state legislatures and in force from time to time are easily accessible. This is just not the case, although the situation is relatively (and that is really not saying much) better as regards the Union legislation. There is no all-India collection of laws in force throughout the territory of India; there is not even an Index. An Indian citizen in Delhi wishing to have, or affected by a need for, some information on relevant laws prevalent, say, in the state of Karnataka, may find this an uphill task even with the intervention of the professional intermediaries. The situation in regard to delegated legislation, the volume of which is immensely larger than that of usual legislation, is even more

alarming. The Indian parliament enacted from the period 1973 to 1977 a total of 302 laws; against this the total number of statutory orders and rules (on the rough count) passed in the same period was approximately 25,414. The corresponding figures for states and union territories are just not available; but the number of rules issued under the delegated legislation powers may well be astronomical. While the Indian Supreme Court has, in a handful of decisions, required publication of delegated legislation as a pre-condition of its validity, and the legislature usually requires some form of publication, mostly through the gazette (Jain & Jain, 1973: 66-67) the situation is that information concerning the rules is very hard to come by. Even well-endowed companies, some of them multinationals, are known to have difficulties in gathering up-to-date information concering subordinate legislation passed from time to time by the Central government. The government of India has been unable to agree with the Lok Sabha Committee of Subordinate Legislation which recommended that there should be an annual publication, as in Britain, of statutory instruments and rules. The government advanced as reasons that the "government press cannot undertake such voluminous work", that rapid changes would in any case made such publication obsolete, and that the costs involved would be too high (*Id.*: 75). In the circumstances, the question of each state and union territory bringing out such a publication simply does not arise. Obviously publication of laws of this kind by private entrepreneurs through government contracts or otherwise is also not encouraged, perhaps on the ground that this would intrude on the natural monopoly of the governments in this regard.

We have so far been referring only to a special strata of people in industry or business in urban India. If consumers, beneficiaries, and victims of law in urban India have such problem of accessibility to normative law, one might well despair of communication of law to the rural masses, even in situations where the law is ostensibly meant to protect their interests and rights. Normative law is virtually inaccessible to the most underprivileged and vulnerable groups in Indian society. Legal illiteracy of the beneficiaries of the law thus contributes to its ineffectiveness e.g., prisoners may not even get to see the jail manuals when distinguished criminologists find it extremely hard to get a copy (see chapter six). Neither the bonded labour nor the contract labour

nor the landless labour have much idea of the law and the uses that can be made of it.

Access to normative information concerning one's legal status—rights and duties—is impeded not just by the legislatures and the executive but also by the judiciary. There is no comprehensive law reporting in India and the official reports of decisions of the High Courts are both inadequate and even irregular (see Jain, 1966: 739). The highest court in the land, whose declarations of law are binding though all courts in the territory of India (Article 141 of the Constitution), retains and also exercises the power to classify certain of its decisions as "unreportable" or "non-reportable." Similar discretion is reserved by High Courts which are also courts of record. A leading law publisher who has unsuccessfully tried to get the judgments of the Supreme Court declassified found that during the 1950-55 period as many as 250 decisions were classified by the court as "non-reportable". The number must have increased since the Supreme Court often cites in its reported judgments the very decisions it classifies as non-reportable, thus causing considerable distortions in the development of the law. There might have been perfectly proper reasons from the court's managerial standpoint for the retention and exercise of this, perhaps "inherent", power. But the question is whether such power ought to exist in the first place in a democratic society. One may ask: does not such power violate what the Supreme Court has so seminally developed as the doctrine of the "basic structure" of the Constitution?

Access to institutional information concerning the law is as problematic as access to normative information. Reports of the state governments on administration of justice, as and when published, are almost impossible to obtain; so are the reports of the state departments of law and justice. The Union government brings out the valuable *Crime in India*, giving immensely useful information, but for some reason this is a non-priced publication, not easily available in most parts of India. Sometimes valuable reports are published; but they are regarded as confidential and are given restricted circulation. A classic example is that of the Justice J.C. Shah Committee Report on arrears in high courts, published in 1972. But for the courtesy of a high government official who was kind enough to loan a copy of this report to me, with some anxiety whether its contents could be properly used even in scholarly work, I would never have been able to obtain and use that invaluable report. In this democratic republic of ours, there may, in effect, exist not merely a regime of secret *laws* (clearly antithetical to civilized legal system) but of secret *reports* as well.

Access to Legal Services

If the citizen has difficulties in reaching the legislator with his advice and opinion on the laws which are enacted for his own benefit or detriment, these difficulties are compounded when he actually has to encounter the operations of the law enacted without any substantial participation and without even minimal awareness of his legal status. Clearly the value of access to legal services has not been taken seriously at all in India, although from time to time there has been a spurt of very genuine concern with the state of legal services.

The Constitution, both in its fundamental rights and in the directive principles of state policy, was construed to be silent concerning the provision of legal aid in deserving cases; it was only in 1976, and during the national emergency, when paradoxically even minimal human rights were totally denied to a large section of Indian massess, that the duty of the state to endeavour to provide legal services was accorded the status of the directive principle of state policy. Although the Law Commission in its famous Fourteenth Report (1958) suggested the provision of counsel at state expense in all cases triable by the sessions courts as an "immediate step", it was only in 1973 that the Criminal Procedure Code was amended to so provide. A more callous attitude towards the rights of the indigent citizens—in a subcontinent of harrowing poverty—is hard to imagine. It was understandable, in these circumstances, that Madhu Limaye's bill (1960), to provide legal aid in all criminal cases to needy people, was consigned to dignified oblivion. However, the argument that there are not enough resources to operate legal services in criminal law contexts does not fit well when the state and its agencies are the most prominent litigants and when the state levies court fees which have been demonstrated to result in considerable profits to the state for expenditure as general revenue. This is not to say that the resource constraint is entirely imaginary; surely the Indian state cannot meet all the legal needs of all its underprivileged and vulnerable sections. This would require a mind-boggling outlay of

human and financial resources (see, for some examples of the magnitude of costs, Baxi, 1975). The point is that it should not take a democratic nation twenty-three years to decide on priorities of legal services, in the most minimal sense of providing counsel to indigent accused at the sessions level. If this is the measure of urgency, one would wonder whether another quarter century would pass before action on any of the recommendations made in the deeply humanistic and luminous reports by the Krishna Iyer and Bhagwati Committees (1974 and 1978). To characterize the state's underlying attitudes towards the legal needs of the large masses of poor people as "colonial" would be stating the matter in the mildest possible terms.

Provisions for adequate legal services to meet the litigation-oriented legal needs of the poor have not caused as much excitement and commitment at the Bar as have the high "superstructure" issues such as the 'supersession of judges' or constitutional amendments narrowing the scope of the writ jurisdiction of the High Courts. Although there is now a degree of responsiveness at the Bar to the claims of legal services, the legal profession is so organized as to discourage, rather than foster, any worthwhile institutionalization of legal services programme. The fact remains, as pointed out so bluntly (and rightly) by the Krishna Iyer Committee that the "legal profession in India . . . enjoys a near monopolistic power", permitting no equalization of the "bargaining power between the consumers of legal services and the closed group of legal profession" and that the "legal services market is essentially a seller's market" where the demand for services is "backed by purchasing power". The Committee noted, by way of mild exoneration, that the legal profession is merely an aspect of "the capitalistic society" which is an "acquisitive society" where the "greatness of a lawyer is measured by the amount of the fees he charges and not by the quantum of social service which he renders as lawyer" (1974: 183-84). Interestingly the Committee saw a nexus between the legal profession and the state agencies : it found that it was "the Central and State governments, corporations managed and/or controlled by (these) . . ., governments and Private and Public Companies which are really responsible for inflating the standard of fees". It recommended that the government adopt a policy on maximum fees payable by its own agencies and thus dry up the "major feedstock of the senior lawyers" : the

Committee also suggested the creation of legal services in the "public sector" (*Id.* : 186). Even these modest recommendations have not been accepted. The recommendations are here characterized as "modest" simply because the Committee shares the liberal assumption that the "autonomy of legal profession" is as "invaluable" and "inalienable" a guarantee of "free society" as is the "independence of the judiciary" (*Id.* : 185). Not a single sub-group of the Indian Bar has, understandably, championed this specific recommendation, although the Bar as a whole may be quick to denounce the very idea of a "public sector" in the delivery of legal services as fatal to the "rule of law" values.

Access to legal services transcends, of course, litigation-oriented legal aid. The programming of legal services should include non-litigative services as the two recent Committees (the Iyer and Bhagwati Committees) have stressed. Non-litigative legal aid will include a whole range of functions—skilled counselling, mediation, arbitration, conciliation, and continual monitoring—in resolving potentially litigious situations. Legal services strategies would have to extend as well to a re-examination of the normative and institutional aspects of the ILS. Massive reform of substantive and procedural laws and of the administration of justice institutions may also be needed, as stressed by the Iyer Committee (see, for an analysis, Baxi, 1975 : 1009-11).

It is a strange paradox that while the Indian government both at the national and state levels has been prolific in enacting a very large number of laws making a determined attack on the inequities of the social structure, it should have been so quiescent on the need for different types of mobilization of law for effective implementation of these very measures. In any case, the experience of over a quarter century has now clearly shown that such laws require not just bureaucratic and legal mobilization; what is needed is not just the spruce palliative of random provision of legal services. What is needed is a thoroughgoing attempt at increasing civic participation in the making and implementation of laws; the colonial idea that one can promote social change by normative proclamations of objectives and random bureaucratic enforcement of legal provisions needs to be given a timely, and unceremonious, farewell.

Access to Courts: The "Misappropriated" Court Fees

Lord Macaulay condemned the preamble to the Bengal Regulation, which imposed in 1795 high court fees with the avowed objective of inhibiting litigation, as "the most eminently absurd preamble that was ever drawn". In 1835, Macaulay launched a vigorous, though futile, attack on the justification of the continuation of court fees. In words still cogent today, he said:

> If what the Courts administer be justice, is justice a thing which the Government ought to grudge to the people?... It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the Government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or by bad Judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice. And the public will never long entertain such an opinion without good reason... [The imposition of court fees] neither makes the pleadings clearer nor the law plainer, nor the corrupt judge purer, nor the stupid judge wiser. It will no doubt drive away dishonest plaintiffs who cannot pay the fee. But it will also drive away the honest plaintiffs who are in the same situation.

A case against this eminently absurd tax on litigation cannot be more cogently made. The colonial government duly ignored Macaulay's rather inconvenient analysis. Although this analysis has been reiterated times without number by law reformers, including the Law Commission of India since independence, the Indian state has retained the colonial system of imposition of court fees and indeed made the fees nearly exorbitant over the course of the last twenty-seven years. The Fourteenth Report of the Law Commission did not merely invoke Macaulay's memorable observations; it went further (and by a thorough analysis of budgets on administration of justice) to show that the amount raised by court fees was not merely adequate for meeting the administration of justice but resulted in surpluses which were appropriated to the general revenues of the concerned states (1958: 487-510). The Fifty-fourth Report of the Law Commission went out of the way to reiterate the unhonoured recommendations made in the Fourteenth Report. The Krishna Iyer Committee on Legal Aid was "cold and blunt" concerning state inaction:

> Something must be done, we venture to state, to arrest the escalating vice of burdensome scales of court fee. That the state should not sell justice is an obvious proposition but the high rate of court fee now levied leaves no valid alibi is also obvious. The Fourteenth Report of the Law Commission, the practice of 2 per cent in the socialist countries, and the small standard filing fee prevalent in many Western countries make the Indian position indefensible and perilously near unconstitutional. If the legal system is not to be undemocratically expensive, there is a strong case for reducing court fees and instituting suitors fund to meet the cost directed to be paid by a party because he is the loser but in the circumstances cannot bear the burden (p. 35).

Interestingly, even the Bar has missed the hint that the levy of court fees could be challenged on the ground that it is "perilously near unconstitutional". And such is the state of arrears, that eight years after the Gujarat High Court invalidated levy of court fees, we still await a final pronouncement by the Supreme Court in this matter! That aside the democratic governments of the states in India have just not bothered to respond to these stirring observations. *How else* can one characterize the attitude and approach to this question except as distinctly, and pejoratively, 'colonial'?

What is worse, by any standards, is the fact that despite the huge collections by way of court fees, the amount thus realized (as in British India) is not put to service of administration of justice. Physical and administrative 'facilities' provided to the subordinate judiciary are, by and large, scandalous. The requirements for office space, for adequate maintenance of buildings, for furniture and office staff for subordinate judiciary are ignored with undemocratic nonchalance. Whenever pressed for reasons, the stock answer of the governments is: "lack of resources" ("where have all the court fees gone?...") For example, the report on the administration of justice in Uttar Pradesh for 1969 contains revealing exposures. Out of thirty-one proposals for courtroom buildings (and some residen-

tial quarters for judges) made in 1969-70 only four were sanctioned. Three such sanctioned proposals included electrification of the munsif's court at Bansi in district Basti (Rs 5,900), extension of record room at Mirzapur (Rs 30,200), and construction of munsif's courtroom at Kashipur, Naini Tal (Rs 13,300). Of course, the sanction did not arrive till the end of the year and the work had yet to begin on any of these projects (one hopes that by now it has been completed!). Original allocations placed at the disposal of the High Courts for the expansion of physical facilities are abruptly curtailed in the middle of the period, causing great confusion and demoralization all round. Even the biannual whitewashing of court buildings has not proved possible, according to the report; and "the condition of the furniture of civil courts is in general very deplorable". The existing items are "rickety and have outlived their utility". The report humbly reiterates the need for providing fan coolers to civil courts in Uttar Pradesh as the *khas tattis* are more expensive to operate. The courts do not have enough typewriters and typists: "from time to time the Court has been requesting Government in the interest of work to accord permission to the District Judges to take English typewriter wherever necessary on hire, but that request too has been unheeded" (pp. 53-56). (Three cheers for the independence of the judiciary!) It is pointless to multiply examples.

Of course, our immediate purpose in referring to some details of the Uttar Pradesh report is to show that, even assuming that there is some kind of justification for the retention of court fees, there cannot be any justification whatsoever for what must be called "misappropriation" of the proceeds for purposes other than administration of justice. Surely, the minimum needs of the justice institutions should be met; neither equity nor expedition nor even excellence can be expected when judicial institutions are denied the bare physical and functional facilities. If this state of affairs continues, it is both conceivable and likely that judicial offices at the level of the subordinate judiciary may cease to be attractive to young and talented people, who might opt for other careers. Perhaps, this is already happening. To this extent, urgent attention needs to be given to more financial outlays being provided to coordinate courts, and the court system generally, lest the integrity of the legal process suffer.

The Uttar Pradesh report reveals another, and more insidious,

aspect concerning the autonomy of the judiciary in its relations with the executive. The administration of subordinate judiciary is the responsibility of the High Court, which is at the apex of the state judicial system. If the High Court's carefully formulated demands for budgetary appropriation are treated callously by the executive, the legitimacy, dignity and prestige of the High Court concerned are likely to be adversely affected. More fundamental is the further point: is it not the height of the centralization of power in our country that district judges, who have substantial discretionary powers for the administration of justice, should have to await permission from some faceless bureaucrat even to hire typewriters for the expeditious handling of matters before the courts or to provide fan coolers instead of *khas tattis*? Some structural device has to be found to make administration of justice by the courts independent of stringent financial and bureaucratic controls. The crisis facing the Indian court system in terms of crushing arrears of work may be attributed partly to the inadequate infrastructural facilities compounded by the lack of adequate and timely funding and above all the lack of autonomy characterizing the present system.

3. The Courts in Crisis

Introduction

For well over a quarter century, the state has ignored the warning signals concerning the overload of its justice institutions and their possible breakdown. The problem of mounting arrears and the increasing rate of institution of suits or recourse to court system is not new; what is only the present Union government's sustained attention to it and the zeal to find out a set of rational solutions. The proposed solutions have also been anticipated in the reports of the several all-India enquiries. The Fourteenth Report of the Law Commission offers a diagnosis of the problem and makes many worthwhile recommendations as early as in 1958. The Law Commission's fourteenth Report was preceded, in 1949, by the Report of the High Court Arrears Committee under the chairmanship of Justice S. R. Das. Comprehensive reviews of state administration of justice were commissioned by the States of Uttar Pradesh and West Bengal during the period 1949-51. In 1972, another Committee reported under the chairmanship of Justice J. C. Shah. This report, although confined to High Courts, is a valuable document in terms of both analysis of data and policy prescriptions. Although published, it is (as noted earlier) only a quasi-public document and even now not easily accessible.

All these reports demonstrate the frightful urgency for combating the problem of overload and arrears. And yet no systematic national attention was focused on this problem. In 1975-76, during the emergency, Article 226 was sought to be amended by limiting the writ jurisdiction of the High Courts and a comprehensive tribunal system for a whole variety of matters, now dealt with by the High Courts, was proposed on the ground that the judicial system was overloaded and there were very long "delays". The first pursuit had to be modified in the face of an organized resistance by the Indian Bar but the new chapter on tribunals was a worthwhile innovation,

although, in the event, it did not come into operation and is now being proposed to be altogether deleted by the Forty-fifth Constitution (Amendment) Bill. During the debates on constitutional changes in 1975-76, the then government seems to have relied considerably on the analysis and policy suggestions contained in the 1972 Shah Committee Report, although it now becomes possible to say after a close look at the text of the Report that it was somewhat selectively used during that period.

Before we proceed with an examination of the problem, we need to enter some caveats. The first is that time-consumption is a structural property of legal systems. This feature of the legal systems is related to the normativity of law. Whenever decisions are to be made in accordance with general, public and positive norms by third party mediators or adjudicators, some time must necessarily be consumed in arriving at authoritative and, hopefully, just decisions. Which time-costs are reasonable and which are unreasonable, is a matter for both value-judgment and empirical analysis. Except gross situations where the time taken is manifestly unreasonable (say 10-20 years), it would be somewhat dishonest to talk about "delays" in judicial decision-making without specifying how one decides what constitutes delay. Expedition by itself is no virtue; expedition in pursuit of equity is. But pursuit of equity (or justice) is after all, pursuit of excellence. If as Eugen Ehrlich rightly said, the best guarantee of justice lies in the personality of the judges, this must be so because that personality is partly shaped by the discipline of procedural due process, and not just the dictates of substantive justice which are apt to be variable.

A second caveat is that the nature of the normative complexes will determine the judgments concerning when the consumption of time is a part of doing justice and when it is "delay", a part of doing injustice. The normative legal system tries to govern a very wide variety of human relations; it is not just possible to set, in an *a priori* fashion, a universal time-span for all cases and controversies coming before the court. To do so would be to altogether ignore the complexity of legal norms, which is another distinct feature or property of modern legal systems. The third point also related to the second, is that the quest for justice in the ILS as well as in most modern legal systems, is based on the principle of hierarchy : the principle of hierarchy, in legal systems, is in constant conflict with that of finality. The higher courts (in

our case the High Courts) have powers not just of superintendence but the review and revision and in some situations even of interference. The highest court (in our case the Supreme Court) possesses all kinds of jurisdiction to review the cases decided by other forums. The struggle to oust the jurisdiction of the courts (in the interests of finality and expedition) by the state through statutes conferring finality on decisions rendered by tribunals and other bodies and even by private parties (through prorogation or *professio juris* stipulations) is a struggle in which the judicial institutions have the last say; and one in which the higher courts have more say than the lower ones.

All this, should be sufficient to alert us when we come to aggregate date on the workload and disposal rates of the court system. The mere fact that cases and matters are pending, in large number and over a number of years, tells us precious little : it is useful to know this only as an initial point for further enquiries as to *what* kind of matters are pending for *how* long and for *what* reasons. Equally important are the baselines which we adopt for measuring optimum time consumption for arriving at final and equitable, decisions. The available Indian exercises in measuring "delay" advert to the first set of criteria specified here; it is still open to question whether there is enough explicit awareness of the other problem : how does one, and by what criteria, measure time-consumption as "delay" or "arrears" ? It is a tribute to our disinclination to get at the whole truth and nothing but the truth that even in the present days the proposed measures to combat the "menace of arrears" are being contemplated without the slightest attempt to articulate the thresholds of time beyond which a case becomes a part of unjustifiable "arrears."

Faute de mieux, we proceed, in what follows with what we have. But we must note, even as we do so, one aspect of the present debate concerning delays in the administration of justice. The debate is between and among the appellate judges, law ministers, bureaucrats, and the bar groups. The discussion excludes the members of the subordinate judiciary as well as the district bar and their problems in combining the values of equity and expedition. Social scientists and legal researchers are excluded; their potential for study, research, and policy guidance is assumed to be either marginal or irrelevant. The question, in this state of affairs, of involving other people, e.g., informed laymen, litigating public,

companies both (government and private), media, administrators of rural government institutions, and many other just does *not* arise. One gets the impression that the problem facing the IJS is only a problem concerning appellate judges, lawyers, bureaucrats and ministers; they know the questions and they too will have the answers which are best for the nation. This is one more example of planning change without participation, of reducing a national problem to the size of a sectional problem for some institutions and actors of the government, although many more might be involved and affected.

The Problem: the Docket Explosion

The problem, we learn, of mounting arrears affects not just the subordinate courts but also the High Courts and, what is more, the Supreme Court. As late as on 6 June 1978, it has been estimated that there are as many as 600,000 cases pending before the state High Courts and the Supreme Court put together. The Supreme Court itself has a backlog of 21,960 cases. Among the High Courts, Allahabad leads with a score of 132,797 pending cases. The other High Courts arranged in terms of "arrears", give us the following picture:

Calcutta	72,448
Bombay	52,592
Madras	50,496
Madhya Pradesh	46,613
Punjab and Haryana	46,069
Kerala	42,739
Karnataka	33,449
Patna	29,435
Delhi	26,587
Rajasthan	16,627
Andhra Pradesh	15,887
Gujarat	11,722
Gauhati	6,548
Orissa	6,042
Himachal Pradesh	5,019
Jammu and Kashmir	4,742
Sikkim	22

If this is the rate of pendency in the appellate courts (prescinding all the problems of aggregate data analysis here) it is obvious that millions of cases would be pending before trial courts, in both civil and criminal, jurisdiction. Again, we are confronted with the lack of data; but as regards criminal cases whatever information we have causes anxiety. According to *Crime in India 1974* (1978) there were at the beginning of 1974, 13,07,933 total cognizable cases pending for trial before the Indian courts, of which trial was completed only in 3,63,665 cases. The number of cases carried forward for trial for the next year was 8,68,836. In percentage terms, trial was completed only in 27.8 per cent cases; 66.4 per cent remained pending. In addition, there were 32,48,010 cases for trial under special and local laws throughout India; trial was completed in as many as 23,15,571 cases and yet the cases pending at the end of the year for trial amounted to a total of 9,09,542. The set of figures for the period 1975-76 provided for the first time in the Union law ministry's annual report, shows that the pendency before sessions courts on 1 July 1975 was 1,02,245 cases (including original, appeals, and revisions); the corresponding figure for the period 30 September 1976 was a total of 1,24,442. While the number of pending criminal cases in the magistrates' courts were 30,82,135 as on 1 July 1975, it went up to 44,09,728 on September 1976 despite the fact that as many as 35,45,847 cases were disposed of. The rate of disposal seems to be very high. Of the 39,40,182 cases instituted in 1975, as many as 3,45,847 were disposed of; the corresponding figures for 1976 we are even better: 65,04,312 cases instituted: 61,19,004 disposal). On the civil side, the number of cases pending on 1 January 1976 and 30 June 1976 was 19,65,654 and 20,60,070 on the original side and 1,82,491 and 1,93,695 on the appellate side respectively (Law Ministry 1977 : 53-57). We have no information on matters pending before the various administrative tribunals now functioning in the country.

Compared with these staggering statistics, arrears in the Supreme Court may indeed look miniscule. But it is important to realize that the Court stands at the apex of the judicial hierarchy and possesses the most wide-ranging jurisdiction. As the highest court, its enunciation of law is binding on all courts throughout the territory of India. Any tendency towards unmanageable arrears in the high level must be regarded as symptomatic of the deep crisis of ILS. Indeed, it has been demonstrated that the arrears in the Court

have tended to grow, despite several measures (such as constant adjustments and amendments to the Supreme Court rules) adopted by the Court with a view to achieving expedition (Dhavan, 1977 : 112-27; 472-78; *Id.*, 1978 : 51). We summarize below the statistical information :

Year	*Pending at the beginning of the year*	*Instituted during the year*	*Disposal during the year*	*Pending at the end of the year*
1965	2,166	3,930	3,814	2,282
1966	2,282	5,507	3,806	3,893
1967	3,983	5,202	4,146	5,039
1968	5,039	6,576	6,228	5,387
1969	5,387	7,524	6,641	6,270
1970	6,270	7,106	6,272	7,104
1971	7,104	7,949	6,941	8,592
1972	8,592	9,076	6,822	10,846
1973	10,846	10,174	8,175	12,845
1974	12,845	8,203	8,261	12,787
1975	12,787	9,528	8,727	13,588
1976	13,588	8,254	7,734	14,109
1977	14,109	14,501	10,395	18,215

Clearly, the rate of institution of cases has increased, as it has with the High Court and the subordinate judiciary. Clearly there has been an attempt—an impressive one—at all levels to maintain an efficient disposal rate. The judge strength has been increased in the Supreme Court in 1960 from eight to thirteen and in 1978 from thirteen to seventeen; the total number of High Court judges has also increased over ten years to 348 (including additional judges); there are today in India a total number of 1,340 courts, apart from the Supreme Court and eighteen high courts, 1973 Senior courts (district and sessions level) and 4,351 junior courts (magistrates and munsifs) which also represents a marginal increase in subordinate judiciary over the years. There is, however, a noticeable increase, at all levels, of initiation and arrears.

We must reiterate, even as we offer in the next section some understanding of why this may be so, that a rigorous scientific

analysis of the problem is not possible here. For example, we cannot be sure as to what factors explain the high rate of initiation or court recourse. Is this due to increase in the jurisdiction or powers of the courts? or due to the increase in rights—consciousness of the people or just due to the growth of legal profession? Is high court recourse simply due to growth in population? or is it also related to the normative overpopulation produced by a very large number of law-making exercises? Can we further explain this increase in court recourse by the variable vigilant law enforcement or by an increase in governmental lawlessness? Social scientific understanding of arrears will require disaggregation of the data and its qualitative and quantitative analysis. This is the kind of work that should be commissioned as a matter of high priority before any national policy consensus is evolved on this vital matter.

(i) *Understanding Arrears*

(We have already adverted to some structural properties of legal systems which make inevitable a certain time consumption for arriving at authoritative and fair decisions. In this section, we approach the problem of the overload in terms of institutional factors, which by their very nature can be changed with a view to enhancing expedition as an aspect of equity. All that we will be doing in this section is to cluster the myriad factors which contribute to dilatoriness and delay under certain rubrics: detailed discussion of each of these factors is already available in the Fourteenth Report of the Law Commission as well as in the Shah Committee Report. Broadly, one can categorize factors contributing to inexpedition in at least four categories: (*i*) government caused delays (*ii*) court caused delays; (*iii*) Bar caused delays; and (*iv*) litigant caused delays. The overarching rubric of the very structure of the normative law, and its institutions, is a domain by itself; we will refer to it only briefly towards the end of this section. It should be possible to appreciate, towards the end of this exercise, that the problem raised by the overload of justice institutions is not one admitting facile or *ad hoc* solutions such as the increase in judge strength or some piecemeal reforms in one area or another. The problem is one that requires a critique of the ILS as it now exists and willingness to consider bold departures from it. In this sense, and in this only, the crisis of the ILS provides an opportunity for its restructuring as well.)

(ii) *State-caused Delays*

(The state contributes to the crisis of the ILS by its own lack of priority for matters relating to the administration of justice. This happens in several ways. First, judicial appointments are held up for no valid and publicly debatable reasons. Appendix B, derived from the Shah Committee Report, tells the story: as many as 799 days were lost in a six-year period (1965-70) in Punjab and Haryana by slow action on judicial appointments. For Patna High Court the corresponding figure is 694 days; for Bombay, 454½ days; for Delhi, 450 days (for a five-year period); for Calcutta, 390½ days. Why so? After all, the constitutional scheme requires consultation with the Chief Justice of the High Court and the Chief Justice of India, as the case may be, in making judicial appointments. Is the delay because of disagreement by the state or the central government with the recommendations of the Chief Justices? If so, this raises rather serious questions concerning the independence of the judiciary. Or, is the delay due to the Chief Justices themselves being leisurely in making recommendations? Or, is it because of the leisurely manner in which the law secretaries and ministers pursue this matter? Surely, not so many mandays are lost in distributing party tickets or organizational offices or appointment of ministers or distribution of political patronge and 'spoils'. All these are also important matters for the governance of the country. Since 1973, and the debate on committed judiciary, a lot of thinking on judicial appointments has been generated in the country. Time is now ripe not so much for the solution of ideological wrangles that occasionally obsess the Bar (or really its top echelons) as for the solution of the *structural* problems inherent in the lackadaisical approach of the governments to judicial appointments. The lack of organized concern by the Bar on delays in judicial appointments (have you heard of strike or a threat of strike by lawyers in India because judges are not appointed for long periods of time?) gives rise to the rather uncharitable impression that the Bar has a degree of *vested interest* in delayed judicial appointments.

(Another related aspect of judicial appointments concerns the quality of judges appointed to the higher judiciary.) The Fourteenth Report pointed out that ulterior considerations such as political influence, communal and caste factors, and undue executive and political factors were intruding in the appointment of judges. It also pointed out that the Bar, which is the source of judicial

appointees, had shown noticeable reluctance in supplying its leaders as judges for several reasons, the principal ones relating to emoluments and facilities for the performance of judicial tasks. This is, in a sense, a perennial problem. The Shah Committee also pointed out that some judges learnt the law, as it were, while on the Bench; this, it observed, was not an edifying spectacle. The not-too-well-thought-out, but basically sound, step of enabling the appointment of jurists to High Courts in the Forty-Second Constitution (Amendment) Act was one way of meeting the problem; unfortunately, this is now summarily dropped. The existing provision relating to the appointment of jurists to the Supreme Court have not been used even once presumably because the "official" eye is unable to see even a single jurist in India. Clearly, the "closed shop" mentality of the Bench and the Bar has reinforced the state's unwillingness to experiment in the arena of judicial appointments. Be that as it may, there is much to be said for diversifying the sources of judicial appointments in a situation where the requirement of minimum standing at the Bar has served the needs of competent judicial manpower somewhat indifferently.

A second major factor is that the state, which has had all along the information concerning the dimensions of judicial workload, has surprisingly made no realistic assessment of the judicial manpower needed for maintaining an efficient and a just justice-administration. The Shah Committee deplored this and made several constructive suggestions: it called for the fixation of optimum strength of the judiciary on statistical projections of the workload and pending cases. It also asked the governments to take into account the judicial time lost for special work (enquiry commissions) assigned to sitting judges and called for periodic appointment of *ad hoc* judges. These eminently sensible suggestions failed to evoke any positive response from the state. Nor do we know whether the Chief Justices Conference itself ever undertook this projective exercise, before or after the Shah Committee report; the Bar's lack of concern in this important area (until 1977) is manifest although the Bar Associations and Councils are somewhat strategically placed to work out the kind of projections needed to support the case for an optimum judge strength. Of course, such an exercise has to be done not just for the higher judiciary, it is even more important to perform it at the level of subordinate or grass-roots judiciary, particularly in terms of the administration of

criminal justice. In the latter sphere the human cost is indeed frightful and should be unacceptable in a civilized society boasting of the "rule of law". I refer here to only one indicator: the size of the undertrial prisoners in many states normally doubles the population of convicts undergoing punishment (see chapter six). In some states, people have been under trial for periods exceeding four to ten years. Offsetting of punishment, in case of eventual conviction, is no answer to the problem; the answer is in any case impossible if the trial does ultimately result in acquittal. In so far as the fixation of judicial strength at all levels has some relation to this problem and indeed it may turn out to have a substantial relation, it becomes even more pressing for the state to engage in a perspective judicial manpower planning.

I have already referred, in the preceding chapter, to the problem of inadequate, and in some cases grossly so, facilities provided to subordinate courts, in terms of both trained manpower and physical facilities. The same difficulties are faced, to no small extent, by the higher judiciary, and they affect the expeditious handling of litigation at that level. The Shah Committee put the matter bluntly: "Of all the delays which hamper the administration of justice, those caused by the inefficiency or inadequacy of the staff attached to the High Courts, are the least tolerable" (1972 : 44). The increase in staff has been "disproportionately small" compared with the increase in the workload of the High Courts. The lack of physical accommodation also affects the necessary augmentation of judge strength; the Committee found that it also led to inadequate utilization of judges, as because of want of accommodation often two judges assembled to decide cases which might be perfectly disposed of by one judge sitting singly (1972 : 48). Even today, haunted by the spectre of delays, when Parliament has increased the number of Supreme Court justices to seventeen, some appointments can only be made when the new wing of the Supreme Court becomes available for occupation (These appointments have yet to take place as we go to press!). The problem of adequately trained managerial personnel for higher courts, and provision for in-service training has often been emphasized: the Shah Committee also emphasized the more innocuous need for making available to courts the services of efficient stenographers which the courts are unable to maintain in view of the comparatively unfavourable emoluments and terms of service. To all this,

I would like to add the need to provide some research staff for the Supreme Court and the High Courts. The Fourteenth Report, after a very careful consideration, decided against the system of law clerks for justices of the Supreme Court. Maybe, the idea still appears to be rather unusual and even radical; but the need for research assistance for the appellate judiciary just cannot be gainsaid.

This is so for many reasons, both theoretical and practical. Theoretically, if appellate judges are, and have to act as lawmakers, there is a strong case for making available to them research services to help them preserve high standards of judicial craftsmanship and creativity (see Baxi, 1978). Judges need to have access to the necessary non-legal and comparative legal literature in order to develop through cases a more satisfactory regime of law and constitution. The Indian Bar is progressively insulating itself from the mainsprings of juristic and jurisprudential learning; judicial legislation cannot any longer be allowed to depend on the chance virtuosity of individual judges. In complex matters affecting relations of law to polity, economy and technology, judges ought to have additional and independent research assistance to be able to make sound policy as well as sound law. The Supreme Court tried, in the recent past, to avail itself of such research assistance and to all accounts the experiment proved worthwhile. Some bodies, like the MRTP Commission, have already some provision for adequate research both into law and economics. Such assistance is all the more needed if we are to continue with the present system of oral arguments merely on the technical aspects of legal interpretation and exegesis, unsupplemented by any version, however weak, of the Brandies brief. The availability of such assistance will not merely promote just law-making by courts, but also contribute to efficiency and speed by minimizing claims on judicial time for individual research by judges. Whether such an enlightened claim will be met by the state, which is so unmindful of the minimal claims of administration of justice, is doubtful; but certainly this claim is deserving of as wide articulation and support as possible.

2. *Court-caused Delays*

Here, we come across a mix of tangible and intangible factors. To take the former first, the lack of court management procedures do contribute to the growing arrears. The Shah Committee was

able to point out, as late as 1972, that the failure to maintain a proper notice of ready cases, failure to provide priority for old cases, failure to bunch together cases involving substantially similar points of law contributed to delay and arrears in the High Courts. Not all these failures were inadvertent: the Shah Committee records that "we have been told that in the office of the High Courts, manipulations, whereby cases could be held up from being disposed of, are being made with the result that older cases which could be disposed of are held up and add to the backlog" (1972:47). There is this possibility that "corrupt and improper" practices are already being followed in the apex judicial institutions. Obviously, as the Shah Committee suggested, it becomes necessary for the Chief Justice or other judges nominated from time to time by him to ensure that such things just do not happen. This would add thus to the administrative responsibilities of judges; in some cases, they may have little or no aptitude for such administration. However, it is quite possible to devise simple procedures and controls over the court-room bureaucracy: judges ought not to feel shy of consulting management experts for working out of these procedures. There is clearly a need for modernizing court management including its supervisory role in relation to the subordinate judiciary. A manual of court management should be prepared for all levels of judiciary; the judicial officers of court-system should occasionally meet at training programmes and seminars to understand the new and comparative methods of court management.

We now move to a series of intangible factors which, directly or indirectly, contribute to the problem of arrears and workload. One group of factors involve the relation between the judge and counsel; another group involves the exercise of appellate or review powers; and finally the last group of factors concerns the exercise of judicial power that the High Court judges themselves possess and the institutional settings in which they exercise these powers. All these are rather delicate matters. Both the Fourteenth Report and the Shah Committee Report have highlighted these factors in relation to the problem of structuring expedition: we briefly follow these.

It is a fact that the superior court judges are unable to exercise any effective control over lawyers appearing before them. Prolix argumentation and obsolete forensic styles continue to prevail; "sometimes passages from evidence are read out in extenso and

180

95

decisions are read verbatim from the commencement to final order". Citations "of decisions from obscure sources is also a common occurrence" (1972:72). Judges have been unable to insist on an adequate written statement and have been unable to restrict counsel to the terms of whatever statement they submit. Control over adjournments is equally difficult, particularly with senior advocates, with whom most legal work is concentrated. The results can be best described in the words of the Shah Committee:

> Often these Advocates are unable to attend to the cases in which they are engaged because the cases reach hearing before the different benches at the same time and they are unable also to give full attention to preparation of cases. The practice of allowing cases to be passed over because the Advocate is busy before another Bench leads to dislocation of court business. Again concentration of many cases in the hand of the Advocate on which he is unwilling to relax his hold makes it impossible for him to adequately prepare for his case. It is not uncommon to find an Advocate reading the case practically for the first time in the Court when he rises to argue it (1972:79).

The conception of a lawyer as an "officer of the court" aiding it in impartial dispensation of justice seems thus to have more or less disappeared from India, if the above description is substantially correct. Of course, the judge needs the cooperation of the Bar for the efficient functioning of the court; but the existing rules of the game seem to allow far greater *leverage* to lawyers than to judges. One result is simply the inability to cope with the work; in other words, the accommodation between the judge and counsel is not only at the cost of justice to parties involved but also at the cost of efficiency in operating the overall system of justice of administration. This surely cannot be in the long-term interests of the Bar itself.

Judicial workload also increases with the widening, whether self-conscious or otherwise, of the scope of the appellate, review and revisional jurisdiction of the High Courts through their case by case decisions and approaches. For example, as the Shah Committee put it somewhat gently, "there is not often a proper appreciation of the limits of the High Court's revisional jurisdiction" under section 115 of the Civil Procedure Code ; also, "there has

been of late a singular misconception in some courts about the true dimensions of power which the Higher Court may exercise" under Article 227 of the Constitution. Further, there is "a great difference in practice" in the matter of admission of criminal appeals among the various High Courts (1972:67, 75). A "disproportionately large number of second appeals" are pending before the High Courts. A "primary cause" according to the Shah Committee, for this is "the laxity with which second appeals are admitted without serious scrutiny" (1972:73). It is pointless to multiply the examples here. It should be sufficient to note that such approaches do contribute to the intensification of judicial workload, often without any corresponding gains of equity. The basic principles governing appellate and review jurisdiction need to be codified either through legislation or "practice statements" under the authority of the Supreme Court. Article 141 of the Constitution does impliedly enable the Supreme Court to issue practice statements.

The third group of factors deserving notice concerns the exercise of their own judicial power by High Courts and the style of the exercise. It is clear that a substantial part of the workload of High Courts is that of writs under Article 226 of the Constitution. The Fourteenth Report, as well as the Shah Committee, stressed the need for the proper scrutiny of writ petitions, and their timely disposal. The Law Commission pointed out, as early as 1958, that High Courts granted interim stay orders too readily. It recommended that the High Courts may devise certain clear guidelines for the purpose. The Shah Committee also pleaded for "greater vigilance by the High Courts" at the stage of admission of writs in view of the unfortunately growing tendency of facile over-recourse to the writ procedure by parties and counsel for all sorts of matters (1972:76). The Committee also noted that "unduly prolix and argumentative petitions and affidavits-in-reply and in rejoinder contribute in no small measure to the delays" in disposal of writs and urged that courts exercise the power to refuse to entertain petitions which do not "set out succintly the right to relief and the nature of relief claimed" (*Id.*, 77).

Overloading of High Courts under writ jurisdiction and the costs of rather undiscerning tendency of granting stay orders, most of which were to be later vacated, featured conspicuously for the first time in the debate over the Forty-second Constitution amend-

ment. The painful controversy would not, perhaps, have been necessary if the High Courts had somewhat systematically heeded the recommendations of the Law Commission as well as the Shah Committee. The writ jurisdiction is certainly an extraordinary one; for that reason it has also to be expeditious. It must remain the cardinal duty of the superior courts to ensure that this high jurisdiction retains both these features.

The bench-structure is another factor which relates to expedition and equity. Too much fluctuation in the bench structure disables the court from availing specialist interest of individual justices in certain fields of law, which might, if heeded, facilitate expeditious handling of cases. Obviously, special aptitudes of judges should be borne in mind while forming the benches. The Shah Committee had, after noting this, still more to add:

> We have been told that in some courts rosters are so arranged that a bench of judges breaks up three times in the course of a day. This is responsible for cases remaining part heard, to be taken as and when the bench is available, and if a fairly long period elapses as it does many times. the causes has (*sic*) to be argued again from its inception (1972:83).

Obviously, if a committee of judges has to make these observations concerning the manner of formation and functioning of benches as late as 1972, the phenomenon of arrears must be regarded as judge-made to this extent. One hopes that such practices are discontinued.

This brings us, in general, to some questions concerning the leadership role of the chief justice. As one among equals, the chief justice of a High Court has naturally to rely on the cooperation of his colleagues on the bench; on the other hand, he is responsible for the efficient functioning of the High Court as well as the subordinate courts. Does the chief justice ensure that the overall work is done by all judges with maximum despatch? The Shah Committee suggested that each puisne judge may be required by the Chief, as in America, to file a strictly confidential detailed weekly report of "the number of hours he spent on the bench each court day, the number of cases and motions he has heard and disposed of, and... (those) he has heard but not disposed of, with the reasons" (1972:90). Organizationally, this is an ideal suggestion, although, given the individualism of Indian judges, one wonders whether such a suggestion can really be put into practice: it is because of this factor that one would think that the appointment of chief justices of the High Courts has to be made primarily in terms of leadership potential of the appointee. The tasks here involved require a person of tact as well as firmness; administrative ability as well as a degree of statesmanship; and a standing as a jurist. Above all, he must be able to generate commitment to expedition as an aspect of justice and must be able, as leader of the team, to control the Bar in some of its anti-justice stances and styles, described earlier.

However, persons of this ideal description are not always easy to find given the sources of recruitment and patterns of political patronage in judicial appointments. And any determined effort to reorient court-management by a Chief Justice so inclined often incurs wrath, rather than cooperation, of the Bar and even colleagues on the bench. When Chief Justice Satish Chandra of the Allahabad High Court initiated certain steps to manage more expeditious administration of justice, the Bar Association described these as measures to "massacre justice" and proceeded on strike lasting for about thirteen days in May 1980. The Chief Justice initiated several reforms which threatened major aspects of the livelihood of lawyers (Mahajan, 1980). The rotation of benches was so determined that the century old practice which virtually allowed lawyers to 'pick' their own bench at will was abolished. To combat the menace of stay orders which took three to eight years in ultimate disposal, the Chief Justice and his colleagues together bunched a large number of matters and began disposing them all through one decision involving similar or same legal contentions in numerous matters. Specialist benches were constituted; these also led to expedition in disposal. This had the result that litigation designed to secure a stay order, protecting the interests of clients for fairly long periods of time, became less attractive. Criminal revision applications which used to take three years began to be disposed of in about three months; this result was achieved by the simple device of not allowing, save for exceptional reasons, lawyers to call for records from district courts which invariably took (and was often made to take) long time. The system of "Friday" adjournments inveterate in the Allahabad Bar was virtually rendered extinct by sterner anti-adjournment

drives by the Chief Justice. Friday adjournments were freely available on production of illness slips; the elongated weekend was used to solicit and attend to clients in the interior or the hills of the Uttar Pradesh.

The lawyers' strike, extending even to the first two days of the vacation, could best be understood as their resistance to uprooting the 'traditions' of Allahabad Bar by a boldly assertive Chief Justice, unmindful of public relations with the 'leaders' of the Bar. But the unprincipled and even malicious propaganda accompanying the lawyers' protests, involving attacks (covert and overt) on the dignity and personality of the Chief Justice and brother justices must indeed have caused some demoralization among the bench. Interestingly, apart from the media support (in the columns of the *Hindustan Times*) the 'confrontation' received no attention from the All India Bar or even the judiciary and others who otherwise reiterate the virtues of streamlining judicial administration, avoiding arrears and of the survival of the people's confidence in the judicial system. Be that as it may, the Allahabad experiment's result (as we go to press) are indeed noteworthy: from 1,321,797 cases pending in 1978, the overall arrears in 1979 was 1,00,300. The rate of disposals also improved: as against the disposal rate of 727 cases per 33 judges in 1977, 46 judges disposed of about 1,300 cases every year against a filing of 45,000 cases.

The 'confrontation' at Allahabad High Court may continue and demands for the transfer of the Chief Justice may gain momentum. If it succeeds on any ground and by whatever process (such as elevation to the Supreme Court) the Bar would have won a victory in preserving its 'traditions'. Of course (and fortunately in this respect) Uttar Pradesh is not India. The reforms in Kerala, especially the List system (see Law Commission Seventy-seventh Report, 1978) has not evoked such resistance of the Bar. Perhaps, there are important cultural dissimilarities between the two Bars. But in many ways the final outcome at Allahabad will influence patterns of initiative and leadership in the reform of judicial administration in other High Courts in India.

3. *Legal Profession-caused Delays*

We have already noted in the previous section how inequitable distribution of professional work, a dominant feature of the Indian Bar as presently organized, militates against expeditious handling

of cases. Senior lawyers, in whose hands the work is heavily concentrated, contribute to delay and arrears by their non-availability and unpreparedness; what is more they seem to obstruct, in a variety of specialized ways (such as lack of due care in written statements, prolix argumentation, manipulation of interim orders procedure, manifestly wide ranging use of writ jurisdiction, etc.) the expeditious handling of cases. The substantial influence they must wield over the court-room bureaucracy is still a matter for examination. If the ILS is to be made to pursue the goals of equity as well as expedition, the Bar must be made more amenable than it seems to be to judicial control. A perusal of the Shah Committee Report overwhelmingly suggests that the situation is other way around: senior Bar exerts mighty influence on the High Court judges, because its cooperation is so vitally necessary for the judiciary in its daily tasks. The problems of workload and arrears thus cannot be examined without a careful analysis of the organization of the Bar, the variability of its professional performance and the unwritten rules of the game under which the Bar's relations with judges are maintained. A consideration of this aspect of the matter cannot be said, with any degree of integrity, to threaten the independence of the legal profession or the rule of law. If anything, such an examination would be oriented to restore the rule of law within the Indian legal profession and in its dealings with the Indian judiciary and the Indian litigating public.

The forensic habits of the Indian legal profession also contribute to the escalation of time taken for disposal of civil and criminal proceedings, even at the trial level. As early as 1925, the Civil Justice Committee (the Rankin Committee) noted that "there is a tendency in India to over-prove essential allegations" and there is "a further tendency to prove and over-prove unessential allegations". The Committee also noted that: "Even more surprising is the cross examination" which "frequently extends over a period which is more than six times as long as is necessary to produce useful results". Similarly, arguments often tend to be unduly prolix. Large numbers of authorities are cited and the practice of reading out lengthy excerpts from leading decisions is quite common.

The Bar so dominates the Bench as to subvert both the spirit and the text of law seeking to achieve a modicum of expedition in trial. For example, as early as 1956, the Fourteenth Report of the Law Commission found that Order XVII Rule (2) (a) of the

183

Civil Procedure Code requiring day to day hearing of witnesses upon the commencement of the suit was replaced by—"the hearing of a suit through a series of adjournments .... contrary to the Code". Indeed, the Commission reported that in various states "we found the subordinate judiciary acting as if they understood the Code to provide *to the contrary*". They "seemed to think that interrupted hearing should be the rule and day-to-day hearing the exception". It was only in 1976 that the Code was explicitly amended to provide that adjournments shall not be granted "except where the circumstances are beyond the control of the party". And such circumstances were not to be constituted by the fact that the pleader "is engaged in another court" or that he is ill, or unable to conduct the case for any other reason, if the party had reasonable opportunity to engage another pleader in time. Only one state—Kerala—seems to have taken the command of the Code seriously through its list system (Law Commission: Seventy seventh Report, 1979: 87-89). It remains doubtful whether the Bar and Bench in India have taken any more seriously the command of the Code in 1976 than the pre-existing one which required the courts not to grant adjournments save for "exceptional reasons" to be recorded in writing.

The position as regards criminal trials is not too dissimilar. The Criminal Procedure Code too makes the provision (Section 309) for day to day examination of witnesses: adjournment of the same "beyond the following day" has to be specially justified by the Court. The Code also requires that when witnesses are in attendance, no adjournment or postponement shall be granted without examining them except for "special reasons to be recorded in writing". And yet the "unwholesome practice" of piecemeal recording of evidence continues. The tragic human consequences of all this have now been well documented for us by the undertrial cases (see chapter eight). But this kind of expose is unlikely, without more to force a change in the system, given the fact that the legal profession does not consider the situation as being at all problematic.

Thus, for example, it is well known that many "an appeal or petition is filed with the sole object of obtaining a stay order or an injunction restraining the enforcement of the decree of subordinate court or the order challenged" (1972: 55, 74). The Shah Committee also noted that "disputes which are in truth not civil disputes are sometimes sought to be brought before the High Courts under the guise of a claim for constitutional protection". *Disputes* which could be ordinarily tried by civil courts are too frequently brought in writ proceedings and "it has become fashionable to challenge the validity of every statute however innocuous it may be". Petitions are "often filed without exhausting other avenues" provided for in the statutes (*Id.*, 77). The Shah Committee felt that the antidote to the court congestion caused by this type of litigational device lies in "a proper appreciation of the scope and object of the Constitutional writs on the part of the Bar and public...." The indifference of the litigating public and the Bar is often shown in the fact that many a time out-of-court settlement takes place and yet the cause continues to be maintained on the records of the court, thus contributing to unnecessary workload (*Id.*, 71).

Litigant-caused Delays

Understanding why people litigate, and the *way* they do so, is as important as understanding why people rebel. We have no theory or even sustained approaches to a theory of litigation in India. But we do have plenty of generalizations. The colonial administrators of the nineteenth century spread the word, generously, that Indians are highly litigious and produced varieties of statistics to support the claim. In independent India too the volume of litigation has been steadily rising. But if Indians are litigious, the question arises, why are they so? Is it because some Indians love litigation for its own sake? It has been observed (Morrison, 1974: 51) that the North Indian villagers' attitudes lie mid-way between those of the "rural Japanese" (who abhor litigation and respect mediation) and "of those of, say, central African cultivators" (like notably like the Bugosa of Uganda who "admire and cultivate arts of litigation and adjudication...and pour a great deal of energy and talent into legal activity" (Fallers, 1969 : 2)? Or does greater litigiousness show an increasing rights-consciousness and access to law? In other words, is litigiousness indicative of purposive legal rationality among Indian people? Or, is it that courts are resorted to not so much to secure relief or vindicate rights but rather with the objective of harassing the adversary ? Is judicial process used as an instrument of attrition in an ongoing social conflict? There is some evidence to show that the very failure of the adjudicative system to provide expeditious justice has contributed to this (But

~~205~~ 184

97

are growing arrears a *cause* of such use of courts or a result of it?) use of judicial process (see chapter eleven). Such use of the judicial process is entirely rational from the point of the view of the users of the legal system, although it may not be so from that of the ILS.

It has also been suggested by Duncan Derrett that the litigiousness may manifest the quest for "finality", an elusive quality given the ways the ILS functions. He notes that disputes go on for generations and the "frequency of appeals are greater than in any other country". And the "chance of a decision being overturned on appeal is very high". Such a state of affairs

> may be explained, in part, on the basis that in the search for right, opportunism reflects a want of faith not in the cold reality of the outcome, which is (logically) certain, but in the referee's fitness to conclude the matter (1978: 48).

Derrett goes on to suggest that that the western principle of "majority decision making which is essentially democratic has no place in a hierarchic society such as India was and to some extent remains". There persists, as a kind of cultural residue, the belief that a man's duty may not be determined "by counting heads, even wise heads". (*Id.*, 50).

Unless lawmen seek to understand Indian litigative behaviour in wider contexts of society and culture, they will end up reiterating the problem of arrears without fully understanding it and proposing 'solutions' which, naturally, do not work.

The System and Delays

Understanding of arrears has thus far been no simple task: we have found that in minute as well as in major ways all limbs of the justice system contribute to the excessive workload. If the breakdown of justice institutions has to be avoided, not merely would the matters hitherto examined have to be given serious thought but also some structural aspects of the ILS as a whole, and of the Indian bureaucracy would have to be included in our deliberations.

For example, there is a clear tendency to overlegislate: for every problem there has to be a law. We have already indicated the dimensions of legislative activity of the Union Government for the

period 1975 to 1976 (see page 60). We now add one more bit of statistical information to reinforce the point. According to one estimate, during the period 1955 to 1970 (May) Parliament passed 959 statutes and the legislatures of seventeen states (the information is not complete) enacted 6,358 laws. Of course, these figures are deceptive because under almost every legislation the power to make rules would be conferred upon the administration and this power in turn may have been sub-delegated; such power, together with the power vested by pre-existing laws, would also be exercised to make subordinate legislation in large quantities. It is difficult to guess the number of such legislations for the whole country. But it would be safe to say that the number of subordinate legislations will run into tens of thousands every year. If the number of laws passed every year or the GLP (Gross Legislative Product) were an index of development, we should rank amongst the world's most developed nations. While we have, more or less, assumed that in a modern complex economically organized society we would need a large volume of laws, it is not to be assumed that we cannot develop at all without such a large number of laws. The point here is that every law made, whether by executive or legislature, increases the potential workload of the justice institutions in a society. This problem is only partly solved when with a new law we also create a new forum for settlement of possible disputes. It is only partly solved because the system as it obtains now invariably provides one way or the other for reaching the higher judiciary, which, given the present arrangements, just cannot escape the impact of new legislative inputs. We need to think seriously as to whether excessive use of the technique of delegated legislation, as well as excessive use of legislative power itself, should not be curbed. Is there not a scope of substantial delegalization of Indian society? (Please note, in considering this question that the burden does not fall on the courts alone; it falls equally on the law enforcement authorities, especially the police, whose plight is as bad, if not worse, than that of the subordinate judiciary: see chapter four).

Excessive use of the legislative technique is accompanied by other serious problems, besides the overload on judicial and enforcement institutions. It makes the legal system notoriously complex, indeed so complex, that even the Indian Supreme Court has held, as late as 1975, that municipal tax inspectors may be excused if

206
185

they did not really know the provisions restraining and structuring their own powers since the municipal code was itself so prolix and complex. Complexity of laws entails other costs. It introduces uncertainties in the citizen's planning of his conduct, it leads to divergent and conflicting interpretation by various courts of the same provisions (further aggravating the situation), it encourages devious practices at the Bar, and last but not the least, it does play an important role in encouraging corruption at all levels of administration and implementation of legislation.

Once again we must not be misunderstood as saying that modern law can always be simple; we have ourselves stressed the complexity of normative law as a structural property of legal systems. However, not all laws need be complex and unintelligible without the help of legal professionals, and sometimes even despite their help. In India, we have *not* endeavoured to produce simple and intelligible law. The reasons for this phenomenon are many and diverse. One reason is that we have too few trained draftsmen: even a cursory perusal of the Union Law Ministry's annual reports show that comparatively more people from neighbouring countries receive the benefit of the Ministry's training programmes in legislative drafting than Indian. Only one or two states send their officials for such training. Much of the crisis affecting the Supreme Court and Parliament over the question of amendments to the Constitution is manifestly the result of wayward drafting (Even now, if you have any doubts, please look at the proposed amendment to Article 368 in the Forty-fifth Amendment Bill).

In addition to the lack of adequate drafting skills and talent, the other reason for complexity of almost all our laws is that we have by and large, mindlessly adopted the drafting pattern from overseas models, especially English law. Legislative formulae from foreign statutes are lifted verbatim and engrafted onto Indian laws, regardless of the Indian context and circumstances. This copycat drafting entails other costs besides complexity: it generates in the profession and judiciary a continual dependency on other people's law to understand and interpret our own. From this point of view, the extent of our overall normative dependency on English law jurisdictions is so great as to impart an anglophile profile to the ILS.

All this makes a large number of statutes somewhat dysfunctional in terms of their objectives. This particularly applies to

ameliorative laws—laws directed to better the conditions of specific groups, which are vulnerable and exploited. It would be rare if such beneficiaries (and indeed the targets) of the law could really understand their rights and obligations under the statute. If subordinate legislation is involved, such understanding becomes even more difficult, as it is usually drafted with less elaborate care than a statute. In this situation, there is little scope of beneficiary groups themselves being in a position to mobilize the law, without very special efforts being made at promoting legal literacy. But even such efforts, if they ever get systematically organized throughout the nation, would have their natural limits of accomplishment.

Certainly, this is the time for experimentation and innovation, unless we want the crisis of the ILS to continue. We have to decide whether the law is meant for the operators of the legal system alone or also for the people. If the latter, it must endeavour to use a style and language that people understand and not just the lawyers' language. Hopefully, even the operators of the legal system would know how to handle statutes drafted with the sole aim of communicating directly with the people affected by them. How do we go about managing this transition?

I suggest that there should be a constitutional requirement, may be through a directive principle, that laws should be, as far as possible, drafted in a manner that is simple and intelligible to all people affected by the law. This directive must be operationally supported by a further constitutional requirement that, no bill can become a law and no subordinate legislation can become valid and operative, unless it is accompanied by an officially binding description in common language of the law or rules. This latter requirement of appending a binding general description of the law would go a long way, over the years, in contributing towards making our laws simple and intelligible.

Finally, one must note that government agencies do not seem to care to scrupulously comply with the law themselves, while they continually expect the citizen to do so. The present growth, which is phenomenal, in administrative law and adjudication is indicative of the fact that discretionary powers are being abused and courts are continuously embattled with the administration to ensure that they follow certain minimum standards of fairness in the exercise of their statutory, discretionary powers. The

standards imposed are indeed minimal. There is the requirement to give fair opportunity to the parties to be heard; there is the salutary rule that bias, whether personal or pecuniary, should not affect decision-making; there is the rule that reasons should be given by the authorities making a decision affecting the citizen. I am not suggesting that the formulation of these requirements by courts has always been crystal-clear; but the underlying message is that every attempt be made by the administration to be scrupulously fair, and to ensure that the rules themselves are tolerably clear. And yet cases in which violations of natural justice occur in decision-making by the executive continue to come up before the courts and their number seems to be on the increase rather than declining. Why?

Similarly, for example, government agencies, when they assume the role of management of public sector industries, are themselves unable to comply with the minimum rules of labour legislation. For example, although substitute labour is legally prohibited, the Chasnala mine disaster proved tragically in 1974 that a nationalized coal-mine could still be running on such labour. The Minimum Wages Act and rules do not seem to be a part of "laws in force" for the Pantnagar Agricultural University, which recently witnessed cruel suppression of workers claiming minimal enforcement of the Act. The governments which are required to revise minimum wages every three years fail to do so for long periods of time. Nor as we have seen *before, during and after* the national emergency are the values of human dignity paramount for the administration of law by the police. All these examples, of course, refer to very complex socio-legal configurations which have to be understood in their own terms; and while such examples can be multiplied, one thinks that the point concerning the lack of optimum responsiveness to the claims of justice and rule of law is more or less, adequately made for the present purposes. One may now sharpen it a bit by saying that everyday excesses of the executive power are not different in kind but in degree only from the ones labelled as "emergency excesses". Everyday governmental lawlessness has to be checked by proper mechanisms and procedures at the governmental level. For example, an official whose action has been invalidated on the ground of violation of natural justice may be sanctioned through many processes inclusive of some kind of disciplinary action.

Other procedures, with incentives rather than sanctions, may also be thought of. The point is that such procedures will decrease the incidence of governmental lawlessness: it is important to do this both in terms of expedition and equity. In terms of expedition, surveillance by state over its agencies for their compliance with law, will tend to increase officials' responsiveness to law and decrease citizens' grievances, and thereby judicial workload. Indeed, be it recalled, that once the movement for provision of adequate legal services succeeds even partially, the workload of courts will increase by ten or twenty times at the very least and the incidence of governmental lawlessness would become increasingly socially visible. When this happens, the crisis of the ILS and the legitimation crisis, will be further deepened. It is thus all the more necessary that steps be taken to make the administration responsive to the requirements of the rule of law. This line of argument is purely pragmatic. But, of course, strong justification exists, in principle, for enhanced administrative responsiveness which is a justice value in itself, regardless of its practical utility.

Of course, this is a theme which needs elaboration on its own terms and not just a passing reference in the context of the workload of the judicial institutions. But it is hoped that even such a passing reference would illustrate that the crisis in the ILS cannot just be handled just by tinkering with the outer peripheries of the justice system. The problems raised by arrears are problems whose scope transcends the court system itself and lies in the entire set of arrangements which we call here the ILS. Perhaps, nothing short of a total transformation is needed if we are even to begin to "solve" these problems. That is why the crisis of the ILS also presents substantial opportunities for its reconstruction.

~~208~~
187

G. Haragopal, Political Economy of Human Rights: Emerging Dimensions
Himalaya Publishing House, Mumbai, 1

HH 2004
188

CHAPTER 3

THE LEGITIMACY CRISIS OF THE INDIAN STATE*

This chapter is an attempt to enquire into the causes for the growing crisis of legitimacy of the Indian state. The paper is divided into two parts: the first part is a brief description of the sources of legitimacy of state; the second part discusses the three phases of the political process and the state in the post-independence decades. The focus is on the third phase which portends the deepening legitimacy crisis of the Indian state and its implications for human rights.

I

Legitimacy refers to 'governance' through consent. This reduces the dependence and sustenance of the state on violence. It can, therefore, be stated that "lesser the use of violence greater is the legitimacy of the state". This also implies that in the event of any use of violence, it enjoys tacit approval of different classes of people. What are the key factors that constitute the essence of the legitimacy structure? One of the crucial factors is the nature of the class relationships in the society. As long as the contradictions remain within the manageable limits, the legitimacy of the state can last. As the contradictions sharpen and the social forces start getting polarised, the state

* Presented in a seminar on 'Indian State', held at Indian Institute of Advanced Studies, Shimla, 1992.

(Entire chapter)

gets into crisis of governance. As the behaviour of the state gets exposed to the oppressed sections, the latter not only start disbelieving the earlier notions of the state but may even start directly opposing it. It is historically this development that pushes the state into 'crisis of legitimacy'.

There is yet another dimension which relates to the relations within the ruling classes. In the societies where there is "enlightened" ruling class, legitimisation process is well knit. For, the ruling classes adhere to the norms and laws lending legitimacy to those norms or the laws. In the case of the societies like India where the ruling classes are heterogeneous and are engaged in intense struggle for power and dominance on the one hand and claims and counter claims for the growing wealth on the other, arriving at a concensus on the ground rules poses problems. This is a situation where the possibility of enforcing the rule of law becomes difficult.

The process of legitimacy is also significantly related to culture and cultural symbols. The rituals play a very important role as they influence and structure the levels of consciousness. The way a coronation ceremony was organised in the earlier times to the modern oath taking ceremony, the rituals occupy an important place. The perceptions of power and authority by the people and the symbols associated with them do add strength to the legitimisation process. The religion, God, the structure of the family, the school and the other socialisation processes adopted are all important. In the modern context the role of mass media also cannot be underestimated.

In the legitimacy question, how the power is acquired is as important as how the power is exercised. What role people play in the process of acquisition of power is one of the key elements of 'legitimacy'. In this context periodic elections, have become important. The electoral processes make every voter believe that he is electing the men in power. That the men in power can also be overthrown by the voter has a very powerful ideological appeal and operational significance. The elections have come to be so initimately associated with the democracy and freedom that it is considered as the *sine qua non* of liberal democratic structure. The 'democracy' in turn, has come to be considered as the most legitimate form of governance.

The democratic governance is supposed to rest on rule of law where the power is vested not in the person but positions and not in the individuals but institutions. It is impersonal authority that distinguishes the democratic form of governance

from earlier feudal and primitive forms of 'governance'. It is this unique characteristic of legal rational authority which Max Weber extolled as one of the landmarks of the modern civilisation. However, it is working of the institutions and the confidence that they inspire in the people that is crucial to continuously sustain the legitimacy.

The legitimacy, in the modern context, has something to do with the rule of law is obvious. This is a result of a higher level of consciousness among the oppressed classes. The masses in general would not accept any naked brutal force. The acceptance is always subject to the condition that it is exercised in the common interest of the society. The law is supposed to be an expression of that general will or the common interest. Thus, the power of state is regulated by the law. Those actions of the state which are not in accordance with the law, in the public eye, would not be legitimate. And those laws which tend to be arbitrary would either be disapproved or opposed. The force that is used to just maintain the order gives rise to the question of legitimacy.

The question of legitimacy of the Indian state has to be examined against this theoretical backdrop. The Indian state is passing through transition. The growing experience and evidence suggests that the state is in a state of crisis. The crisis is evident from the growing state violence, blatant violation of rule of law, the crippling of the electoral process collapse of institutions and consequently the erosion of human rights.

II

The Indian state, in the so called post-colonial phase derived legitimacy from three sources: (i) The anti-colonial struggle resulting in the transfer of power; (ii) The development ideology enjoying a broad concensus of the dominant class; and (iii) The hopes and expectations of the poorer classes. These three sources need elaboration. The notion that the power is transferred from the whites to Indian rulers worked as a very powerful influence on the mass psychology. This was backed by the suffering and sacrifice that the people and the leaders made in the wake of freedom movement. Nothing can be more legitimising than demonstrated sacrifice. The second source of legitimisation was embedded in the development ideology. The development ideology, in our case, implied three elements: (i) The thrust on the growth by improving the productivity of the land; (ii) Launching the basic industries to meet the demands of the people; (iii) Guaranteeing

189

the freedoms — political and civil — to the people to organise and articulate their needs and aspirations. However, the poorer classes, particularly of the princely kingdoms of the local rulers governed by the client-patron relationship were indifferent as they were not associated with the freedom movement. It is against this background we require to examine the changing legitimacy base of the Indian state.

The Consensus Phase (1947-1967)

The legitimacy that prevailed at the time of independence sustained itself almost for two decades. During this period (1947-67) Indian state enjoyed a high degree of legitimacy. This was a period when the collaboration among the dominant socio-economic groups could be achieved. The development model could be designed from the compromises of the competing and conflicting interest groups. The landlord, rich peasant conflict was partly resolved by the partial abolition of zamindari. For the zamindars got settled in certain modern roles. The abolition of zamindari and the other land reform measures were also necessary to expand markets for the industrial development. The state also launched major irrigation projects to help the rich peasants and also enlarge that social base of power. The public enterprises were started to create the basic infrastructure for industrial growth. In fact, the abolition of zamindari system and the other land reform measures and development projects helped for readjustment of the classes within the given structure.

The major irrigation projects — the modern temples in the words of Nehru — coupled with the land reforms served an ideological purpose as far as legitimacy is concerned. The poorer classes believed that it would lead to restructuring of the socio-economic order. The liberals and even radicals who knew that the measures would not lead to qualitative changes thought that at least the process of percolation would operate and the living conditions of the large majority of the people would become tolerable. The public enterprises served as symbols of socialist experiment. Thus, land reforms and public enterprises served the needs of the propertied classes; for the poorer classes they symbolised justice and social change. It is this advantage that stabilised Nehruvian regime as it was acceptable to both the exploiter and the exploited for different and even conflicting reasons.

This period of consensus of the ruling groups did witness certain political movements — ethnic, religious, linguistic and

cultural. In fact, these questions were raised as a part of the freedom movement itself. For instance the reorganisation of states on linguistic principle came up in sharp form in the course of freedom movement and the Congress party accepted it in principle. The party went back on its promise immediately after independence indicating a shift in the overall balance of socio-economic forces and a shift in the social base of power of the Congress party itself. This led to a confrontation between the centre and the people in the southern states and the states of Punjab and Maharashtra. The confrontation turned violent in the Telugu-speaking parts of the Madras state. This did call for readjustment of the forces and Congress party had to concede the reorganisation of the states on the linguistic principle. This process was complete in the case of a large majority of the states by 1956. After the reorganisation of the states, there was a relative stability in the socio-political order. The ruling groups arrived at a concensus and poorer classes were looking for change and improvement with a hope.

The Confrontation Phase (1967-1977)

Although in the first phase there was considerable legitimacy to the state power, the symptoms of fracture were visible by mid-sixties. The tensions that started in the early sixties assumed wider and serious dimensions as the time passed. The polity entered the phase of confrontation rendering the legitimacy problematic. The disturbance in the overall equilibrium was caused by several reasons. Of them the most important is the changing and rising consciousness of the poorer classes. The overall growth and development in the economy did not percolate to the lower levels as it was anticipated. The people became restless. In the year 1965-66, there was severe drought and food prices shot up by 40% within a period of two years. There was a decline in industrial growth and rupee was devalued. Added to it, the uneven development-economic and political-caused its own tensions.

In the agrarian domain the landed gentry acquired new economic strength partly by appropriating greater surplus from the labour exploitation and partly from the enhanced irrigation potential and the green revolution. In this overall transitional process, the craving of the landed gentry for greater share in the power and dominance got intensified. There were structural limits beyond which their share in power could not be enlarged. This has disturbed the equilibrium to a considerable extent.

~~116~~ ~~211~~ 190

The Ghaem Revolution allowed the developing countries, like India, to try to overcome poor agricultural productivity. Within India, this started in the early 1960's and led to an increase in foodgrain production.

100

The public expenditure that the state had incurred over a period of time created a new class of rich. This neo-rich is born out of the leakages of the public funds. This group consists of a few rich and upper caste peasants and also includes those middle or lower middle class individuals who knew how to manipulate the weaknesses and vulnerable points of the system. The unscrupulous class of individuals made huge amounts without participating in the productive process. This gave rise to the phenomenon of What J. P. Sethi calls 'non-investment expenditure' which in turn gave rise to the class of rentiers, speculators and parasitic elite (*India In crisis*, 1974, p. 39). This was the class which increasingly became powerful and its access to power enhanced in amazing proportions. The Sanjay Gandhi phenomenon was somewhere rooted in this rise of a new class.

The disturbance in the political equilibrium shattered the concensus that was arrived during the Gandhian and Nehruvian phases. It was this fracture in the concensus that gave rise to several protest movements including the violent outbursts. One example is the case of sub-regional movement. Almost every state in India, thanks to the colonial machinations, has three region syndrome — the advanced, transitional and backward. The uneven development within the boundaries of the state gave rise to sub-regional movements like Vidarbha, Mahakosal, Telangana, Chattisgarh, Uttarkhand, Jharkhand, Travancore, Cochin, Malabar, Gurkha region so on. The entire linguistic unity that symbolised the spirit of consolidation phase got transformed into confrontation between the people. Ram Reddy observes that 'language alone does not bind the people; — economic inequalities and political differences could become overriding factor and provide sufficient ammunition to explode linguistic unity (*G. Ram Reddy*, 1976, p. 28). These movements challenged the power at the state as well as central levels. This was the period when the uniparty dominance totally collapsed. The united fronts that emerged could not offer any ideological alternative. This is mainly a result of fragmented and split social base of political parties which, in turn, prevented political direction to the party or the system as a whole. This confrontation did raise the question of greater autonomy to the state as certain groups thought that their advancement would not be possible under the over-arching union Government. Mrs. Gandhi's forte, therefore, "was in political management and not economic development" (*Ashok Mehta*, 1979, p. 40).

A part of the phenomenon was a result of the green revolution which placed new wealth in the hands of the landed gentry. This new wealth, instead of leading to increased satisfaction resulted in considerable uneasiness. With the result the long standing assumption about the positive relationship between rapid economic growth and the political stability has been shaken up by the growing instances of rural violence. (*Francine Frankel*, 1971, p. 8).

Francine Frankel's case studies on Ludhiana in Punjab, West Godavari in Andhra Pradesh, Tanjavur in Tamil Nadu, Palghat in Kerala, Burdwan in West Bengal highlight certain broad trends which provide a base to understand the impact of green revolution on the political processes. Firstly, the gains of the new technology got very unevenly distributed or choice of wheat technology favoured regions and the farmers who had more than 20 acres of land. In Bihar and Uttar Pradesh over 80 per cent of all wheat cultivating households have less than 8 acres of land. Thus, those who are left out are far more in number than those benefited. In the rice zone the marginal and small farmers were not able to create any surplus. In fact, as many as 75 to 80 per cent have experienced a relative decline in their economic position (*Francine Frankel*, 1971, p. 19). The landless labourers are the most hard hit. It is also noted that during the same period the small landowners, the share croppers and labourer got increasingly liberated from the old authority patterns with the erosion of customary client-patron relations (*Francine Frankel*, 1971, p. 196). In the year 1967-69 the Home Ministry found that over 80 per cent of the agitations were led by the landless against landowners, poor peasants, Francine Frankel observes, had become resentful of institutional arrangements which deprived them of their 'legitimate share' in the increased production (*Francine Frankel*, 1971, p. 10). This created an objective situation which could be exploited either by forces of transformation or reactionary forces. The state of human rights depends on who uses the situation and to whose advantage.

The Naxalbury movement was one of the sharp manifestations of the changing situation. In addition to the other reasons it is also a result of the unfettering of ties between the patrons and clients. This has eroded the social base of intermediate elite and their structures and created base for alternative politics. It is also this process that produced Mrs. Gandhi phenomenon. This was a period, although very short, when the Indian state

HER 191

did distance itself from the dominant classes and raised the hopes and expectations.

The 1971-1977 period, unlike the 1967-71 period, witnessed initially relative stability with high tension built into the system. The increasing consciousness and the problems of underdevelopment and uneven development continued to characterise the Indian political process. Mrs. Gandhi through her politics of populism and the rhetoric could temporarily hold the masses. But the path of economic development pursued by the ruling classes reached by mid seventies its own inexorable limits. For economic development could incorporate a small minority of the population into the high productive, high wage industrial sector of the economy. Despite a large expansion of industrial output, there was little effect on the traditional sector. Eighty per cent of the population continued to live in rural areas and derived their livelihood from the agriculture. The green revolution could create only small pockets of affluence leaving large areas of subsistence sector without any benefit. With the result in 1970s there were food shortages and consequently low growth rates in the industrial sector.

Given this objective situation Mrs. Gandhi had to perform two tasks in the process of consolidation of her power and also maintain a social base which can give her the required stability. The first task was to confront her opponents who were challenging her socialistic credentials and simultaneously contain the Communists including the Naxalites. In this process she sought to build a base of her own in the Congress party. It was this political development which pushed her to a point where she had to resort to politics of populism and a radical rhetoric without any fundamental measures to restructure the society. The strategy of Mrs. Gandhi included tightening of the control over the industrial houses. There were demands for nationalisation of certain industries. There was a new company law department. The new licensing policy reversed the process of decontrols initiated in the mid sixties. All previous exemptions given were withdrawn. The Government imposed special restrictions on the large industrial houses and dominant undertakings. The policies looked 'radical' compared to the earlier liberal policies. However, the measures indicated that Mrs. Gandhi manoeuvred the state apparatus and the power in such a way that she could tentatively distance the state from the dominant social classes. This fitted well with her politics of populism and her methods of mass mobilisation for the electoral purposes. The

rising and changing consciousness of the people and their identification with Mrs. Gandhi led to the emergence of a strong leader and a strong centre. Consequently the state governments were considerably weakened.

The political process Mrs. Gandhi triggered created fresh enthusiasm among the poorer classes but it did not last long: the hopes started getting shattered as there were no qualitative changes in their life as there were no serious attempts at structural changes. The socio-economic structure imposed inexorable limits beyond which the programmes for the poor could not be carried out. The anti-poverty programmes emanating from this half-hearted measures could not tackle the magnitude of the problem. (G. Haragopal and Ch. Balaramulu, 1988, pp. 55-56). The failure of the Government to make any progress in realising the goal of social justice with growth made several members of the middle classes almost cynical about the capacity of the 'democratic system' to provide any solution to the fundamental problems embedded in the socio-economic order. The frustration among the people gave rise to intense law and order problems representing the other part of the tension!

As the elite classes and also masses started getting disillusioned, although for different reasons, the uprisings got intensified. This led to the demand from the left groups for greater state intervention and the right for greater state withdrawal. The attack was directed against Mrs. Gandhi as she symbolised power. As the credibility started declining Mrs. Gandhi attempted to protect her position and prevent by all means rise of any alternative power-center. Within two years of greatest political ascendancy Mrs. Gandhi faced an unprecedented political crisis. Sudipto Kaviraj notes that 'this crisis is a result of; firstly, the radicalised distributive expectations sets higher performance criteria and even slight shortfall become magnified; secondly, there was a chronic crisis particularly on food front that led to political turmoil' (Sudipta Kaviraj, 1986, p. 1702). This is the objective situation which gave rise to the Janta Party Movement.

The Janta Party Movement in the North India was a movement of a different kind. It was the first mass movement to be organised by the opposition groups in which the right wing groups were strongly represented. The parties like Bharatiya Janta Party started assuming political importance. This shows a significant alteration of political forces in India compared to the consensus phase. Till 1974 it was the left which constituted the main opposition and also the alternative. But from the mid-seventies

192

101

it was the rise of the rightist alternative that started occupying the political space. The essence of the Janta Party movement was the search for an alternative alignment of the ruling groups. This was supported by the youth and various interest groups for their own reasons. The discontented masses who also lent support were also looking for an alternative. The demands of the movement included not only better living conditions of the people but restoration of institutions and norms which suffered under Mrs. Gandhi's leadership. The demand for the revival of the institutions was part of the search for a mechanism through which the ruling groups could negotiate and arrive at a consensus.

The Janata Party movements signified two important trends: (1), the gradual weakening of Mrs. Gandhi's grip over the masses, and (2) the alienation of the dominant groups from the Congress Party. These two trends together mounted the opposition against Mrs. Gandhi resulting her marginalisation of and narrowing down of the space for manoeuverability. Since her power rested on the unorganised masses, she could not fall back on that social base. This made her to continuously press the state apparatus into the power game. The culmination of the process was the imposition of the emergency which placed arbitrary power in the hands of the state apparatus as all the space for democratic activity was closed. The implications of this development were far reaching. The most important of them were: (1) people perceived the state as helpless and oppressive, and (2) the dominant groups thought that it was very harmful. Thus, the phase of confrontation represents an overall decline in the legitimacy of the state.

The Crisis Phase: (1977-1990)

The Janata Party victory in 1977 reveals not only rejection of Mrs. Gandhi by the classes but the search for a new alignment of the class forces. The masses started asserting and organising themselves. This led to pressures from the below. This phase which started in 1977 continues and at every stage the crisis is touching a higher point. This was obvious, in the failure of the Janata experiment in a shortest spell. The party represented a wide range of class forces — industrial, trading, agrarian, regional which were not able to pull on together. As far as the masses were concerned, it was a negative vote to the Janata Party. Such a negative support has two serious implications: (1) it does not lend stability to the system; (2) it weakens the legitimacy of power. To face this crisis the party should

be able to resolve its inner contradications. It is in the process of finding concensus, the party developed inner crisis and was rendered helpless. It was obvious that the conflict between Morarji and Charan Singh or the Janasangh and the non-Janasangh groups could not be amicably resolved. This failure was located in the very objective situation in which the Janata Party was required to operate.

Kaviraj rightly points out that "the Janta Government", most of its three years in power, "spent in devoting what to do with Mrs. Gandhi rather than with the country". While Indira Gandhi lost the elections, the Janata which emerged as an alternative could not provide any stability. *(Kaviraj*, 1988, p. 1703). Balagopal observes "it is the inability of any one of these contending classes to take charge of the affairs and settle the crisis within the crisis in its favour" *(Balagopal*, 1988, p. 151). He further adds that in deepening the crisis "the ruling gentry would take the lead and attack the industrial class. This was evident in the exchanges between these two dominant groups of Indian society. The rural gentry waged a severe attack on the urban oriented Nehruvism and the urban bourgeoisie severely attacked and maligned Charan Singh-the main representative of the rural gentry". *(Balagopal*, 1988, p. 151).

After the Janata experiment failed, Indira Gandhi was brought back to power by the dominant elite of this country. Indira Gandhi of 1980s was different from Indira Gandhi of 1970s. She was tamed. She was no longer talking of the poor and the down trodden in the same tone. She was looking for alternative rhetoric. She discovered — communalism — created and nurtured by the right wing politics for about three decades as an important political resource. She wanted to knock off this base for two reasons: (1) this was readily available and needed no economic programme; (2) by knocking away this base she thought she would hit rising right wing political parties like Bharatiya Janata Party. As a part of this shift she was now too open to not only capital and market forces but to the foreign capital. The first dose of massive IMF loan was taken during this period. The IMF loan provided space for *manoeurability* wherein one could satisfy a section of the dominant groups as it did not pinch their resource base.

The return of Mrs. Gandhi and her changed policies indicate the long-term hidden tendencies in the Indian politics. This includes trends of intensification of competition for power. It reconfirmed, Kaviraj observed "the structural crisis in Indian

politics". The crisis was also due to the absence of a viable alternative to Indira Gandhi. Despite some of her failure,[8] in the form of politics that are engendered she was both the problem and the only available solution" (*Kaviraj*, 1988, p. 1706). Her return, instead of leading to a better coalition, has given rise to confrontation of different type and of a higher order. Balagopal comparing the two periods of Mrs. Gandhi observes that "in the first period it was the economic crisis and disaffection of the masses that were the main problem. The disaffection of propertied classes was as yet very much incipient". He adds "in fact it was the green revolution and the further industrialisation of the economy which were undertaken during this period with imperialist aid and advice was an answer to the economic crisis that would bring out the disaffection. Indira Gandhi successfully achieved these tasks". In the second phase the disaffections comes from the wealthy (*Balagopal*, 1988, pp. 149-150). The conflict and competition among the ruling classes on the whole got degenerated. This has resulted in large-scale erosion of values. The search for new alignments for an equilibrium of social forces did not succeed. It was this crisis that Mrs. Gandhi could not handle. The disequilibrium that brought down the Janata Party shifted into her party and took the form and the peculiar Congress phenomenon 'dissidence'. For one crisis after another destablised her: Andhra, Assam, and Punjab became her major and formidable problems. She resorted to all the methods and tried to bring consensus among the ruling groups but failed. It was this failure that resulted in her death.

The rise of regional parties particularly in a state like Andhra Pradesh which was the bastion of the Congress party indicates the sharp changing trends. The crisis in Assam, Punjab, Kashmir represent the crisis at different levels. Those crises are not only an indication of the failure of consensus among the ruling groups but also the discontentment of the masses. Most of these uprisings were not political protests but violent outbursts. Any socio-economic issue that takes a violent turn needs a highly imaginative and creative political intervention. The Indian state lacked this vision and experience. The rulers pressed the coercive apparatus — police, para-military and army into service. Instead of interpreting the situation in these crisis terms, the coercive intervention has come to be considered as a substitute to political solution. The coercive intervention is clearly an admission of a failure at the political level. Once coercion becomes substitute to politics the legitimacy touches the lowest ebb.

Another important trend one notices is the growing peasant and tribal unrest. The problems of the landless agricultural labourers combined with about 50 million educated unemployed make the system literally rest on a volcano. The existing economic structure and path of development that the rulers opted for does not seem to have any solutions for the problems. The state, therefore, started letting loose its coercive forces.

The dominant classes who themselves are not able to pull together are in search of solutions. A section of the ruling class has fallen on religious appeal and has fairly succeeded in communalising the society and also polity. Another section of the ruling groups has been using the regional appeal. Yet another group is using caste without a political programme. There have been pulls and counter pulls on the state and society. Consequently relationship between the state and the dominant groups on the one hand and the state and the masses on the other has taken a crucial turn. Of all the appeals the communal appeal seem to be far more powerful. The poorer sections particularly in the northern states are under its grip. A major chunk of north India is vulnerable to such appeal as that part of India not only has been the base of orthodox Hinduism and its mystification but experienced no major social reform movements. The overall economic development in these regions has been far lower than many other regions. With the result the electoral politics in these regions got largely communalised or castised.

The Hindu "Nationalism" has become the defining characteristic of electoral campaign. Rajani Kothari notes "the Hindu chauvinistic psychology is largely located in north India and in states like Maharashtra and Gujarat. In these parts the demands coming from the people are expressed more in communal terms rather than economic". (*Rajani Kothari*, 1988, p. 2590). The Indian state seem to be aiding and abetting these processes. The way the mass media particularly the Doordarshan is used is a clear evidence of this trend. The communal nature of the programmes and continuous overdose of Hindu symbols and coverage of festivals, sects, cults, Ashrams without any critique does indicate the tacit approval of the ruling elite of communal propaganda. This leads to an inference that communalism has come to be considered as one of the important means of consolidation, if not legitimisation of power of the ruling classes and specifically their state power.

~~190 2675~~
194

Another significant dimension of the behaviour of the Indian State is the way it deals with the class politics. All the peoples movements — tribal, dalit and poor peasants — are dealt with iron hand. The force used against these movements is not only arbitrary but totally brutal. The rule of law and constitutional norms are thrown to the winds. Any keen observer or activist of the grassroots movements knows how the coercive apparatus uses its fire power. The lock-up deaths, fake encounters, torturing the mass of people, raiding of the villages and destroying their belongings, raping of women are serious manifestations of the crude nature of the Indian state. The tentacles of repression quite often get extended to the press, judicial machinery and civil liberties movement. The extensive use of physical force by the state indicates more of the weakness and not the strength of the state.

The recent developments, which need careful and detailed analysis, do indicate the readiness of the ruling classes and the state to proceed on a path of development which bypasses the people and disassociates them from the entire decision-making process. The symbolic association people enjoyed is shattered through the systematic and blatant rigging that the agents of power are resorting to. The perversion of the electoral process is almost the last straw on democratic processes. The increasing nexus between the capital, state and communal politics on the one hand and the disassociation of the underprivileged and exploited classes from even the symbolic participation reveals the deep underlying crisis that is developing at the base of the system. This is the objective situation which is giving rise to a brutal state. This is, of course, a product of brutal path of development. Thus, the overall political developments convincingly indicate a deep legitimacy crisis of the Indian state. And the legitimacy crisis invariably leads to greaters use of physical force, which in turn seriously endangers human rights.

REFERENCES

1. Ashok Mehta, (1977), *A decade of Indian Politics*, 1966-1977, S. Chand & Co., New Delhi.
2. Balagopal, K. (1988), *Probings in the Political Economy of Agrararian Classes and Conflicts. Perspectives*, Hyderabad.
3. Francine R. Frankel, (1971), *India's Green Revolution*, Oxford University Press, Mumbai.
4. Francine R. Frankel, (1978), *Indias Political Economy (1947-77)*, Oxford University Press, Delhi.

5. Haragopal, G. (1988), *"Dimensions of the State Politics: A Political Economy Perspective"*, ICSSR Seminar on India Since Independence, New Delhi, December-27.
6. Haragopal, G. (1990), *"Political Economy of the Development: Review of the Literature on the Indian State"*, ICSSR Third Survey of Research in Public Administration.
7. Haragopal G, CH. Balaramulu, (1989), *Anti Poverty Programmes in a District of AP*, Economic and Political Weekly.
8. Iqbal Narain, (1976), *Sate Politics in India*, Meenakshi Prakashan, Meerut.
9. Sudipta Kaviraj (1986), *Indira Gandhi and Indian Politics: EPW*, Vol. 20, No. 3.
10. Manoranjan Mohanty, (1990), *"Duality of the State Process in India. A Hypothesis"*, in Ghansham Shaw (ed.), *Capitalist Development: Essays in Honour of A. R. Desai*, Popular Prakashan, Mumbai.
11. Rajni Kothari, (1988), *"Class and Communalism in India,"* Economic and Political Weekly, Vol. 22.
12. Rajni Kothari, *"State Against Democracy"*, (1988), Ajanta Publishers, New Delhi.
13. G. Ram Reddy, *"Language, Religion and Political Identity; the case of Mujlis-e-Ittehadl Muslimean in Andhra Pradesh,"* in David Taylor (Ed.), (1975), *Political Identity in South Asia*, Curzon Press, London.
14. J. D. Sethi, (1975), *India in Crisis*, Vikas Publishing House, New Delhi.

~~276~~ 195

Raphael's Political Philosophy

IV GROUNDS OF POLITICAL OBLIGATION

D. D. Raphael is Emeritus Prof. of Philosophy at Imperial College, London. He is a specialist in Moral & Political Thought in Britain during the 17th and 18th centuries and is the author and editor of a number of books including 'Concepts of Justice', 'British Moralists' and 'Problems of Political Philosophy'.

1 PRUDENTIAL AND MORAL OBLIGATION

The authority of the State implies that those who exercise it have the right (of action) to issue orders and the right (of recipience) to have those orders obeyed, and that, corresponding to the second right, the citizens have a duty or obligation to obey the orders. In this chapter I shall consider the question: *why* does the citizen have a duty to obey the laws of the State? This is the problem of the grounds of political obligation.

Of course, there is one answer to the question that is simple and obvious: the citizen is obliged to obey the laws of the State because the State has sovereign authority. It follows logically that if the State is authoritative, i.e. has the right to issue orders to its citizens and the right to receive obedience from them, the citizens are obliged to obey those orders. The recipient right of the State to be obeyed by the citizens, and the obligation of the citizens to obey, are simply two different ways of expressing one thing, the metaphorical tie or bond between the two parties. This answer is formally correct but tells us virtually nothing, as when Hamlet is asked by Polonius 'What do you read, my lord?' and replies 'Words'. The answer evades the point of the question. In the case of our question about political obligation the answer takes the question to mean, 'Why is the citizen legally obliged to obey the law?' This question would indeed have no point at all, and could only be answered by a statement of the formal implications of the terms 'law' and 'legal obligation'. The citizen

(of University Prof.) having retired but keeping his or her title as an honour

is legally obliged to obey the law because the law just *is* that which imposes legal obligation. To what else could there be a *legal* obligation except the law? But the original question, 'Why does the citizen have a duty or obligation (or, why ought he) to obey the law or the State?' was not meant in that sense. It meant, 'What reasons can be given for accepting the legal jurisdiction of the State?'

In Chapter III, Section 3, I said that a claim to authority can be acknowledged for different reasons. One reason is fear of the coercive power exercised by the person or body claiming authority; but there are other reasons too, such as general consent, or a rule of hereditary succession, or the possession by the claimant of special personal qualities. We now need to make a distinction of kind between reasons for acknowledging a claim to authority. (1) To acknowledge the claim from fear or dislike of the consequences of not doing so, is to admit a *prudential* obligation. It is to say that I ought in my own interest to obey; I 'had better' do so, or else it will be the worse for me. (2) To acknowledge the claim from the thought that it is right to do so, is to admit a *moral* obligation. It is to say that I have a moral duty to obey. So the question, 'Why ought I to (or, why should I) obey the law?' may be asked from either of two standpoints, and consequently it may be understood, and answered, in either of two ways. It may be asking for either of two kinds of reason for action. (1) It may presuppose the question, 'Is it in my interest to obey the law?' and so be understood to ask how it is in my interest. (2) Or secondly, it may presuppose the question, 'Is it my moral duty to obey the law?' and so be understood to ask why it is a moral duty.

Writers on moral philosophy used often to say that the word 'ought' has different meanings or senses when expressing prudential and moral obligation respectively. Nowadays it is more common to hold that the word has the same meaning but depends on different sorts of reasons in the two kinds of situation. This particular dispute in moral philosophy does not affect the distinction that I have drawn. It does not matter whether we say that the question 'Why ought I to obey the law?' has different

~~257~~
196

103

meanings or the same meaning when asked from the two standpoints. What does matter is that different sorts of reason can be given in answer to the question. It is, however, worth noting that while the question in its present and in some alternative forms ('Why should I . . .?' 'Why am I obliged to . . .?') can be asked from either standpoint, this is not true when the noun 'obligation' is used. The question 'Why have I an obligation . . .?' or 'Why am I under an obligation . . .?' cannot, so it seems to me, refer to a prudential obligation but only to a moral or a legal obligation. I have used the noun in speaking of a 'prudential obligation' to describe the situation where we may say a man 'is obliged' in his own interest to do something. But as I said in Chapter III, Section 4, such an 'obligation' is not an obligation *to* someone else, as is a moral or legal obligation. Not all moral or legal duties are of this kind, obligations *to* specified persons. For our present purpose, however, it is important to notice that some are.

I also said in Chapter III, Section 4, that the terms 'obliged' and 'compelled' are often used of action performed under duress, because the choice offered cannot be regarded as a genuine or effective choice when one of the alternatives is too unpleasant to be seriously entertained. We must not suppose, however, that this is always true of prudential 'obligation', or that if it is true for most people in a particular situation it is true for all. We certainly have a choice whether to follow a doctor's advice on diet even though we believe his prediction of the consequences of neglect. Most people threatened by an armed robber will feel that they have no choice, but a few will think differently. The fact that we often use the words 'ought' and 'should' to express prudential obligation shows that we think there is a choice. There would be no point in employing these terms if we thought that one course of action was inevitable. The armed robber does not say 'You really ought to hand over the money' (though he may well say 'You had better . . .'), as the doctor says 'You really ought to keep off alcohol'.

The question 'Why ought I to obey the law?' may be asked from the standpoint of prudence, and in that event it will be

sensible to answer 'Because you will run the risk of imprisonment if you disobey' or 'Because the law is intended to protect your interests along with those of other people'. There is no difficulty in providing an answer to the question in terms of self-interest, and one does not need the reasoning of a philosopher to discover it. Nevertheless answers to the question in terms of self-interest have figured in philosophical discussion of the grounds of political obligation, and the reason for this is that the standpoint of prudence has been confused with the moral standpoint. Because the same form of words can express different types of question, an answer in terms of self-interest has often been given instead of, or alongside, an answer in terms of moral duty.

Some people may be inclined to deny that political obligation has anything to do with moral duty. Let me try to show, then, than an answer to our question in terms of interest will not deal with the problem that has arisen in consequence of the discussion of the preceding chapter. Our problem is to find reasons for acknowledging the *authority* of the State. Authority implies two things: (1) it implies an obligation to obey the commands issued by the person or body vested with authority; and (2) it implies that that person or body has a right to issue the commands and a right to be obeyed. Now if we approach the problem from the standpoint of self-interest and say that the citizen ought to obey the rulers because it will be the worse for him if he does not, then we do indeed show that the citizen is obliged; we give him a reason why he ought to, or why he should, obey. But we do not show that the rulers have a right to make their demands or a right to receive obedience. We have pointed out that they have might, that they have the power to make things nasty for the citizen if he does not do what they require. But might is not right. Power may be said to oblige but not to confer a right. Furthermore, if we recall a point made earlier, we can note that the 'obligation' imposed by coercive power is not an obligation *to* the rulers, corresponding to a right against the citizen to receive his obedience. We can say that the citizen 'is obliged' to obey, but we should not find it natural to say that he 'has an obligation'

or 'is under an obligation', and it would be clearly inappropriate to say that he is under an obligation *to* the rulers or that they have a right against him. On the other hand, if we give the citizen moral instead of prudential reasons for obedience, these can take the form of showing that he is not only obliged but is under obligation to the State, which correspondingly has a right to his obedience. And since we are seeking reasons for acknowledging authority, we need an account in terms of moral obligation and not in terms of prudential.

We can now see more clearly the point of the statement made in Chapter III, Section 3, that power alone is not sufficient to constitute authority. Power may make people feel (prudentially) obliged to obey, but it does not confer a right to obedience and so does not confer authority. We can also now see more clearly the point of Hobbes's contention, at first sight a curious one, that a conqueror acquires dominion only if his vassals are understood to have tacitly promised obedience. Their fear of his power does not make them subjects, or give him authority, unless there is the intermediate link of moral obligation created by a promise.

2 MORAL GROUNDS FOR POLITICAL OBLIGATION

Granting that prudential reasons for obedience cannot constitute reasons for acknowledging authority, does it follow that only moral reasons will suffice? If recipient rights and corresponding obligations towards those who have the rights may be either legal or moral, cannot reasons for acknowledging authority be legal as well as moral? Legal reasons may be given for acknowledging the authority of a particular law or of a particular ruler or official, but not for acknowledging the authority of the State as such or, to put it in another way, of the system of law as a whole. We have already noted that it is a mere tautology to say that we are (legally) obliged to obey the law because the law is what imposes legal obligation. The reasons for accepting legal obligation at all must be drawn from outside the system of legal obligation. We can, however, give reasons from within the system to justify obedience to a particular holder of authority.

I said earlier that, apart from fear of coercive power, one might acknowledge a claim to authority because the claimant had popular support, or satisfied a rule of hereditary succession, or had some special personal qualities. Popular support and special personal qualities may give rise either to prudential or to moral reasons. One may regard popular support as potential coercive power which it would be imprudent to oppose, or one may think that the consent of the majority constitutes a moral reason for acceptance. Likewise the success which is likely to attend a leader with outstanding personal qualities of character or intelligence may give rise to prudential or moral reasons for accepting his leadership; I may consider that his success will ensure my safety and prosperity, or I may consider that his aims, say a maximum of prosperity and justice for the whole society, are moral ends and that his personal qualities afford the best chance of achieving them. The case is different, however, when we take as our reason for acknowledging authority some rule like that of hereditary succession. Needless to say, my list of possible reasons was not an exhaustive one, and hereditary succession is not the only example of a reason provided by a constitutional rule. Now if one ruler succeeds another as his heir, or as having been duly appointed under some other constitutional rule, he is entitled to be obeyed because there is a law, a constitutional rule, to that effect. This gives us a legal reason for acknowledging the authority of the new ruler. Similarly a particular law has authority because it has been passed in accordance with the constitutional rules for making individual laws. But we may also ask why we should accept the constitutional rules themselves, and then we are asking for reasons outside the system of law for accepting the authority of the system. And in answering this question we may want to fall back on one of the reasons mentioned earlier, such as the consent of the majority or the best means of securing moral ends.

I have mentioned this complication in order to say just a word about the theory of divine right. In former days, one theory of the ground of political obligation was the theory that the sovereign was given his authority by God. There is little point in

discussing the divine right of Kings nowadays because nobody in a modern State (leaving out of account pre-communist Tibet and some tribal kingdoms) would want to claim it. I shall therefore omit it in surveying theories of the ground of political obligation. The one matter that is still worth noting is that the theory of divine right, like others, made the legal authority of the King dependent upon moral authority. If it is assumed, as it was by the proponents of that theory, that morality depends on the will of God, then to say that a King is divinely invested with authority is to imply that his authority is moral and not merely legal. The basic problem in considering grounds for political obligation is to find moral reasons for obedience. It is felt that unless moral reasons can be found, there is no justification for acknowledging the State's authority. And once it was no longer thought plausible to say that a sovereign was invested with authority by God, it became necessary to find or return to other ways of giving a moral justification for political authority. The notion of charismatic authority likewise was originally one of divine authorization. The exceptional personal qualities of a religious leader like Moses or Jesus of Nazareth were taken to be signs that he had been invested with authority by God, and it was assumed that the will of God was the source of morality. A secularized idea of charismatic authority attributes to the leader himself superior capacities of moral judgement and of success in attaining what are taken to be moral ends.

Why does this problem of finding moral grounds for acknowledging authority apply specially to *political* obligation? Philosophers have not debated similarly the reasons for obeying the rules of other associations. They have produced theories to justify obedience to the laws of the State, but not to justify obedience to the rules of a club, or a school, or a Trade Union. The reason why the problem arises for political obligation is because of the universality and compulsory character of the State's jurisdiction. We have seen that compulsory acceptance of rules can apply, to a degree and for some people, in certain other associations, but the universality of the State's jurisdiction makes its compulsory character more pervasive and more evident.

Membership of most associations is voluntary. I can decide for myself whether to join and to accept the rules. If I do not like the rules, I need not join. If I decide to join, I do so freely, and in joining I promise to abide by the rules. But in the case of the State I have had no choice. I am a member, or at least am subject to the rules, whether I like it or not. It is therefore natural to ask why I should obey these rules if I have not freely chosen to do so. We should also note that some theories try to answer the question by saying that, despite appearances to the contrary, the situation is no different from membership of a voluntary association. They have argued that the obligation to obey the rules of the State arises from a sort of promise such as one gives when joining a voluntary association. Some other theories, but now outmoded like the theory of divine right, have compared the authority of the State with that of the head of a family; for membership of a family, like membership of a State, is not something we choose but something that is thrust upon us.

We are now in a position to survey those theories of political obligation which still retain, in my opinion, philosophical interest. I shall deal with five answers to the question: what are the grounds of political obligation? They are:

(1) The State rests on social contract.
(2) The State rests on consent.
(3) The State represents the general will.
(4) The State secures justice.
(5) The State pursues the general interest or common good.

3 THE THEORY OF SOCIAL CONTRACT

The theory of social contract tries to justify political obligation as being based on an implicit promise, like the obligation to obey the rules of a voluntary association. A theory of contract proper has been held in different forms. I shall discuss three kinds of contract theory, and shall then turn in the next section to the theory of consent, which depends on a similar idea but is perhaps not intended to imply a contract or promise.

(a) Contract of citizenship

Theories of social contract go back a long way in history. Two explicit versions of the idea are formulated by Plato, and no doubt hints of it can be found in earlier writings too. The first form of supposed contract that I want to consider may be called a contract of citizenship, a contract made by each individual citizen with the State or the law. An implicit contract of this kind is described as the ground of political obligation in Plato's dialogue, *Crito*. The argument is put forward that if a man remains in a particular political society and enjoys its privileges, he is bound for his part to accept the obligations too. Socrates draws a metaphorical picture of the laws of the State saying to him that a bargain has been struck between them; by living in Athens he has implicitly promised to obey the laws in return for the privileges of an Athenian citizen.

A literal version of this doctrine applies to a man who acquires citizenship by naturalization. He applies for membership of the State, just as one may apply for membership of a voluntary association. He has weighed up the privileges and the obligations, and is prepared to accept the second along with the first. In many countries he is in fact required to give an explicit promise to accept the obligations, in the form of an oath of loyalty. Now since his legal position, once he has become a citizen, is supposed to be exactly the same as that of a citizen by birth, it seems reasonable to think that the basis of obligation is similar for both; and since the basis of obligation for the naturalized citizen is manifestly a promise to accept the obligations in return for the privileges, it seems reasonable to say that for the natural-born citizen too, although he has not given any explicit promise, the basis of obligation must again be quasi-contractual, the obligations being a fair return for the privileges.

Actually, however, the analogy does not hold good. Although the naturalized citizen is told that he has the same privileges and obligations as the citizen by birth, his consequent position is not precisely the same. In Britain, and in many other countries, a certificate of naturalization may be revoked if the person holding

it is convicted of a serious crime. This means that his acquisition of the privileges of citizenship is conditional on reasonably good behaviour, and that fits in with the idea of a contract or bargain. But a citizen by birth is not, in most civilized countries, liable to be deprived of citizenship as part of the penalty for serious crime. And this reflects the idea that one cannot rightfully withdraw what has not been granted. The citizen by birth has not been granted citizenship; he has acquired it automatically.

Even if the two classes of citizens did have precisely the same status in regard to privileges and obligations, it would not follow that the ground of obligation was the same for both. This may be illustrated by a similar duality, in Britain at least, in the special military obligations of volunteer and conscript members of the armed services. A volunteer takes an oath of allegiance; he has chosen to accept the obligations of a soldier (or sailor or airman), and in signing the military oath of allegiance he explicitly promises to obey his superior officers. A conscript does not take an oath of allegiance; he has not chosen to serve, and so cannot reasonably be expected to give a promise; his military obligations are imposed on him by statute and are founded on his general obligation to conform to the laws. Yet once they are in the army, the volunteer and the conscript have exactly the same obligations and rights, although the grounds of obligation are clearly different.

What would the theory of contract of citizenship say of a man who thought that he received no benefit from being a member of the State, that he wanted neither the privileges nor the obligations? As Plato states the theory, it would say that in that case the man should have gone off to live elsewhere. Socrates represents the laws as arguing that, by remaining in Athens, he has shown that he prefers Athens to other city-states and therefore that he wants its privileges. This line of argument could not be applied so easily to-day, when many people are not free, as Socrates was, to become a citizen of a different State.

There are therefore two objections to the theory of contract of citizenship. First, it does not apply to natural-born citizens as it does to naturalized citizens. Secondly, the theory presupposes

200

freedom to accept or reject the contract, and this freedom does not exist for many people nowadays.

(*b*) *Contract of community*

A second form of contract theory is discussed by Plato in the *Republic* (Book II), but not as a view that he himself accepts. This theory depicts men as being by nature egoistic, everyone out for himself. Everyone is therefore liable to suffer harm as well as to cause it, and so men make a compact or agreement with each other to set up laws for the regulation of their conduct. This, it is claimed, is the origin of society and of justice. The laws restrain our liberty to do as we like, but give us protection from injury by others. It is therefore in our interest to join in the compact. Having done so, we are obliged to obey the law because we have promised this in the agreement.

A similar version of the social contract theory is developed in more detail by Hobbes.[1] He too sees the natural man as largely an egoist seeking his own advantage. In consequence, if there were no organized political society, men would be in a state of war, in which everyone would be in danger of losing his life. We may suppose that in order to obtain security, men have made a contract with each other to give up their natural right to do as they please, and have invested a sovereign person or body of persons with authority to make laws regulating their action. The citizens are obliged to obey the law, both because they have promised to do so, and because the alternative to a politically organized society is the 'state of nature' in which every man goes in fear of losing his life. As held by Hobbes, the theory combines moral with prudential obligation. There is a moral obligation to obey the law because we have implicitly promised to do so. There is also a prudential obligation because the alternative is chaos; however restrictive the laws of the State may be, says Hobbes, any form of order is preferable to the chaos that results from the breakdown of the State. As in Plato's version of the theory, Hobbes represents the contract as having been made for prudential reasons, but he adds that our consequent obligation

[1] *Leviathan*, chaps. 13–18.

to obey the law rests both on the moral ground that we have promised and on a continuance of the prudential ground that led us to make the promise.

Several stock objections are made to this form of the social contract theory. One of them is more relevant to a contractual theory of ethics than of politics. If it is supposed, as the Platonic version of the theory in the mouth of Glaucon seems to suppose, that the idea of moral obligation itself depends on an agreement to observe moral rules, that in fact, as Glaucon says,[1] laws and agreements can come into existence only after a social contract has been made, then the theory is involved in a vicious circle. If agreements cannot be made in the 'natural' state of man before society has been organized by a social contract, it is impossible for a social contract to be made; if the idea of moral obligation depends on the conventions of law, men in the 'natural' state will have no conception of obliging themselves by a contract. There is, however, no need for a social contract theory to land itself in this difficulty if its aim is simply to explain political obligation. It can assume, as Hobbes does assume, that men in a state of nature are perfectly capable of making promises and contracts, and therefore of knowing what it is to put oneself under obligation; but because there is no security, without the organization of political society, that men will keep their promises when they can break them with impunity, it is desirable to set up a sovereign authority by means of the special device of social contract. For our present purpose, therefore, we can ignore the objection that a contractual theory of *moral* obligation is circular.

We can also ignore a second stock objection to the theory of social contract, namely that it is historically unsound because few States have in fact come into existence as the result of a social contract. Some of the philosophers who have held a social contract theory did think of it as an explanation of the way in which organized States first arose, but such an account, apart from being historically false, misconceives the purpose of a philosophical theory. An account of how things have come to be as they are, is a causal explanation of the type sought in scientific theory. A

[1] *Republic*, 359a.

philosophical theory attempts to supply justifying reasons for accepting a belief (in this instance, the belief that we ought to obey the law), not explanatory causes of the belief or its objects. As the proposed answer to a philosophical problem, the social contract theory should not be regarded as a theory of historical genesis. Hobbes at least is quite clear about this. He knows very well, and says so, that most States have come into existence as the result of conquest, not of social contract. But he adds, as we have seen in Chapter III, Section 3, that those who submit to a conqueror can become his subjects, i.e. can be under an obligation of obedience, only if they are assumed to have implicitly promised obedience so long as their lives are spared. Such subjects have placed themselves under a contract of citizenship (except that Hobbes regards it as a one-sided promise, which binds the subjects only and not the sovereign). Hobbes draws the admittedly mythical picture of a contract of community because this brings out more clearly the logical implications of sovereign authority and of the obligations of subjects. The purpose of the social contract theory in Hobbes is to illustrate what sovereign authority and political obligation mean, not to explain how States in fact arise.

A third objection, however, is more to the point. The theory, as put forward by Glaucon in Plato's *Republic* and by Hobbes, assumes that all forms of society are artificial, deliberately set up, and that man is by nature a solitary individual who thinks only of his own interests. The objection is that this assumption is psychologically untrue. Man is by nature 'a social animal'. Men have natural dispositions to association with their fellows, and to affection for kindred and other close associates.

The objection is sound in so far as the theory purports to account for the bonds of all forms of society. That form which Tönnies calls community rests on 'natural will', on bonds of affection and concern that grow up naturally among people who are close to each other, as for example in family relationship. But the main point of the theory is to account for the bonds of deliberately organized society, and especially the bonds of legal obligation in the State. We may agree that community is natural,

but it does not follow that the State is natural. The real defect of the theory as presented by Glaucon and Hobbes is that it does not distinguish between community and the deliberately organized association of the State. It assumes that the only alternative to an organized State is a collection of psychologically isolated individuals, each out for himself and liable to come into contact with others only by way of hostile social relations. This is why I have given the name 'contract of community' to this version of the theory. As such it must be rejected. It can, however, be modified so as to avoid the objection, and it then becomes a different form of the social contract theory.

(c) Contract of government

Some social contract theorists have in fact distinguished between community (or 'society') and the State, and have spoken of a double contract, which we may call contract of community and contract of government. According to this form of the theory, men first contract with each other to join together in community (or 'society'), and then make a second contract in which they agree to set up a State and promise to obey its laws. A double contract theory of this kind was held notably by Samuel Pufendorf, writing a little later than Hobbes. The distinction between the two kinds of social union was not Tönnies' distinction between community and association, in which the very description of community implies that it is natural, not artificial. Pufendorf's distinction is between 'society', in a loose sense of the term, and that specific form of association which we call the State. Since 'society' in this loose usage includes community, the objection to a contract of community applies equally to the first half of Pufendorf's double contract. But we can drop this half of the idea, and simply retain the contract of government, which no doubt is what Glaucon and Hobbes were really after. The object of our inquiry is to find reasons for the obligation to obey the State, and if we think that the idea of contract can give us the answer, the only contract that we need to posit is a contract of government. We may say that community is a natural form of union, depending on the social tendencies and needs of men, but that

202

106

the organization of the State is set up deliberately, and that the obligations of law depend on an implied contract.

When so modified, the social contract theory avoids the objection I have made to a contract of community, but runs into a different one. The idea of a contract of government does apply to some instances of political rule. The founding fathers of the original American colonies did subscribe to a sort of social contract, because they supposed, under the influence of the political philosophy of the time, that this was the rational method of setting up a new State. Again, if we think of Hobbes's second category, a covenant of obedience made towards a conqueror by all the members of the conquered society, this answers well enough to the signing of an instrument of surrender by the representatives of a nation defeated in war. But then we need to ask, how can the promise of one generation bind later generations? The founding fathers of a State have voluntarily agreed to set up a form of government and to abide by its rules; and the leaders of a country defeated in war have, by signing the instrument of surrender, given a promise on behalf of all the citizens that the conditions laid down by the conqueror will be obeyed. Their acceptance of obligation has been voluntary, and in the second instance we may suppose that the general body of citizens have already agreed to accept decisions made on their behalf by their leaders. But the descendants of the generation which has promised are supposed to be equally obliged although they have not given or agreed to any promise. They have not freely chosen to accept their obligation.

It does in a way seem proper to say that the descendants of a defeated nation are bound by the conditions of surrender which were accepted by the earlier generation. The difficulty is that their obligation is not like that of a normal promise, which must have been freely given by all persons who are said to be obliged by it. For that matter, the original generation which accepted the conditions of surrender is in much the same boat. Normally a promise extorted under duress is not held to be binding, but this one is. It seems necessary to conclude that the agreement is not really a promise, as normally understood, but an analogous device of human invention to produce a continuing obligation after the

coercive means of inducing prudential obligation have been withdrawn. At any rate the analogy which the social contract theory is designed to draw, between political obligation and the obligations of membership of a voluntary association, has broken down. Hobbes does, however, have a sound point about the obligation to obey a conqueror; it cannot rest simply on fear of his coercive power, once the major part of his armed forces has been withdrawn; and just as promises and contracts are devices for the smooth running of society, so surrender is a similar, though not identical, device for future peaceful relations. This means that the *ultimate* reason for abiding by the conditions, as for having the two kinds of device in the first instance, is general utility. Still, it does seem to me that the *immediate* ground of obligation to abide by the conditions of an instrument of surrender is similar to that of the obligation of promises. Although the obligation is not undertaken with that full freedom which applies to the giving of a normal valid promise, the actual device, like that of promising, is specifically designed as a means whereby obligations are undertaken.

In the case of the American colonies, the device used was literally that of social contract. The obligation of the original members, therefore, arose from a promise proper, and we cannot say that the obligation of their descendants is one of promise-keeping, since the descendants were not parties to the original contract. The obligation of an American citizen to-day to obey the laws of his State is no different from the corresponding obligation of a British subject. The theory of contract of government faces the same sort of difficulty as the theory of contract of citizenship; it can cover only a minority of relevant instances. The theory of contract of citizenship accounts for the political obligation of naturalized citizens, who accept it voluntarily by means of a promise, but not for the obligation of natural-born citizens, who have not accepted it voluntarily. Similarly the theory of contract of government accounts for the obligation of the founder generation of a particular State which happens to have been set up by this device, but not for the obligation of their descendants or of any citizens in States that were not founded in this way.

~~227~~ 203

4. THE THEORY OF CONSENT

The doctrine of consent is a watered-down version of the social contract theory and is designed in part to avoid the difficulties facing the latter. It is simply that the authority of the State rests on the consent of the subjects. The idea of popular consent has played an important part in the development of parliamentary institutions in England. The process originated in the Middle Ages with the notion that property owners could not be taxed by the King without their agreement or consent. This led in the course of time to the appointment of representatives, who consented on behalf of the property owners to the raising of taxes and who took the opportunity, when they met for that purpose, to make grievances known to the King. Elements of this procedure are still retained in the usages of Parliament to-day. All Acts of Parliament state that the Queen legislates 'by and with the advice and consent' of Parliament. The idea is that the requirements of a statute are valid only if the representatives of the people have agreed to them.

This means that a form of consent is essential for the authority of a *particular* law. The notion that consent supplies the ground of political obligation *in general*, is commonly associated with the political philosophy of John Locke,[1] though in fact Locke's theory includes also a kind of double contract (strictly, a contract and a trust) together with the idea, to be discussed in Section 6, that the State's purpose is to secure natural rights. However, he does talk as if the real point of the social contract lay in consent when he says that men remain in a state of nature, i.e. outside the bonds of political society, 'till by their own consents they make themselves members of some politic society',[2] and again when he says that 'no one can be . . . subjected to the political power of another, without his own consent'.[3]

Locke in fact thinks of this act of consent as an act of promising, so that his theory is still one of contract. The difficulty with the contract theory, as we have seen, is that most members of a

[1] *Second Treatise of Government*, especially chap. 8.
[2] Chap. 2, § 15. [3] Chap. 8, § 95.

State cannot be said literally to have given any promise. A watered-down theory of consent can try to meet this difficulty with the view that if a citizen *acquiesces* in the laws imposed on him, he may be taken to have consented; if a man, being born within a certain State, does not choose to leave, he may be taken to have consented to abide by its laws. This of course is the point that Socrates makes in Plato's *Crito* when he puts forward what I have called the theory of contract of citizenship. As stated in the theory of bare consent, however, the citizen is not regarded as having made a contract or given a promise.

The question that I now want to raise is this: if consent does not imply a promise, can it impose an obligation? It seems to me that the answer to this question is 'No'. Promising is a device for putting oneself under obligation by the use of a particular form of words.[1] To make a promise is to 'bind' oneself figuratively to the performance of an action or series of actions; it is to undertake an obligation. But mere failure to protest or resist surely does not create an obligation. It may perhaps be taken as an indication or sign *that* one has accepted authority but it does not afford a reason *why* one has done so. The idea of a contract does afford such a reason, since it is implicit in the notion of a contract that one promises to do something in return for an anticipated benefit. I am not saying that the benefit received or anticipated constitutes the reason why one is obliged to fulfil the promise; it is the reason why one has made the promise. The reason why one is obliged to fulfil the promise is simply the fact that the promise has been made. Nor do I imply that all promises are made for reasons of self-interest. A one-sided promise to benefit either the person to whom the promise is made or a third party, may be given for altruistic reasons; and for that matter, the benefit anticipated in return when one joins in the mutual promises of a contract, may be a benefit for a third party. The point is that the obligations incurred in making a contract are intelligible by reason of the benefits expected to accrue. But if we say that mere acquiescence imposes an obligation, so that bare

[1] This was first made clear by Hume, *Treatise of Human Nature*, III. ii. 5.

consent of this kind is undertaking an obligation, as is the giving of a promise, it is not intelligible why the person who acquiesces should be supposed to have undertaken an obligation. Of course, if he acquiesces because he fears the unpleasant consequences of resistance or protest, it might be said, as by Hobbes, that his acquiescence can be interpreted as a tacit promise, made for reasons of self-interest. But his acquiescence may be due to apathy or sheer failure to consider whether there is any alternative, and we cannot then say that he has a reason and that his acquiescence consequently may be interpreted as a promise. The device of promising has a purpose, and while it does sometimes make sense to speak of a tacit promise even though the device normally operates by the actual use of words expressing a promise, it surely does not make sense to speak of a tacit promise, or of undertaking an obligation without overt signs, if no reason can be assigned. A man might make an explicit promise without thinking of what he was doing and without having reasons for making it, and he might then be nonetheless obliged because of the conventions associated with this use of words. If, however, he has not actually made use of any form of words that would conventionally be called promising, we cannot attribute to him the undertaking of an obligation unless we know of good reasons why he may be supposed to have undertaken one.

In short, to say that no man can be subjected to political power without his own consent is a way of drawing the distinction between being compelled by coercive power and accepting authority. It is a way of saying that acceptance of authority is voluntary, while being coerced is not. As such, it has its point. But it does not give us reasons *why* we should accept the authority of the State, which is what we are looking for in seeking the grounds of political obligation. The theory of consent does not supply a ground of obligation unless consent is understood, as it is by Locke, to mean the making of a promise. If I am right, the doctrine of consent does not avoid the difficulties of the social contract theory. Either it is simply a form of social contract, or it cannot afford a ground of obligation at all.

5 THE THEORY OF THE GENERAL WILL

I take next the theory of the general will because this, like the theories of contract and consent, tries to make out that our obligation to obey the law is voluntarily assumed. It must not be supposed that this theory is either historically prior to, or logically simpler than, the theory of natural rights or justice, which follows in my order of treatment. The idea of the general will first appears in the work of Jean-Jacques Rousseau in the eighteenth century, while the theory of natural rights came into prominence in the seventeenth century. Furthermore, an important feature of the theory of the general or 'real' will is the view that morality, including rights, depends on the existence of organized society; in the hands of some of its advocates, such as T. H. Green, the theory begins as a criticism of the idea of natural rights.

Practically all versions of the general or 'real' will theory, whether in Rousseau or Hegel or the English Hegelians, Green and Bosanquet, are highly complex and rather obscure. The sketch of the theory that I shall give here may well be accused of being an over-simplified and even distorted parody, if taken to represent the view of any important philosopher. This book is not a history of political philosophy but a simplified indication of problems and attempted solutions. It should not be thought that what I say in this section is an accurate interpretation of the view of any one political philosopher, or that the important insights of Rousseau or Hegel are disposed of by my criticism. In the case of Rousseau, indeed, it may be held that his theory is not intended to give the grounds of political obligation in actual States, since his purpose is the different one of working out a hypothetical or ideal state of affairs which would, if it were practicable, reconcile freedom with authority.[1] As against that interpretation, however, there are features of Rousseau's main work on political philosophy, *Du Contrat social*, which suggest that he is dealing with the actual as well as the ideal. The fact

[1] See, for example, the admirable discussion by Professor John Plamenatz in *Man and Society* (London, 1963), Vol. I, pp. 391ff.

is that he is not a consistent writer. However, I am not claiming to give an accurate interpretation of Rousseau or of the other philosophers I have mentioned, but only an outline of an interesting type of answer to the question of why we are obliged to obey the law.

The view is that we ought to obey the laws of the State because they represent the general will. What is meant by the general will? One might suppose that it means either the will of all the citizens or the will of the majority, but obviously the first of these will not do. If the general will meant the will of all, the theory would not have given us an answer to our question. For if everyone wanted the same thing to be done, there would be no problem. 'Everyone' includes me, and if the State is doing what I want to be done, I shall not ask why I should join in. The question is raised only because the demands of the State often go against the wishes of an individual, who in consequence is disposed to ask: 'Why should I do what the State requires, when I do not want to?' In any event, if the State is to act only when there is unanimity among all the citizens, it will have to wait until the millenium before it does anything at all.

Let us turn to the more promising alternative suggestion that the general will means the will of the majority. Why does majority opinion lay an obligation upon the dissident minority? Suppose that most people want the State to do something or other, e.g. to build earthworks so as to prevent flooding, but I do not, because I live on the top of a hill and do not want to pay taxes for earthworks that will be of no benefit to me personally. Why should I fall in with the majority? What is the justification for accepting a majority view? One reason that might be suggested is that a majority is more likely to be right than a minority. If two heads are usually better than one, then thirty million heads are probably better than twenty million. Probably, but not certainly. Two heads are not always better than one. Some heads have better brains in them than others. If fifty sheep take it into their heads to go one way when their shepherd thinks they should go the other way, the shepherd is not likely to be impressed by the argument that fifty heads are better than one. Still, when all

the heads belong to human beings, it is not easy to say who are the sheep. There is often no means of knowing, especially in political affairs, who is likely to be right. We also need to ask, right about what? In my example of building earthworks to prevent flooding, the difference of opinion arose from what people wanted. If politics is to be concerned with what people want; then, brains or no brains, a man can usually be expected to know what he himself wants; so that if the ideal, but unattainable, aim is to satisfy the wishes of all, we shall come nearer to it by satisfying the wishes of a majority than by satisfying the wishes of a minority.

In fact, however, the theory of the general will is not referring to the wishes of the majority. Rousseau, for example, says that the general will is always right.[1] This sounds as if he accepted the view that 'fifty million Frenchmen can't be wrong'. But he does not mean that the majority are always right. He knows they are not, and he wants his general will to be something superior to the fallible opinion of the majority. If we ask 'right about what?' the answer that we receive is 'right about the common good (or common interest)'. The object of the general will is the common good, not what any particular people happen to want for themselves. The common good is taken to be the aim of moral volition, and the general will is the will that each man has as a citizen or moral agent, not the sum of particular wants that each has as a non-moral individual thinking of his own interests in isolation from the interests of others.

Now if the theory of the general will were simply saying that we ought to obey the laws of the State because they seek to promote the common good and that this is the proper aim, or one of the proper aims, of each of us as a moral agent, it would be nothing more than a version of the common good theory, which I have placed last on my list, and which is a straightfoward utilitarian theory of political obligation. But in talking of a general or real *will*, the theory goes farther than that. It holds,

[1] *Contrat social*, II. 6. He qualifies this statement (in the second, revised version of the book) by adding 'but the judgement which guides it is not always enlightened'.

not simply that the common good is what we morally ought to aim at, but that this is what we 'really' *want*, and that therefore the State, in pursuing a moral aim and in requiring, sometimes forcing, us to give effect to that aim, is getting us to do what we want, despite appearances to the contrary. How does the theory reach this paradoxical conclusion?

I said earlier that we might justify the following of majority preference if we thought that political decision should approach as near as possible to an ideal aim of giving everybody what he wanted. Now a person may want something which is not good for him; and it might be argued that what is good for someone is what he *would* want if he had complete wisdom about the consequences of satisfying alternative possible wishes. He thinks that what he now wants will satisfy him, but this is because he is ignorant of some consequences. In fact it will not give him lasting satisfaction. It is only an apparent good. His real good, what would give him real or lasting satisfaction, is what he would want if he had more wisdom. Holders of the general or real will theory then take the step of saying that his real good is what he 'really' wants though he does not know it. They also argue that a man's real good or interest must be in harmony with that of other men, since a conflict of interests is harmful to all concerned. Such a harmony could be secured if the interests of all were the aim of each. This common good, or general interest, is what we ought to pursue; it is the object of a rational, real, or general will, and so is the real good of each individual. Since the State aims at securing the common good, the State or the law is the concrete expression of the general will. We ought therefore to obey the State, and if we do so we are following our real will, a will that is general or common to all the members of the State. If a particular individual does not understand what he 'really' wants and is unwilling to fall into line, the State is justified in forcing him to conform.

There is more than one unwarranted jump in this train of argument, but I shall confine myself to three objections. First, the theory assumes that the Government knows better than the individual what he really wants. 'The man in Whitehall knows best.' Now the man in Whitehall may know more than I about the causal effects of different policies. His knowledge of economics, for instance, may enable him to say that if the rail services are electrified they will be twice as quick and will cost twice as much. I know little of economics and am prepared to defer to his superior knowledge in accepting his conclusion. It says nothing about my wants. But suppose the man in Whitehall then adds that a quick service is preferable to a cheap service, and that therefore the railways ought to be electrified. There is no reason for me to treat his opinion on this issue as being knowledge of what I really want. If I do want a quick service rather than a cheap service, it will be rational for me to agree that the railways ought to be electrified and that I ought to pay more taxes or higher fares. But if I decide that I want a cheap service rather than a quick one, it is no use saying that I 'really' want a quick one because the man in Whitehall thinks it will be best for me. Perhaps it will, or perhaps most people want it, and either of those circumstances may be a good reason for going ahead with the policy and requiring me to join in the cost. The fact remains that I do not want it.

Secondly, the theory holds that everyone really wants the same things; it makes no allowance for differences of taste. It assumes that fundamentally human nature is always the same. But if, as is presupposed by the theory itself, people differ in their knowledge, why should they be supposed not to differ in their wishes? Indeed the mere fact that they differ in their intellectual capacities makes it likely that they will have different tastes in consequence of their different capacities, and this of course is what we find.

Thirdly, the theory identifies moral obligation with interest. It says that what I ought to do is what I really want to do. It assumes that there can be no obligation other than prudential obligation, and this is why it has to make the absurd assumption that everyone wants the same things. Now there is nothing absurd in saying that everyone shares a common set of moral obligations. It is perfectly sensible to say that everyone has a moral obligation to promote the common good, i.e. to serve other

207

people's interests as well as his own, so far as he can. We can make this moral obligation the ground of political obligation, as is done by the utilitarian theory. In a way, the general will theory is doing the same thing, as I said earlier, but this simple, straightforward thesis is confused and distorted in the general will theory because it is supposed that one can be obliged to do something only if it is in one's own interest, a means to what one chiefly wants. The mistake is a common one, but in the case of the general will theory it is aided by the further supposition that a solution to the problem of political obligation must take the form of showing that somehow the State is a voluntary association.

6 THE THEORY OF JUSTICE

The three theories that I have so far considered all try to make out that political obligation is voluntarily undertaken and is grounded on this voluntary acceptance itself, independent of aims or consequences. The two theories that remain take a different line. They concentrate simply on the purposes of the State and hold that we are morally obliged, generally speaking, to obey the State because the State is a means to the fulfilment of moral ends which are themselves the objects of moral obligation for everyone. In principle, therefore, the theory of justice and the theory of general interest or utility take the same sort of form, and my own opinion is that they need to be combined. They have, however, been held separately, partly because earlier ideas of the purposes of the State were confined to the negative function as I explained in Chapter II, Section 5(*c*), and partly because the utilitarian theory takes the concept of justice to be comprehended in that of utility. It will therefore be convenient to consider them separately in the first instance.

According to the theory of justice, our obligation to obey the laws of the State depends on the fact that these laws are intended to secure justice or moral rights. One version of the theory speaks of 'natural rights', a conception that plays an important part in the political philosophy of Locke, who also, as we have seen, held a doctrine of social contract or consent. It is of course possible

to think that there is more than one ground of political obligation, and thus to combine two or more theories.

The theory of natural rights maintains that men have certain absolute moral rights, such as the right to life, to liberty, and to the opportunity to pursue happiness. (Locke in fact made life, liberty, and property his three cardinal rights; but he was clearly uneasy about joining a natural right to property with the other two, for whereas it seemed to him self-evident that all men have a natural right to life and liberty, he thought it necessary to produce an elaborate argument for the view that there is also a natural right to property. The American Declaration of Independence, which was much influenced by Locke's idea that the purpose of political society is to protect natural rights, substituted 'the pursuit of happiness' for 'property' in its list of three cardinal rights.) These rights were called 'natural' because they were thought to be derived from 'natural law' or the law of God, but there is no need to include metaphysical or theological preconceptions in the idea of such rights. 'Natural law' was simply a way of describing principles of morality. They involve duties and rights, as does positive law, and the adjective 'natural' was used in order to contrast moral principles and rights with artificial or man-made laws and rights. Some rights are plainly man-made, such as the right of certain persons in Britain to an old-age pension of a fixed amount of money per week. This right would not exist if the State did not grant it. When it is said that the right to life, or the right to liberty, is a natural right, this means that it does not depend on man-made laws but is a right irrespective of whether the State or any other organization guarantees it.

Locke's view was that the State is designed to guarantee and protect natural rights. If we think that the notion of justice includes more than what Locke had in mind as natural rights, we may expand his doctrine and say that the State is designed to guarantee justice, i.e. established rights plus fairness. We may then say that if the State effectively carries out this function, we are thereby under an obligation to support it and obey its rules. On this view, political obligation depends on our moral obligation to pursue justice.

So-called 'natural' rights are a species of moral rights of recipience, which go along with 'natural' i.e. moral, obligations. To say that a man has a moral right to life and liberty is simply an alternative way of saying that other people have a stringent moral obligation not to take his life or interfere with his liberty. 'Natural rights' or 'rights of man' or 'human rights' are moral rights attributed to every human being and corresponding to 'natural' or moral obligations which everyone has. But since some people do not in fact respect the rights of others, it is expedient to have an agency, the State, which will protect rights, if need be by force. The theory takes for granted that everyone has a moral obligation to respect rights and promote justice. In consequence it is morally obligatory to take the necessary means to that end. If the State serves as such a means, it is morally obligatory to give the State our support. Political obligation is treated as a form of moral obligation, the State being regarded as a necessary means to a moral end, the securing of justice.

It should be noted that this theory of the ground of political obligation implies that our obligation holds good only if the State does secure justice. If the State acts unjustly, it is not a means to a moral end and it forfeits its right to be obeyed. Locke deliberately intended this consequence. He wanted to show that it was justifiable to rebel against the existing rulers if they were pursuing unjust policies. Locke would also say, however, that, human nature being what it is, there is little chance of securing justice to any appreciable degree unless we have a State to enforce it. So that, if we live under an unjust government, his view would be that we are entitled, indeed obliged, to replace it by another government which will aim at securing justice. Mere rebellion by itself is not warranted, but only rebellion which aims, with reasonable hope of success, to replace an unjust by a just régime.

The theory of natural rights has been criticized on the ground that no rights are absolute and that natural rights are a myth. There is in fact no need for the theory to maintain that natural rights are absolute, i.e. that there are no circumstances in which a man loses them. Most of us would agree that a criminal forfeits his right to liberty for a time; and it may be argued that a murderer who deliberately and coolly takes the life of another thereby forfeits his own right to life, though this does not necessarily imply that the State or anyone else ought to execute him. Locke undoubtedly thought that natural rights are forfeited by one who breaches the natural rights of others. Some advocates of the doctrine of natural rights have called them 'inalienable' or 'imprescriptible', but what they have meant is that moral rights cannot be lost merely by legal enactment. A man may forfeit moral rights if he deliberately breaches the similar moral rights of others, and the law may give effect to this by listing crimes and imposing punishments. What it cannot (morally) do, according to the theory, is to deprive a man of his moral rights for non-moral reasons. All this is simply reiterating that moral rights and obligations do not depend on law and that legal obligations must depend on moral reasons if they are to be morally acceptable.

The second objection, that natural rights are a myth, may take either of two forms. (1) It may mean that the theological or metaphysical presuppositions of Locke and others are mythical. To this we may reply that, as I have said earlier, the natural rights theory can stand without such presuppositions; the word 'natural' here simply means non-artificial, and the rights concerned are moral as distinct from legal rights. (2) The objection may be understood, however, as a denial that there can be such things as moral rights distinct from legal ones. It may be said that 'rights' is a legal term and cannot properly be used to refer to anything other than legal rights. In reply to the objection in this form, we must allow that the term 'rights' is initially used in the context of law, but it has come to be used, by analogy, outside the field of law, and I do not see why the extended use should be called improper. We should all agree that there are moral as well as legal obligations. Legal obligations often correspond to legal rights, and therefore it is quite natural to think of certain stringent moral obligations as corresponding to moral rights. This is hardly more than saying that the obligations are stringent obligations and that they are obligations *to* other persons. To say that *A* has a moral right against *B* is just another

209

way of saying that *B* has a stringent moral obligation to *A*. The meaning of the two statements is perhaps not quite the same, for often the point of saying that *A* has a moral 'right' is to express implicitly the view that it ought to be turned into a legal right, i.e. that the obligation of *B* towards *A* ought to be enforceable by law. Certainly one of the main points of issuing declarations of 'the rights of man' or 'human rights' is to urge that these moral rights be given legal protection and so be turned into legal rights. In that case, the objector may think, it would be less misleading to speak of interests that ought to become rights instead of calling them moral rights. But if he agrees that *B* does have a stringent moral obligation towards *A*, this is all that is required by the natural rights theory. As an account of the grounds of political obligation, the theory says that the State is a necessary means to the fulfilment of certain moral obligations that we all have, and therefore we are morally obliged to give it our support.

In any event, all these objections to the idea of natural rights disappear if we extend the natural rights theory, as I have done, into a theory of justice. Few philosophers will deny that justice is a moral as well as a legal notion. Utilitarians would object to the theory of natural rights and to the theory of justice alike, on the ground that these notions are both concealed forms of the idea of utility. The ultimate and comprehensive principle of morality, in their view, is the promotion of the general happiness; and justice is a means to that. My own opinion is that the idea of justice cannot *wholly* be subsumed under that of utility for the general happiness, but this is a question that I shall leave for discussion in Chapter VII, Sections 1 and 4. Meanwhile we can turn to the utilitarian theory of the ground of political obligation.

7 THE THEORY OF GENERAL INTEREST OR COMMON GOOD

This theory is held by Utilitarians, who take the view that all moral obligations depend on their utility for promoting the general happiness or interest. The State is a necessary means to securing a substantial part of this moral end, and therefore we are obliged to obey the law as an essential condition of fulfilling our general moral obligations. The State carries out its purpose by laying down laws, backed by force, requiring everyone to refrain from actions (crimes and torts) that harm the common good, and to contribute in taxes and other imposts to the upkeep of services (such as defence, public utility, and social services) that promote the common good. As with the theory of justice, it follows from the utilitarian theory that if a particular Government is harming instead of helping the promotion of the common good, it loses its right to obedience.

I imagine that everyone would accept the common good theory as providing *one* of the grounds of political obligation. Objection would be raised only to the thesis that it provides all the grounds needed. We have seen that the general will theory includes the idea of the common good as the object or aim of the State. Both the general will theory and the theories of contract and consent, however, would say that this is not sufficient because political obligation must have been voluntarily undertaken. It is not in fact true of most citizens that they have, in any straightforward sense, voluntarily undertaken their obligation to obey the State, but there is point in the contention that consent in some sense is a necessary addition both to the theory of common good and to the theory of justice. I shall consider this in the next section. Meanwhile we may turn to an objection to the common good theory that naturally suggests itself from our discussion of the theory of justice.

Both the theory of justice and the theory of the common good ground political obligation on the functions of the State in pursuing a moral end. When I dealt with the functions of the State in Chapter II, Section 5 (*c*), I said that its negative function was to preserve order and security, and that its positive function was to promote welfare and justice. Each of the two theories that we are now considering would claim to cover the negative function. The theory of justice would say that this function is the protection of established rights, one aspect of justice. The common

good theory would say that the negative function is to prevent harm to the common good. What of the positive function? I do not think it can be said that the further *promotion* of welfare is an aspect of justice, so that if we accept the theory of justice as giving one ground of political obligation, we must add the theory of common good as specifying another similar ground. We should then have the composite theory that political obligation is grounded on the moral character of the functions of the State, these being both the securing of justice and the promotion of welfare. The common good theory, however, would say that it already provides for all functions, since the concept of justice is comprehended under utility. Just as the protection of established rights is a method of preventing social harm, so the redistribution of rights in terms of fairness is a form of promoting the general happiness. Take reward and punishment, for example. According to utilitarian theory, reward is appropriate only for such achievements as are useful to society, and it is appropriate because they are useful and because the encouragement of them by this incentive is useful; punishment is appropriate only for such actions as are harmful to society, and it is appropriate because they are harmful and because the discouragement of them by this sanction is useful. This view obviously has a certain plausibility. As I have already mentioned in the preceding section, I myself do not think that utility can account for all the ideas included in our concept of justice, and therefore I consider that both the theory of justice and the common good theory need to be combined in giving the grounds of political obligation. Those who think that justice is comprehended in utility can adopt the common good theory alone.

8 OBLIGATION AND AUTHORITY

Both theories, however, still have to meet the contention of the contract, consent, and general will theories that it is not enough to refer to the moral functions of the State. We have seen that it is a mistake to say, of most citizens, that they have, in any straightforward sense, voluntarily undertaken their obligations to

the State. The State is not a voluntary association. Nevertheless the contention has point, which may be brought out in the following way. Authority, or a right to give orders, it may be said, must have been granted by people in a position to grant it. The fact that an agency pursues a moral end does not by itself oblige others to give it their support. Otherwise we should have to say that our general moral obligation to be charitable implies an obligation to support any and every charitable association, instead of leaving us free to fulfil our moral obligation in whatever way we choose.

The theories of justice and the common good can give a partial answer to this objection by reminding us that they treat the State as a *necessary* means to fulfilling some of our general moral obligations, and it is this necessity which directs our general obligation into the channel of political obligation. The State, with its system of enforceable law, is a necessary device for securing essential rights and interests, and this fact, together with our acknowledged moral obligation to promote justice and the common good, obliges us to give the State our support.

This is not, however, a complete answer to the objection since it does not meet the point about authority or a right to give orders. I said in Section 1 that the problem of the grounds of political obligation could not be solved in terms of prudential obligation because that would show only that we were obliged to act, not that the State had the right, implied by the idea of authority, to give orders. Now an account of political obligation in terms of the moral functions of the State does not indeed make political obligation prudential, but it does show only that we are obliged to act and not that the State has authority. The answer to the objection which I have put forward comes to saying that we have moral obligations to the members of our national community (as we have, though often in a different degree, to other persons also), that some of our moral obligations to other members of our national community can be fulfilled only through using a necessary device, and that therefore we are 'obliged' to use the device, just as a man is 'obliged' to make a detour if, owing to a landslide, that is the only way to reach his destination.

211

The 'obligation' to use the device of the State is not a prudential obligation, because the end which it serves is not self-interest but the common interest together with justice. Nevertheless its obligatory character is that of being obliged by the exigencies of a situation and not that of being under an obligation *to* some person or body that has a corresponding right. Of course we are under an obligation to the other members of our community, but when we are obliged to obey the State as a necessary device for fulfilling some of our presupposed obligations to others, this does not mean that the State has been given a right to issue orders and to have them obeyed.

We can see therefore that it was not superfluous for the theory of the general will to add something else to the idea of promoting the common good, or for the theories of social contract and consent to fix their attention upon the idea of authorization. An account of political obligation purely in terms of the moral functions of the State is not enough. What should be added? If we were to add the idea of a social contract, we could say that the contract is an agreement to use the device of the State for promoting moral ends; it would constitute a form of authorization that the State should act on our behalf. But the objections to the contract theory will hardly allow its reintroduction at this point, though I shall suggest in the next section that the idea of social contract does have some place in the institutions of a democratic society.

What of the weaker notion of consent in the sense of acquiescence? I think the addition of this suffices for giving the State a right to act as it does. I said in Section 4 that the theory of consent in the weaker form does not afford a ground of obligation, but in the composite theory that I am now building up, the *obligation* does not come from consent. The obligation comes from the presupposed moral obligation to promote the ends of justice and the common good together with the recognition that the State is a necessary means to those ends. All that consent is required to do is to allow the State to act as the agent of the citizen body. This need not involve an explicit contract. For most of us, the State is a *fait accompli*, already exercising its

functions; but if we recognize the necessity of it for the securing of moral ends, and acquiesce in its continuing to exercise its functions, we thereby permit it to act as the agent or channel through which we are to fulfil part of our moral obligations. The consent adds to the State's power the authority or right to give orders, and since it is acting as an agent or channel for moral obligations, our obligations to fellow-citizens are channelled into an obligation to follow the arrangements made by the State.

9 THE EXTENT OF POLITICAL OBLIGATION

What follows in regard to the extent of political obligation? Obviously it does not follow that political obligation is absolute, i.e. that subjects are obliged to obey anything at all that the State may decree. On the contrary, since their political obligation depends on pursuing the ends of justice and the common good, they are not obliged unless the State's laws are effectively directed towards these ends.

But who is to judge whether the State's laws are effectively directed towards securing justice and the common good? The man in Whitehall, the majority, or each individual for himself? If any individual thinks that a particular law is unjust or harmful to the common weal, is he morally entitled to disobey it? If we answer that he is, the whole system will become unworkable. If the State must win the approval of *all* citizens for *every* law, no laws will be passed; and yet it will be plain to everyone that a number of rules of some sort need to be made and accepted, although there is not unanimity on the details. We are faced again with the problem of the general will. And here I think we may say that, in a democratic society, something like a social contract can properly be assumed. If the State's system of law *as a whole* is directed towards the approved ends of justice and the common good, there is a convention that whatever is decided in detail should be accepted as binding. This convention is acceptable only if those who take the decisions are authorized to do so by the general body of the citizens, and since unanimity is impossible even for that, majority opinion (either in the

community as a whole, or, with large States, in constituent units) is taken to be the best approximation to the general will.

I am suggesting that something like a social contract does operate, in a democracy, for the acceptance of *particular* laws, provided that these can properly be said to represent the general will, as being authorized by the majority, with due regard to the differing views of the minority. The minority may be taken to have consented to accept decisions so reached, as representing the general will. My suggestion is that the *general* obligation to accept the authority of the State depends on the State's pursuit of the moral objectives of justice and the common good; and that the *particular* obligation to obey a specific law, with which one may disagree, can be regarded as contractual, depending on the convention of accepting majority decision.

Now I objected to the idea of social contract, when offered as the ground of political obligation in general, that one could not properly speak of a promise in the case of most citizens. Cannot the same objection be made again? Where is there a promise to abide by the decision of a majority of representatives, or of a Government? I think we can say that such a promise is implicit in the procedure of an election (or of a referendum). If one takes part in an election, or in a vote (whether it be a referendum of the whole populace or a vote in a legislative assembly), one can be assumed to have agreed to the presuppositions of voting procedure, namely that the majority opinion will be treated as decisive. To take part in an election is implicitly to promise to accept the majority verdict. If this is correct, it will follow that a compulsory requirement to vote in elections is contrary to the necessary condition of a promise that it be given voluntarily. Compulsory voting has occasionally been adopted in some States, and someone may say that this fact is an argument against the hypothesis that taking part in an election presupposes a promise. I think on the contrary that the rarity of the practice of compulsory voting is an indication of an obscure feeling that a compulsory requirement to vote is improper, even though one can argue in favour of it that, as with compulsory military service, it makes every citizen more fully aware of his responsibilities as a citizen. If participation in an election or a vote of any kind presupposes a promise, this would explain the general feeling that voting ought not to be compulsory.

What of the individual who chooses not to exercise his right to vote? Is it reasonable to impute to him an acceptance of the convention that the majority view shall be binding? Here I think we can only fall back again on the doctrine of consent. The man who abstains from voting has not given any promise; but if he does not actively protest against the whole business or try to leave the country, he may be assumed to acquiesce. The point is that the procedures of democratic government give him the opportunity of protesting and, if he can persuade enough people to agree with him, of changing the Government and the laws. If he lives under a system of government in which no genuine alternatives are made available to the electorate, I do not think we can attribute to him any willingly accepted obligation to obey a particular Government. Of course a citizen in such a State who thinks that the Government is pursuing the proper aims, will approve of the Government for that reason and will record his approval by a willing vote in its favour. But a citizen in such a State who records a vote in favour of the Government from fear, or who abstains, and who is prevented from leaving the country, cannot be said to have accepted the Government's authority or to be morally obliged.

Under a democratic system, does acceptance of governmental authority imply that it is never morally justifiable to refuse to obey a particular law? It is certainly justifiable, indeed it is part of the democratic process, to *campaign* against a law, i.e. to try to persuade a majority to agree with you and so to have the law changed. Is it also justifiable sometimes to *act* contrary to a law when you know that you are still in a minority? Yes, it may be. Political obligation does not exhaust the whole of our moral obligation, unless we take the view that the State is omnicompetent. There can be a conflict of moral obligations, and so there can be a conflict between political obligation and some other moral obligation. This is true, for example, of the conscientious objector who has failed to convince a tribunal, or of the supporter of nuclear disarmament who thinks he ought to

213

protest in a forbidden area or to refuse to pay part of his taxes. Such a person, however, before deciding that he ought to disobey the law, needs to weigh up carefully the point and the extent of political obligation, reflecting that the State does in a large measure secure justice and essential interests as nothing else could. But if he considers that his conflicting obligation (e.g. to refrain from taking human life) is absolute or is otherwise clearly paramount, he is morally justified in disobedience. At the same time, if he agrees that in general his State attempts to secure justice and essential interests, and is therefore to be supported, he may conclude that he is morally obliged to accept whatever penalties the State decrees for disobedience. That is why I said in Chapter III, Section 2, that a conscientious objector may think he ought not to perform military service but that he ought to accept without protest the penalty of imprisonment. The same thing would apply to a supporter of nuclear disarmament who refuses, on conscientious grounds, to pay part of his taxes or who attends a protest meeting in a forbidden area.

My conclusion is that the grounds of political obligation in general depend on the moral ends or objectives of the State (with the proviso that consent must be added to give the State its authority). One is morally obliged to obey the law because one has a moral obligation to promote justice and the common good, and because State action is an essential means to the pursuit of those ends. When one disapproves of a particular Government or a particular law, one is nevertheless obliged, in a democratic society, to conform, if the policy followed has the assent of the majority; and one is then obliged because participation in the democratic procedure of election implies a promise to accept majority decisions. The convention of accepting majority decisions is followed because it is the only practicable approach to the ideal of universally agreed policies. Thus there is some truth in each of the theories I have considered, and that is why each of them still retains philosophical interest. But I should say that the theories of justice and the common good, when combined with the theory of consent, give the correct account of the grounds of political obligation in general.)

214

V LIBERTY AND AUTHORITY

1 THE IDEA OF FREEDOM

'Freedom' means the absence of restraint. A man is free in so far as he is not restrained from doing what he wants to do or what he would choose to do if he knew that he could. The idea of choice itself implies a kind of freedom. Choice is the selection of one possibility among others. More than one possibility must be open to us before we can be said to have a choice. If we were always bound to do the one thing that we in fact do, we should not be free to choose; there would be no freedom of the will. The concept that I wish to discuss, however, is not the freedom of the will or freedom of choice, but the freedom to carry out what one has chosen to do. This is what is commonly meant by freedom or liberty in social and political discussion.

Having distinguished freedom of choice from freedom of action or social freedom, we may define the latter as the absence of restraint on doing what one chooses or what one would choose to do if he knew that he could. We must add, however, that the restraint must either be due to the deliberate action of other persons or be removable by the deliberate action of other persons. A man who is locked up in prison is not at liberty, because he is restrained by the action of other persons. And we may speak of freedom from want, or of freeing mankind from the scourge of cancer, when we mean that the impediments to which we refer, although not imposed by human action, are capable (we hope) of being removed by human action. But we should not say that a

112

Communication

Ake on Political Obligation and Political Dissent: A Gloss

BERNARD WAND *Carleton University*

As the background to his view that the liberal democratic theory of political obligation implies, under appropriate circumstances, not a right but a duty to resist one's government, Ake provides a judicious account not only of liberal democratic theory but also of utilitarian and legal positivist theory.[1] None the less, his three synopses reveal the almost inevitable hazards of such accounts. The issue is not merely a historical one, for in each case the synoptic account determines the direction which his argument takes.

Since the bulk of his argument follows from his version of the liberal democratic theory, I shall begin with it and then comment on his version of utilitarianism and legal positivism. In providing, through reference to Locke, a summary of the liberal democratic theory Ake chooses a section from the second *Treatise* which could just as well have been written by Hooker.[2] For "rights" are not mentioned in it. That Ake fails to see the distinction between Locke's version of natural law and Hooker's becomes clear in his summary of the following section. For he talks about "the right and indeed the duty to enforce the law of nature" (p. 250) whereas Locke himself maintains that "everyone has a right" to restrain others from invading his rights.[3] According to Locke, it is a part of natural law that we have certain rights and that others have obligations to respect them, and that as long as there is no political society we also have the defensive rights of restraint and reparation. Ake also says as much and makes it fundamental to his argument (p. 251).

None the less, although it may at first appear trivial, there is a vital difference between saying that men have the right and the duty to enforce the law of nature and saying that they have, as governed by the law of nature, certain reciprocal rights and obligations. For it is precisely this distinction which constitutes the great divide between medieval natural law theory which ends with Hooker and the modern one which begins with Locke.

In the medieval tradition men were seen as morally obliged to preserve themselves and others from destruction, and the function of the ruler was to promote the public good which included but did not exhaust the preservation of the ruled. In principle, if he carried out this task obedience was owed to him; if he did not obedience was not owed to him and, under rare circumstances, the ruled were

[1]Claude Ake, "Political Obligation and Political Dissent," this JOURNAL, II, 2 (June 1969), 245–55.
[2]*Ibid.*, 250.
[3]John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1967), 289, sec. 7.

Canadian Journal of Political Science/Revue canadienne de Science politique, III, no. 1 (March/mars 1970). Printed in Canada/Imprimé au Canada.

morally obliged to resist. Justification of either obedience or disobedience was seen to depend upon an appeal to natural law or, to put it in more modern terms, upon whether or not the acts or practices of the ruler accorded with basic moral principles. However, there need be no mention of individuals, as individuals, having rights to sustain this position and, in fact, in the medieval theory there was none. In short, it is a theory, or type of theory, in which resistance to the ruler may be justified but its justification is relevant solely to the conduct of the ruler and it leads to an obligation to resistance where appropriate, or more accurately, to the recognition that since he has acted wickedly he ought to be resisted. No right to resistance, as a specific right, is required.

In the modern, Lockean tradition of natural law, resistance to the ruler is related to the stance which he takes towards the natural rights of the ruled. These rights are derived from natural law but their primary function is to serve as moral defences against other individuals in the state of nature, and against the ruler in political society. At the same time, almost all liberal theorists have recognized that there is something distinctive, if not peculiar, about these rights in that they do not arise out of any transactions between persons. The rights to life, liberty, or even property (at least for Locke) are rights which exist independent of our having engaged in some contractual arrangement with others. Although we may exchange property through contract, or establish political society through consent, neither contract nor consent create the original rights. These are viewed as properties of individual human beings, as such, which are inalienable (in the sense that they cannot knowingly be given up) and absolute (in the sense that they cannot justifiably be encroached upon). Consequently, whenever a ruler whose function is to preserve these rights instead threatens to destroy them, the ruled have the right to resist him.

Have they the duty to do so as well? Not on grounds so far given – which is not to deny that they might be morally obliged to resist on other grounds. For in terms of the "concept of natural rights [which] gives the liberal democratic theory of political obligation" its advantages over its rivals (p. 252), it is indeed only a right to resistance which follows even though Ake thinks it odd. Granted that we believe these rights, unlike legal rights, cannot be waived, that we look at them as "so essential to our moral and material well-being that we must insist on their being recognized and exercised" (p. 253), that, in short, we are morally obliged to insist upon them, the duty which follows is a duty to oneself and is no help in accounting for those obligations which are obligations to others.

Paramount in the mind of Locke (and shall we say of most liberal theorists?) is the threat of arbitrary and aggressive action by a government against its individual citizens, and the necessary moral defenees required to justify resistance to it. On the assumption that no reasonable man would waive such a right and that no moral being could, it is a doctrine of a right to dissent or resistance to a given political authority and *not* one of obligation which follows from the concept of natural rights.

None the less, the liberal democratic theory of political obligation also contains a doctrine of obligation to obedience or disobedience to government which can be traced to the vestiges of Hooker which remain in Locke. To use Ake's own phrase, "the proper role" of government is not solely to protect the

individual citizen's natural rights but also to promote the public good and other moral ends of society. Although in fulfilling these latter obligations a government may coincidentally fulfil its protective obligations, the grounds of the two types of obligation are distinct. In order to see this I turn to Ake's "rather abstract" argument.

Ake notes that whereas in the context of ordinary rights to say that *X* has a right and *Y* an obligation entails that *X* may or may not choose to exercise his right but that *Y* is morally obliged to perform his obligation, that is, he cannot waive it without incurring moral censure. Hence, in a contractual relationship between employer and employee, the employer is morally obliged to pay the employee but the latter may waive his right to payment despite the unlikelihood of his doing so. However, on the consent theory of obligation, the ruled cannot waive his natural rights. This is the striking difference between the two types of relationships. But there is an equally striking similarity: that the rights and obligations between employer and employee, between the ruler and the ruled, are limited in their scope. The right to payment for work done arises out of the terms of the wage contract; the right to protection of one's natural rights arises out of the terms of the political contract. Thus both the right to payment and the right to protection arise out of the social transactions which have taken place between the participating parties. Had these not taken place, there would not have been these specific rights and their corresponding obligations.

At the same time this is not to deny that in either case the parties may have other obligations which are not covered by the terms of their respective agreements. Adult individuals may agree to work, or enter in political society, in order to sustain their families. That they should sustain their families is no part of these agreements although, as a matter of fact, a concern for their families may very well have influenced them into entering the agreements.

That one ought, as a parent, to maintain and educate one's children or that one ought, as a moral being, to prevent unnecessary suffering are moral obligations which do not arise out of any social transactions or agreements between the persons involved. Rather it is because we think it morally right for parents to take care of their children or for individuals to prevent unnecessary suffering that we hold them obliged to act in the appropriate ways. And it is because it is morally wrong for parents to be negligent of their children or for individuals to inflict unnecessary suffering that we think ourselves morally obliged to prevent such activities. In these latter cases, the moral obligation follows not from any agreement but from the nature or quality of the actions performed.[4] Consequently, if in the course of its rule a government treats children brutally or promotes unnecessary suffering we do have, as moral agents, the obligation to resist it. However, the obligation does not follow from the concept of rights: it follows from the moral assessment of the government's actions.

The liberal democratic theory can accommodate both the right and the duty to dissent but the grounds of each is distinct. For whereas the right to dissent

[4]For an elaboration of the distinction between obligations which arise out of social transactions and those which are due to the quality of an action, see H. L. A. Hart, "Are There Any Natural Rights," *Philosophical Review*, 55 (1955), 175–91, reprinted in *Political Philosophy*, ed. Anthony Quinton (Oxford, 1967), 53–66.

or resistance arises out of the specific relationships between those who govern and those who are governed, the moral obligation to dissent or resist arises out of the nature of the acts of practices of those who govern. Consider Ake's example, of the Nazi soldier. Since he is part of the governmental apparatus, the right to resistance does not strictly speaking apply to him. Still we judge that he had a moral obligation to disobey the commands of his superior. For they were morally reprehensible. Nor does the judgment we make depend upon any appeal to rights.[5] Of course, the persons directly affected by the carrying out of the commands have both the moral right to resist on their own behalf, and the moral obligation to resist.

I come to Ake's last point – who decides? And here I return to his account of the utilitarian and legal positivist theories of political obligation. One way of deciding is surely by reference to moral principles which both those who rule and those who are ruled should abide by. To hold that the utilitarian resolves obligation into interest or inclination is to confuse the meaning of obligation with the criteria in terms of which a given action, or practice, is to be judged as morally right or wrong. The utilitarians sometimes did so (Bentham more often than not) but it is no necessary part of utilitarianism. The strength and greatness of utilitarianism is that it found the governmental practice of its day wanting in terms of public utility and condemned it accordingly. It was against unnecessary suffering that Bentham chiefly protested. Again, Weldon is a notoriously bad example of legal positivism. If a legal positivist is one who holds to the complete independence of law and morals, then this may be its chief virtue. For then the question of the moral nature of a legal system can significantly be asked. This view can certainly be ascribed to Bentham and H. L. A. Hart, each of whom can be characterized as a legal positivist.

I hope that these remarks are taken for what they purport to be – a gloss: an attempt to expand Ake's original argument and not to undermine it.

[5]The Hebraic prophetic tradition is an illuminating example of moral protest against the iniquitous behaviour of those who govern not only without making an appeal to rights but without even the awareness that such an appeal could be made.

Chapter 6

Henry David Thoreau on Civil Disobedience

Life and Works of Henry David Thoreau (1817-1862)

Henry David Thoreau was born in 1817 at Concord and grew up there. He was educated at Harvard University and graduated in 1837. He was known at Harvard as a serious though unconventional scholar. During his Harvard years, he was exposed to the writings of Ralph Waldo Emerson, who later became his chief mentor and friend. After graduation Thoreau worked for a time in his father's pencil shop and taught at a grammar school, but in 1841 he was invited to live in the Emerson household, where he remained intermittently until 1843. He served as handyman and assistant to Emerson helping to edit and contributing poetry and prose to the transcendentalist magazine, 'The Dial'.

Thoreau is considered one of the most influential figures in American thought and literature. A supreme individualist, he championed the human sprit against materialism and social conformity. The influence of Rousseau, Jefferson and Tolstoy on Thoreau was impressive and substantial. Thoreau was a philosophical rebel and asserted the right of the individual to resist the institutional conventions to enslave him. His approach to political obligation was based on the dignity and integrity of the individual.

His most famous book, 'Walden' (1854) is an eloquent account of his experiment in near-solitary living on the shore of Walden Pond, near Concord in close harmony with nature. His other works were, "A Week on the Concord and Merrimack Rivers (1849), Excursions (1863), The Maine Woods (1864), Cape Cod (1865) and A Yankee in Canada (1866).

Essay on 'Civil Disobedience

One of Thoreau's most important work, 'Civil Disobedience' (1848), grew out of an over-night stay in prison as a result of his conscientious refusal to pay a poll tax that

supported the Mexican War, which to Thoreau represented an effort to extend slavery. Thoreau's advocacy of civil disobedience as a means for the individual to protest those actions of his government that he considers unjust has had a wide-ranging impact—on the British Labour movement, the passive resistance independence movement led by Gandhi in India, and the nonviolent civil-rights movement led by Martin Luther King in the United States. Thoreau in his 'Civil Disobedience' clearly explained the right of the individual to obey the dictates of his conscience rather than the dictates of the state. Thoreau, in his essay 'Civil Disobedience' explains the good government as follows :—

Good Government

Thoreau accepts the motto, "That government is best which governs least." He also believes, "That government is best which governs not at all." The Government is at best but an expedient, However, most governments are usually inexpedient. The government itself, which is only the mode which the people have chosen to execute their will is equally liable to be abused and perverted before the people can act through it. He gives the example of Mexican war, the work of comparatively a few individuals using the standing government as their tool; for in the outset, the people would not have consented to this measure.

American government, though a recent one, is endeavouring to transmit itself unimpaired to posterity, but each instant losing of its integrity. The Government has not the vitality and force of a single living man; for a simple man can bend it to his will. Government is a sort of wooden gun to the people themselves. Government is excellent, we must all allow. Yet the government never of itself furthered any enterprise, but by the alacrity with which it got out of its way. The government does not keep the country free. For government is an expedient, by which men would fain succeed in letting one another alone; and when it is most expedient, the governed are most let alone by it. Thoreau asked for a better government which educates masses, promotes trade and commerce, and keeps the country free. If the traders go out of law, then they would deserve to be classed and punished with those mischievous persons who put obstructions on the rail roads. Let every man make known what kind of government would command his respect.

When the power is once in the hands of the people, a majority are permitted, and for a long period continue to rule,

is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it. It is not the majority that decides right and wrong but the 'conscience'. Every citizen should be man first and subject afterwards. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which one has a right to assume is so do at any time what he thinks right. It is truly enough said that a corporation has no conscience; but a corporation of conscientious men is a corporation with a conscience. Law never made men a whit more just; and by means of their respect for it, even the well-disposed are daily made the agents of injustice. A common and natural result of an undue respect for the law is, that one may see a 'state with file of force' and men buried under arms. The mass of men serve the state not as men but as machines, with their bodies. In most cases there is no free exercise whatever of the judgment or of the moral sense; but they put themselves on a level with wood and earth and stones. Yet, such as these even are commonly esteemed good citizens. Ofter most legislators, politicians, lawyers, ministers and office-holders serve the state chiefly with their heads, and, they rarely make any moral distinctions. A very few—as heroes, patriots, martyrs, reformers in the great sense, and men-serve the state with their consciences also and so necessarily resist it for the most part; and they are commonly treated as enemies by it. A wise man will only be useful as a man, and will not submit to be 'clay' and 'stop a hole to keep the wind away," but leave that office to his dust at least. Thus, according to Thoreau, a good government is always based on the consent of the individuals and allows them to live honestly and comfortably.

Right of Revolution

Thoreau says about right of revolution thus :

"All men recognize the right of revolution; that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable." He further says, "……when a sixth of the population of a nation which has undertaken to be the refuge of liberty are slaves, and a whole country is unjustly overrun and conquered by a foreign army, and subjected to military law, I think that is not too soon for honest men to rebel and revolutionise. What

makes this duty the more urgent is that fact that the country so overrun is not our own, but ours is the invading army." Thoreau says, that Parley, in his chapter on the "Duty of Submission to Civil Government" resolves all civil obligation into expediency; and he proceeds to say that "so long as the interest of the whole society requires it, that it, so long as the established government cannot be resisted or changed without public inconveniency, it is the will of God…… that the established government be obeyed…… and no longer. This principle being admitted, the justice of every particular case of resistance is reduced to a computation of the quantity of the danger and grievance on the one side, and of the probability and expense of redressing it on the other." Of this, Paley says, every man shall judge for himself. But Paley appears never to have contemplated those cases to which the rule of expediency does not apply, in which a people, as well and an individual, must do justice, cost what it may."

Voting Regarding Slavery

Thoreau rightly regarded the slavery as a bolt on the humanity. He considered John Brown, the slavery abolitionist, as a great hero. Thoreau advised the abolitionists to immediately withdraw their support from Massachusetts Government without waiting till they constitute a majority. He explained that respect for right was more desirable than respect for law. There are thousands who are in opinion, opposed to slavery and to the war, who yet in effect do nothing to put an end to them. They hesitate, and they regret, and sometimes they petition; but they do nothing in earnest and with effect. The opponents to slavery give up only a cheap vote to the right, as it goes by them. All voting is a sort of gaming, a playing with right and wrong. The character of the voters is not staked. One may cast his vote, perchance, as he thinks right; but he is not vitally concerned that the right should prevail. He is willing to leave it to the majority. Its obligation, therefore, never exceeds that of expediency. Even voting for the right is doing nothing for it. It is only expressing to men feebly your desire that it should prevail. A wise man will not leave the right to the mercy of chance, nor wish it to prevail through the power of the majority. There is but little virtue in the action of masses of men. When the majority shall at length vote for the abolition of slavery, it will be because they are indifferent to slavery, or because there is but little slavery left to be abolished by their vote. They will then be the

220

only slaves. Only his vote can has tenten the abolition of slavery who asserts his own freedom by his vote.

Thoreau says, "It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even to most enormous, wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support."

Disobedience to Unjust Laws

Thoreau had no faith in the existing laws. He called them unjust laws which strangle man's freedom. He questioned their propriety and asked the people to break unjust law. (for detailed study see the next unit).

Respect for Individual

Thoreau asserted, like many individualists, that the authority of the government is an impure one. But the government must have the sanction and consent of the governed in order to be strictly just. It can have no pure right over individual and property but what he concedes to it. The progress from an absolute to a limited monarchy, from a limited monarchy to a democracy, is a progress towards a true respect for the individual. Even the Chinese philosopher, Confucious was wise enough to regard the individual as the basis of the empire. Is a democracy, such as we know it, the last improvement possible in Government? There will never be a really free and enlightened state until the state comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly.

Thoreau concludes his essay 'Civil Disobedience' by saying, "I please myself with imagining a state at last which can afford to be just to all men, and to treat the individual with respect as a neighbour; which even would not think it inconsistent with its own response if a few were to like aloof from it, not meddling with it, nor embraced by it, who fulfilled all the duties of neighbours and fellow men. A state which bore this kind of fruit, and suffered it to drop off as fast as it ripened, would prepare the way for a still more perfect and glorious state, which I have also imagined, but not yet anywhere seen."

221

Chapter 7

T.H. Green on Right to Resist (Disobey or Rebel) the State

T.H. Green (1836-1882) gives to an individual the right of resistance. To Green, people should have the right to resist due to the conflict between the natural rights and obedience to the rules of law. The conception of natural rights depends upon the fact that the actual and legal scheme of rights recognised by a given community at a given time is not necessarily perfect. There are other rights, other conditions necessary for the free development of a capacity actually existing in individuals or groups which in actual law are not recognised, but which nevertheless is to the common benefit to recognise, since the capacity means a capacity for doing something for the common good. To distinguish such rights from legal rights we may give them the name of natural rights. The natural rights are not the rights of primitive and solitary individuals but they are innate in the constitution of men when living in a society of other men and are the natural or proper conditions of life in such a society. There natural rights may be recognised by the general social conscience of such social and yet not be recognised by its laws. They may indeed, only be recognised by those, perhaps the merest minority, who claim their possession. Thus the natural rights are a necessary condition of full general welfare. But when there is no implicit acknowledgment of the claim to the natural rights or there is a gap between the natural rights and the legal rights or rule of law, the resistance in the name of such rights loses its moral justification and becomes genuine or natural. The wider the gap between the natural and legal rights, the more is the scope of conflict, but the lesser the gap and the lesser the conflict.

T.H. Green believes that due to conflict, the problem of resistance is bound to rise in a democratic community where the people may readily claim to disobey the unjust law or acts of a government which is merely the law or act of an opposite party and is only based on a temporary majority which has

Chapter 4

The Problem of Obedience to Unjust Laws

The obligation of the state is to make laws which are beneficial to the people and which are acceptable to public. Similarly, the obligation of individuals is to obey the laws of the state. The problem arises only when the laws are unjust. Is it desirable to obey such unjust laws? Many political thinkers propose to disobey unjust laws. They foresee that revolutions take place if the laws are unjust.

Unjust Laws and Disobedience

Disobedience is the action which produce increasing tension between laws and behaviour. In permissive societies, the emphasis on liberty inspires resistance to duty; and deep-seated religious or social antagonisms sharpens the tensions and fosters rapid changes in moral ideas.

Why People Disobey Unjust Laws ?

There is a legal duty to obey the laws. But the individual has the inner moral liberty to obey or disobey. Disobedience of an immoral law would not necessarily be thought immoral even by those who would still deem it 'law' though they would treat it as illegal. Consent is the reason why people ought to obey laws. Another reason for obedience is that disobedience sets a bad example. Disobedience may bring hardship on others. Disobedience may topple the government in authority. Economy of the state may become turbulence. Political unrest create new problems to the existing ones. However, many political thinkers suggest disobedience to unjust laws through different methods as presented below :

Henry David Thoreau on Obedience to Unjust Laws

Thoreau says that "unjust laws exist". Shall we be content to obey them, or shall we endeavour to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men generally, under such a government as this, think that they right to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil.

But it is the fault of the government itself that the remedy is worse than the evil. It makes it worse." The governments always crucify Christ and excommunicate Copernicus and Luther, and pronounces Washington and Franklin rebels.

One would think, that a deliberate and practical denial of the authority of government was the only offence never contemplated by its government.

Thoreau says, "If the injustice is part of the necessary friction of the machine of government, let it go, let it go perchance it will wear smooth-certainly the machine will bear out. If the injustice has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then I say, break the law. Let your life be a counter- friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn."

Thoreau says, "Under a government which imprisons unjustly, the true place for a just man is always a prison." He explains that the proper place, the only place which Massachusetts has provided for her freer and less despondent spirits, is in her prisons, to be put out and locked out of the state by her own act, as they have already put themselves out by their principles. Prison is the place where the state places those who are not with her, but against her—the only house in a slave state in which a free man can abide with honour.

People have to cast their whole vote, not a strip of paper merely, but their whole influence. A minority is powerless while it conforms to the majority; it is not even a minority then; but it is irresistible when it clogs by its whole weight. If the alternative is to keep all just men in prison, or give up war and slavery, the state will not hesitate which to choose. If a thousand men were not to pay their tax bills, that would not be a violent and bloody measure, as it would be to pay them, and enable the state to commit violence and shed innocent blood. This is, in fact, the definition of a peaceable revolution, if any such is possible. If the tax-gatherer, who does not support the policy of government has to resign his office when the subject has refused allegiance, and the officer has resigned from office, then the revolution is accomplished.

Practically, Thoreau had paid no poll tax, which he felt unjust to impose, for six years. He was put into a jail once on this account, for one night and come out of prison for some one interfered and paid that tax.

Chapter 8

The Problem of Gandhian Civil Disobedience and Political Obligation

Life and Works of Mahatma Gandhi (1869-1948)

Mohandas Karamchand Gandhi was born at Porbandar in Kathiawar district of Gujarat (a State in India) on October 2nd, 1869. He came from a prosperous Gujarati family employed in the service of the ruler of a small principality in Gujarat. In 1888, he completed his school final examination and went to London to study in Law. By 1891 he had qualified himself for the Bar and returned to India and established his practice of law in Rajkot and Bombay. During the year 1893 he left for South Africa to conduct a case of a Gujarati Muslim merchant. Gandhiji stayed for 20 years in South Africa. It was there that his political activities began when he started to defend the rights of the Indian immigrants who were subjected to cruel discrimination. He pleaded for legal equality and social justice.

After returning to India in 1914 he plunged into rising freedom struggle against the British government. Gandhiji set up in 1915 an organisation in Ahemdabad namely, Sabarmati Asharam for the propagation of the principle of Satyagraha. He organised civil disobedience campaigns based on non-violent resistance. By 1942 Gandhi used another weapon of quit-India movement. India attained independence under his leadership on 15th August, 1947. It was tragic that Mahatma Gandhi was assassinated by the Hindu revivalist Vinayak Nathuram Godse on January 30, 1948. To the Indians he is "Father of the Nation" and "Mahatma".

Among his most important work's are : My Experiment with Truth (1925), Satyagraha in South Africa (1925). The Story of Satyagrahi; Hindu Swaraj. He had been writing editorial columns in Indian Opinion (1903), Young India (1919), Navajivan (1919) and Harijan (1933).

Gandhiji was much influenced by many writers and books. Ruskin's "Unto This Last." "Civil Disobedience" and 'Gita' Lastly, he was inspired by the life and techniques of

Lord Buddha.

Doctrine of Satyagraha (Satyagraha, a Technique of Civil Disobedience)

Gandhiji used Satyagraha as a technique of the fight of an oppressed people against foreign rule. According to Gandhiji, every nation should have 'swaraj' *i.e.* self-rule. Swaraj is the birth right of every citizen. Every nation should have independence. Gandhiji frankly called the alien rule as 'satanic' Swaraj means a state such that the citizens can maintain our separate existence without foreign rule. Swaraj is an ideal society in which everyone has the capacity to resist the abuse of authority. Swaraj implies the reign of complete social justice, equality and freedom. Swaraj also desires a social order without egotistic interests that cause social conflicts and tensions. Swaraj means the rule of people of a nation state.

Gandhiji evolved the technique of Satyagraha, a novel and a unique way, to resist the evil of foreign rule. It is a device through which the unjust, impure, untruthful and evil are resisted.

The literal meaning of the word, "Satyagraha", is 'persistence for truth'. It is a soul force or love or truth force. In 1920 Gandhiji wrote in 'Young India' that, "The term Satyagraha was coined by me in South Africa to express the force that the Indians there used for full eight years and it was coined in order to distinguish it from the movement then going on in U.K. and South Africa under the name of passive resistance. Its root meaning base is holding on to truth, hence Truth Force. I have also called it Love Force or Social Force. In the application of Satyagraha discovered in the earliest stages that pursuit of truth did not admit of violence being inflicted on one's opponent but that he must be weaned from error by patience and sympathy for what appeared to be truth to the one may appear to be error to the other. And patience means self-suffering. So the doctrine comes to mean vindication of truth, not by infliction of suffering on the opponent but on one's own self."

Satyagraha is based on three articles of faith namely, (i) belief in non-violence, (ii) the belief that no government can exist without the cooperation of the people; and (iii) suffering and sacrifice for a genuine cause and the law of man. It signifies a genuine, intense and sincere quest for truth which is God. It means an assertion of the power of the human soul against political and economic domination. Satyagraha is the

vindication of the glory of the human conscience. The main ingredients of the doctrine of Satyagraha are following :

(1) It denotes the operation of soul force against all forms of injustice and oppression. It is inconsistent with jealously towards or hatred of the opponent, for the opponent has to be converted, not coerced. The active non-violent resistance of the "heroic meek" makes an immediate appeal to the heart, for it constitutes the gentle process of conversion by love. As such, it is the inherent birth right of a person. However, its practice requires self-discipline and a readiness to bear all kinds of sufferings.

(2) The operation of Satyagraha is a two fold blessing. Firstly, it blesses the person who practices it and secondly, it blesses the individual against whom satyagraha is practiced. If it elevates the character of the petitioner, it also brings a change in the heart of the opponent. If it purifies the sufferer, it also intensifies favourable public opinion. It makes a direct appeal to the soul of the oppression.

(3) But, Satyagraha is the weapon of the bravest and strongest not of the weak. To be a passive onlooker to tyranny and to allow untruth to prevail over truth is the negation of the capacity of satyagraha. It has no room for timidity and violence and if there is a choice between cowardice and violence, Gandhiji prefered the latter, because the use of violence shuns the situation of timidity. It is placed in juxtaposition to coercion.

(4) Satyagraha is like s sacrifice of a self, Suffering is a part of human life and could be noted as an external law. Just like a mother bears all the suffering for the cause of the child, a Satyagrahi similarly faces personal sufferings for the cause of the fellow-citizens. The self-suffering is an adjunct of satyagraha activity. There is a direct relationship between the purity of the suffering and the extent of progress. It may therefore be suggested that the purer is the suffering, greater is the material and spiritual progress.

(5) The concept of Satyagraha should not be identified with the idea of passive resistance. As Gandhi says, "Satyagraha differs from passive resistance as North Pole from the South Pole. The latter has been

conceived as a weapon of the weak and does not exclude the use of physical force or violence for the purpose of gaining one's end, whereas the former has been conceived as the weapon of the strongest and excludes the use of violence in any shape or form."

The following are the differences between Satyagraha and passive resistance of the west :

(1) Passive resistance is a political weapon of expediency but Satyagraha is a moral weapon based on the superiority of soul force over physical force.

(2) Passive resistance is the weapon of the weak but Satyagraha is the weapon of the brave who have the courage of dying without killing.

(3) A passive resister aims at embarrassing opponent into submission. A Satyagrahi aims at weaning the opponent from error by love and patient suffering.

(4) There is hardly any place for love for the opponent in the case of passive resistance. For a Satyagrahi, there is no room for hatred or ill will.

(5) While passive resistance is static, Satyagraha is dynamic.

(6) The passive resistance is undertaken in a situation of weakness and despair. But, Satyagrahi undertakes all sufferings with cheerfulness and love and makes the suffering fruitful. It is clear that Satyagraha is the struggle with violent force by a spirited force of the soul: by love and "ahimsa". In substance Satyagraha can offer substantial and effectual opposition to injustice and tyranny as compared to passive resistance.

(7) The practice of Satyagraha may take any form as strike, non-cooperation, dharna (squatting), fasting, picketing, civil disobedience, non-payment of 'black taxes', surrendering honourary posts and titles, not taking part in 'official functions', boycott of foreign goods, and hijrat or leaving the place of extreme injustice. But it is necessary that all or any of the means of Satyagraha should be reinforced by the practice of non-violence.

Essentials of Satyagraha in Action

Joan Van Bondurant in his 'Conquest of Violence' listed

224

the following fundamental rules of Satyagraha' :

(1) Satyagraha should be self-reliant. Outside aid may be accepted in the proper circumstances, but it should never be counted upon.

(2) Through continuous assessment of the conflict situation. Satyagrahis should by means of constructive efforts where possible, by positive assistance where indicated or by the tactics of persuasion and adjustment, press the movement ever forward.

(3) Propaganda must be made integral part of the movement. Education of the opponent, the public, and participants must continue apace.

(4) Demands have to be reduced to a minimum consistent with truth. Continuing reassessment of the situation and the objectives with a view to possible adjustment of demands is essential.

(5) Progressive advancement of the movement through steps and stages determined to be appropriate within the given situation. Decisions as to when to proceed to a further phase of the Satyagraha must be carefully weighed in the light of the ever-changing circumstances, but a static condition must be avoided. However, direct action is to be launched only after all other efforts to achieve an honourable settlement have been exhausted.

(6) Weaknesses within the Satyagraha group should be examined. The morale and discipline of the Satyagrahis must be maintained through active awareness of any development of impatience, encouragement, or breakdown of non-violent attitude.

(7) Persistent search for avenues of cooperation with the adversary on honourable terms should be made. Every effort must be made to win over the opponent by helping him (where this is consistent with the Satyagrahis true objectives) thereby demonstrating sincerity to achieve an agreement with, rather than a triumph over the adversary.

(8) Refusal to surrender is essential in negotiations. Satyagraha excludes all compromise which affects basic principles or essential portions of valid objects. Care must be exercised not to engage in bargaining or barter. Full agreement must be insisted on fundamental issues before accepting the settlement.

Steps in Satyagraha Campaign

Joan Von Bondurant has listed the following steps in Satyagraha campaign—

(1) First of all, every effort must be made to resolve the conflict, or redress of the grievance through established channels like negotiators and arbitrators must be exhaused before further steps are undertaken.

(2) The Satyagrahi group should be prepared for direct action. Immediately upon recognising the existence of a conflict situation, motives are to be carefully examined the issues at stakes and discussed, appropriate procedures to be undertaken, the circumstances of the opponents, the climate of public opinion etc. The Satyagrahis have to be prepared for purificatory fasting.

(3) Agitation should be taken up after active propaganda campaign together with such demonstrations as mass meetings, parades, slogan shouting.

(4) A final strong appeal to the opponent should be made explaining what further steps will be taken if no agreement can be reached. The wording and manner presentation of the ultimatum should offer the widest scope for agreement, and should present a constructive solution to the problem.

(5) Picketing may be widely employed together with continued demonstrations and education of public.

(6) Non-cooperation such as non-payment of taxes, boycott of schools etc. may be initiated.

(7) Great care should be exercised in the selection of laws to be contravened.

(8) Fullest preparations should be made to usurp the functions of government after the success of Satyagraha.

(9) The greatest possible cooperation from the public has to be obtained for the establishment of parallel functions of government.

Important Conditions and Rules for Doing Satyagraha

Joan Von Bondurant has given the following rules for doing Satyagraha :

(1) A Satyagrahi should harbour no anger.
(2) He should suffer the anger of the opponent.
(3) In suffering, he should put up with assaults from the opponent; he should never retaliate, but he should not submit out of the fear of punishment or the like to any order given in anger.
(4) When any person in authority seeks to correct a civil resister, he should voluntarily submit to the arrest, and he should not resist the attachment or removal of his own property, if any, when it is sought to be confiscated by the authorities.
(5) If he has any property in his possession as a trustee, he should refuse to surrender it, even though in defending it he might lose his life. He should, however, never retaliate.
(6) Non-retaliation excluded swearing and cursing.
(7) Therefore, he should never insult his opponent and, therefore, also not take part in many of the newly coined cries which are contrary to the spirit of *ahimsa*.

Essential Principles of Satyagraha

Gandhiji, in his book 'The Story of My Experiment With Truth', explained the birth of 'Satyagraha' thus : "Events were so shaping themselves in Johanesburg as to make this self-purification on my part a preliminary as it were to Satyagraha. I can now see that all the principal events of my life, culminating in the vow of brahmacharya, were secretly preparing me for it. The principle called Satyagraha came into being before that name was invented. Indeed when it was born, I myself could not say what it was. In Gujarati also we used the English phrase 'passive resistance' to describe it. When in a meeting of Europeans, I found that the term 'passive resistance' was too narrowly construed, that it was supposed to be a weapon of the weak, that it could be characterized by hatred and that it could finally manifest itself as violence, I have to demur to all these statements and explain the real nature of the Indian movement. I was clear that a new word must be coined by the Indians to designate their struggle.

But I could not for the life of me find out a new name, and therefore offered a nominal prize through Indian Opinion to the reader who made the best suggestion on the subject. As a result Maganlal Gandhi coined the word 'Sadgraha" (Sat : truth; Agraha : firmness) and won the prize. But in order to make it clear I changed the word to 'Satyagraha (Satya (truth) Agraha : Vindication) which has since become current in Gujarati as a designation for the struggle)."

Gandhiji prescribed the following Principles of Satyagraha to be followed by a Satyagrahi :

(1) Truth (Satya).—Gandhiji spoke of truth as the supreme being of the highest quality, it is not only a value or ideal but is the highest concrete reality. Truth as God is the eternally perfect infinite consciousness. Gandhiji accepted the truti. conveyed by the concepts of "Karma and reincarnation."

According to Gandhiji, "The spiritual truth was not to be realised by dialectical skill or abstract thinking but by spiritual experience obtained through pure and disciplined holy life and by practicing non-violence in own actions."

To quote Gandhiji, "Man is higher than the brute and has divine mission to fulfil. To find truth completely is to realize oneself and one's destiny."

Satya (Truth) means not mere abstinence from telling or practicing untruth, but is God. Satyagrahi should civilly disobey the wrong orders.

(2) Non-violence (Ahimsa).—Non-violence means not merely keeping away from killing, its active part is love. The law requires equal consideration for all life. Ahimsa simply means non-injury or non-killing. In reality, it stands for 'abstention from hostile thought, 'word or act'. Gandhiji equates non-violence with love, forgiveness, fearlessness, selflessness and all that. It cannot see pain or suffering. It is the most superior force against wickedness. It is a 'soul force' against all injustice, brutality, tyranny and wickedness. It is what light is to darkness.

(3) Brahmacharya.—According to Gandhiji, brahmacharya, is one of essential requisite qualities of a Satyagrahi. Brahmacharya is a necessary condition that one should not look upon any woman or man with lustful eye. Such animal passions must be controlled and better be excluded from mind.

About the greatness of Brahmacharya Gandhiji says, "There should be a clear line between the life of a brahmachari and of one who is not. The resemblance that there is between the two is only apparent. The distinction ought to be clear as daylight. Both use their eyesight, but whereas the brahmachari uses it to see the glories of God, the

~~247~~ 226

118

other uses it to see the frivolity around him. Both use their ears, but whereas the one hears nothing but praises of God, the other feasts his ears upon rivalry. Both often keep late hours, but whereas the one devotes them to prayer, the other fritters them away in one wild and wasteful mirth. Both feed the inner man, but the one only to keep the temple of God in good repair, while the other gorges himself and makes the sacred vessel a stinking gutter. Thus, both live as the poles apart, and the distance between them will grow and not diminish with the passage of time. It is the highest goal, and it is no wonder that the highest effort should be necessary to attain it."

Gandhiji is of the opinion that "One who would obey the law of ahimsa cannot marry, not to speak of gratification outside the marital bond." He thought marriage would be a necessary evil. Family causes obstacles in rendering service to the community. Gandhi took Brahmacharya in 1906 with the consent of his wife Kasturi Bai. To follow brahmacharya, he changed his food habits.

Gandhiji, however, permitted marriage to those who cannot live without it. Gandhiji, says, "Marriage is the most natural and desirable state when one finds oneself, even against his will living the married life in his daily thought."

(4) Control of Palate (Sense of Taste).—Gandhiji says, "Control of the palate is the first essential in the observance of the vow. I found that complete control of the palate made the observance very easy, and so I now pursued my dietetic experiments not merely from the vegetarian's but also from the brahamachari's point of views. As the result of these experiments I saw that the brahmachari's food should be limited, simple, spiceless, and, if possible, uncooked. Six years of experiment have showed me that the brahamacharis ideal food is fresh fruits and nuts. Control of the palate is very closely connected with the observance of brahmacharya. I have found from experience that the observance of celibacy becomes comparatively easy. For the seeker who would live in fear of God, and would see him face to face, restraint in diet both as to quantity and quality is as essential as restraint in thought and speech."

(5) Fearlessness.—Fearlessness is the strongest weapon of satyagrahi, Gandhiji, says, "Fearlessness connotes, freedom from all external fear—fear of disease, bodily injury and death, or dispossession, for losing ones nearest and dearest, or losing reputation or giving offence, and so on."

(6) Non-stealing and Non-possession.—Gandhiji

preached non-stealing which does not only mean taking another's property, it may be a breach of trust. It is also against needless possession of things. Explaining his ideal of non-stealing, Gandhiji says, "I suggest that we are thieves in a way. If I take anything that I do not need for my own immediate use and keep it, I thieve it from somebody else. I venture to suggest that it is the fundamental law of nature, without exception that nature produces enough for our wants from day to day, and if only everybody took enough for himself and nothing more, there would be no pauperism in this world."

(7) Bread-Labour (Physical Labour).—Physical labour is essential for non-stealing and non-possession. Gandhiji honoured labour. He was not ashamed of at any time doing any odd work. He worked very hard. He preached what he practiced. Explaining his ideal of bread-earning, Gandhiji says, "This labour can truly be related to agriculture alone. But at present at any rate, everybody is not in a position to take it. A person can therefore, spin or weave or take up carpentry or smithy, instead of tilling the soil, always regarding agriculture however to be ideal."

(8) Swadeshi and Swadharma.—Gandhiji says, "Swadeshi is that spirit within us which restricts us to use any service of our immediate surroundings to the exclusion of the more remote." The satyagrahi, as far as possible purchases one's requirements locally and not buy things imported from foreign lands. He believed that Swadeshi should be accepted as a creed. It was always essential to use indigenous goods even if they were comparatively inferior or bad. To prevent exploitation by foreigners, he invented the new concept' Swadeshi'. He wanted full employment to native producers. He used the slogan 'Swadeshi' against Englishmen and their made articles.

Gandhiji insisted to follow Indian culture and swadharma. He says, "I do not want my house to be walled in one all sides and my windows, to be stuffed. I want cultures of all lands to be blown about my house as freely as possible..... But I refuse to be blown of my feet by any one of them."

(9) Tolerance.—Tolerance implies equal respect for all religions. He was born in the Vaishnava faith. There was deep impression of Rama on him. He also read Bhagvatgita. Besides it, he had Musalman and Parsi friends. Many things combined to inculcate in him a toleration for all faiths. By religion, Gandhi did not mean Hinduism or any other

particular creed. It was based on truth and Ahimsa. For him God was truth and love. According to him, there are no fundamental differences among different religions. He says "Ishwar and Allah are the different names of the same God."

(10) Removal of Untouchability.—Removal of untouchability means not only not practicing untouchability but also fighting against it as a whole to eradicate that practice. He declared all are the sons of the God and called the untouchables as 'Harijans'. Every Satyagrahi must work for the uplift of the Harijans and treat the Harijans as equals. Gandhiji hated untouchability and regarded it as 'a blot on the fair name of our society'.

Techniques of Satyagraha (Neo-Gandhian Techniques of Civil Disobedience)

The following are some techniques of Satyagraha or Gandhian Civil Disobedience :

(1) Non-cooperation.—By non-co-operation, Gandhiji, meant that those who were injustice or oppressing should be non-co-operative. The oppressing government should not be given any support. It is in such a situation alone that an oppressor will be obliged to listen patiently to all demands of the opponent. If the people refuse to cooperate with him, his empire crumbles like a pack of cards. Non-cooperation is an action of people directed against a government or authority.

Gandhiji maintains that the government perpetuates injustice when the people cooperate with it. The withdrawal of cooperation automatically pardyees. It is understandable that when a most despotic government cannot thrive to dominate over the subjects unless the consent from the people is forthcoming. Non-cooperation, therefore, is one of the weapons of satyagraha to force the unjust and immoral power to rectify his mistake. The methods of non-cooperation are hartals, social ostracism or picketing.

Hartal means stoppage of all commercial activities. But the stoppage should be voluntary. It should not be repeated again and again. The *hartal* should be sparingly used subject to a non-violent and voluntary measure.

Social ostracism is a kind of social boycott against those who defy public opinion. Those who do not cooperate in *hartal* should be socially boycotted.

Gandhiji suggested in a limited sense, picketing is another weapon which relies greatly on the force of public opinion. Picketing is not a dharna. There is no place for coercion, burning of effigies etc.

The non-cooperation cannot be regarded as a negative creed but it is very much a positive philosophy of constructive and social development. A non-cooperate should have moral strength to face all odds and should have so much moral strength that the opponent feels convinced about it.

Items of Non-cooperation Programme of 1920

Gandhiji used the technique of non-cooperation Movement in independence struggle against British rule in India during 1920-22. It was a new technique in light of a strong modern state. The items of it are :

(1) Surrender of titles and honorary offices and resignations from nominated seats in local bodies;

(2) Refusal to attend government levees, durbars and other official and semi-official functions held by the Government officials or in their honour;

(3) Gradual withdrawal of children from schools and collages owned, aided or controlled by the Government and in place of such schools and colleges establishment of national schools and colleges in various provinces;

(4) Gradual boycott of British courts by lawyers and litigants and the establishment of private arbitration courts by their aid for the settlement of private disputes;

(5) Refusal on the part of military, clerical and labour classes to offer themselves as recruits for service in Mesopotamia.

(6) Withdrawal by candidates of the candidature of election to Reformed Councils, and refusal on the part of the voters to vote for any candidate who may, despite the congress advice, offer himself for election.

(7) Boycott of foreign goods and use of Swadeshi goods, laying down of arms, and the suspension of payment of taxes. Swadeshi is that spirit which restricts the people to the use and service of immediate surroundings to the exclusion of more remote. In that of economics, people should use only things that are produced by their immediate neighbours and service those industries by making them efficient and complete where they might be found wanting.

228

119

Civil Disobedience

For Gandhiji, another method of fighting against a powerful oppressor was that of civil resistance. The Civil Disobedience Movement (1930-31) was a step further over the non-cooperation Movement of 1920s. It was a new technique and Gandhiji introduced it in the national life coupled with non-violence and satyagraha. Gandhiji's civil disobedience was a just and moral duty of citizens against an unjust, autocratic and imperialistic political order.

Gandhiji was opposed to armed resistance. He pleaded that the people should not obey unjust and anti-social laws. The people should be bold enough to declare their intention to disobey cruel and unjust laws. They should openly defy such order.

Gandhiji called it "a bloodless substitute of armed revolt." This is the final and the drastic form of Satyagraha. It is not really civil disobedience but only disobedience to be civil. It must be sincere, respectful and without any hatred. Every care should be taken to against the outbreak of violence. The people should be ready to go behind the bars and suffer such cruelties as the oppressor might inflict upon them, but should carry-on the struggles till the time the unjust law was replaced by just law. There is need to exhaust all channels of representation for resolving the issues before the action of contemplated for initiating civil-disobedience. Those taking up the public cause and resorting to such act of civil—disobedience must also ensure that violence and general law-lessness would not outbreak disrupting the peaceful environment of the society.

Gandhiji defined civil disobedience as "the breach of unmoral statutory enactments." It is "a complete, effective and bloodless substitute of armed revolt." It signifies "the resister's out lawry and a civil outburst *i.e.*, non-violent manner."

According to Gandhiji, "Disobedience to be civil must be sincere, respectable, restrained, never defiant, must be based upon some well understood principle, must not be capricious and must have no ill will or hatred behind it." Its use must be guarded by all conceivable restrictions. Its area, as well as its scope should also be limited to the barest necessity of the case. Every possible provision should be made against an outbreak of violence or general lawlessness. The following are some techniques of civil disobedience—

(1) **Hijarat.**—Hijrat means voluntary exile from one's

permanent place of habitation. The people who feel oppressed either in view of loss of self-respect or honourable living may take recourse of permanently migrating to other place. It is a measure of protest against the oppressors. Those who are unable to defend themselves without violence are advised Hijrat.

Gandhiji advocated the method of Hijrat to the Harijans consequent to the oppressive attitude of the dominant castes in a few places of Bihar. Satyagrahis of Bordoli (1928) and of Junagad (1339) were advised Hijarat. Tyranny is comparable to that of a plague, and wisdom lies in deserting, the place of disease and migrating to a safer place. The Hijarat is a non-violent method of protest for forcing the oppressor realise his inhuman and unjust acts of behaviour against the poor, weak, just and innocent people.

Fasting.—Fasting simply means non-taking of food. It is a means of self purification. It is a dangerous weapon of resistance. It requires both physical and mental courage on the part of the satyagrahis to make it effective.

Gandhiji made fasting a very potent and powerful weapon. It may be used either for penance, or to resist injustice, or to change the hearts of evil doers. Its spiritual content has a special significance. It purifies the self and peaceful by bringing out a change in the heart of the opponent. It is a method to a conquest through love. It must be sparingly used and by those who are capable of it.

Strike.—Strike is a weapon of the labourers to remedy their legal demand against the owner. According to Gandhiji, strike is a voluntary, purificatory suffering undertaken to convert the erring opponent. It should be non-violent and disciplined in application. Mahatma Gandhi did not believe in the Marxist principle of class war and forcefully takeover the means of production from the bourgeois. Gandhiji firmly believed that a strike is meant to end injustice, inefficiency, corruption and shortsightedness of the capitalists.

Civil Disobedient Movement in India led by Gandhi

The Lahore Congress of 1929 had authorised the Working Committee to launch a programme of civil disobedience including non-payment of taxes. Gandhiji gave an ultimatum on 31st January, 1930 to the British Government stating the minimum demand in the form of 11 points, namely, (i) 50% reduction in land revenue; (ii) abolition of the Salt Tax; (iii) reservation of coastal shipping for Indians; (iv) lowering of the rupee-sterling exchange ratio;

(v) protection of indigenous textile industry; (vi) 50% cut in military expenditure; (vii) 50% reduction in expenditure on civil administration; (viii) total prohibition of intoxicants; (ix) release of all political prisoners; (x) changes in the Central Intelligence Department; (xi) changes in the Armed Act enabling citizens to bear arms for self-protection.

Of the demands, the first two were essentially, peasant demands, three to five were bourgeois in nature, while the last six represented the common grievances of the Indian people. After waiting in vain for the government response, Gandhiji started the movement with his famous Dandi Movement from March 12 to April 6, 1930. It spread across the entire country. People's defiance of forest laws took a mass movement. The civil disobedient movement turned into no-revenue no rent campaign. The Gandhi-Irwin Pact came into force in March, 1931 to end the civil disobedience.

Distinction Between Non-cooperation and Civil Disobedience

Both non-cooperation (1921-22) and civil disobedience (1930-31) were conducted with the weapons of Satyagraha and non-violence. Still there are distinctions between them. They are :

(1) While non-cooperation with the evil-doer was a mild form of Satyagraha, civil disobedience of the laws of the Government was a strong and extreme form of Satyagraha.

(2) Non-cooperation was simple while civil disobedience deliberate violation of law, and was more militant than non-cooperation.

(3) Greater quantum of risk which was required as in case of civil disobedience was not required in non-cooperation movement, but participation in civil disobedience movement involved greater risk for the people than in the non-cooperation.

(4) The number of participants was lesser in non-cooperation movement while villages, and bourgeois traders and workers, women and children, students etc. all kinds and classes of people participated in the civil disobedience movement voluntarily in large number.

(5) Compared with non-cooperation movement, civil disobedience was more successful and the Congress organisation became organizationally much stronger.

(6) The non-cooperation movement had objectives namely the remedying of two specific 'wrongs' and the demand for a vague swaraj whereas the Civil Disobedient Movement had an objective of achievement of complete independence.

Gandhiji on Political Obligation Towards State (or) Gandhian Civil Disobedience v. Political Obligation

The concept of political obligation is that the citizen must obey the laws of the state. With special reference to obedience to the law, we can say that a law is good and should be obeyed only if and when it has triumphed in a trial of strength against the expressed wills of other groups, that is, if and when it has been already been obeyed. A citizen must have first rendered willing obedience to the law of the State. One must have shown a willing, intelligent and spontaneous obedience to the laws of the State.

Civil disobedience is against the concept of political obligation. However, civil disobedience was considered by Gandhiji as a just and moral duty of citizens against an unjust political order. He condemned British rule and Englishmen's racism and violent methods in the administration in India. He condemned imperialism and colonialism.

Gandhiji opined if the Government would not represent the will of the people and if it would resort to dishonest and atrocitic methods to suppress the people and exploit them, then the laws should be disobeyed. Gandhiji fought against state violence with the force of non-violence through Satyagraha. According to him, satyagraha means the exercise of the purest soul force against all injustice, oppression and exploitation. Satyagraha wants not to endanger the opponent, but to overwhelm him by the over flooding power of innocence.

Gandhiji says, 'A satyagrahi obeys the laws of society intelligently and of his own free will because he considered it to be his sacred duty to do so. It is only when a person has thus obeyed the laws of society scrupulously that he is in position to judge as to which particular rules are good and just, and which unjust and inquitous. Only then does the right accrue to him of the civil disobedience of certain laws in well-defined circumstances. The capacity for civil resistance comes from the discipline undergone in process of obeying the civil and moral laws of the state. A satyagrahi while resisting the laws of the Government should see that the social

230

120

structure is not subverted."

Civil disobedience of the laws of the Government was a strong form of Satyagraha. Gandhiji opined complete civil disobedience implying a refusal to render obedience to state-made law or laws can be a very powerful movement. It would be more dangerous than an armed rebellion, because the stupendous power of innocent suffering undergone on a great scale has great potency.

Gandhiji says, "For me every rule is alien that defies public opinion." Gandhiji believed that Indians were entitled to freedom because of the immense sufferings they had undergone for it. He severely criticised the imperialistic and colourialistic British rule over Indians. He justified civil disobedience to British atrocitic Governments laws.

Gandhiji stressed that there was political obligation on every citizen to abide state-laws, if they are just and genuine and if the laws are bad and unjust, the citizens have a right to protest it and to disobey them.

Gandhiji disobeyed the Government orders not to enter Champaran district and he was arrested. Gandhiji says in open court, "With the permission of the Court I would like to make a brief statement showing why I have taken the very serious step of seemingly disobeying the order passed under Section 144 of Cr.P.C. In my humble opinion it is a question of difference of opinion between the Local Administration and myself. I have entered the country with motives of rendering humanitarian and national service. I have done so in response to a pressing invitation to come and help the ryots, who urge they are not being fairly treated by the indigo planters. I could not render any help without studying the problem. I have, therefore, come to study it with assistance, if possible, of the Administration and the planers. I have no other motive, and cannot believe that my coming can in any way disturb public peace and cause loss of life. I claim to have considerable experience in such matters. The administration, however, have thought differently. I fully appreciate their difficulty, and I admit too that they can only proceed upon information they received. As a law-abiding citizen my first instinct would be, as it were, to obey the order served upon me. But I could not do so without doing violence to my sense of duty to those for whom I have come. I feel that I could just now serve them only by remaining in their midst. I could not, therefore, voluntarily retire amid this conflict of duties, I could only throw the responsibility of removing me from them on the Administration. I am fully conscious of the fact that a

person, holding, in the public life of India, a position such as I do, has to be most careful in setting an example. It is my firm belief that in the complex constitution under which we are living, the only safe and honourable course for a self-respecting man is, in the circumstance such as faces me, to do what I have decided to do, that is, to submit without protest to the penalty of disobedience. I venture to make this statement not in any way in extenuation of the penalty to be awarded against me, but to show that I have disregarded the order served upon me, not for want of respect for lawful authority, but in obedience to the higher law of our being, the voice of conscience." According to Gandhiji, 'soul' is superior and no bad law could stand before its moral values. The dictates and commands of any Government, if they conflicted with the sense of higher duty of a person, have to be resisted. Such person or society will risk all dangers for the sake of truth.

Criticism of Gandhiji's doctrine of Satyagraha

(1) The doctrine of Satyagraha is too spiritual, even metaphysical, whose all implications may not be understandable to a man of average comprehension. C.M. Case points out that satyagraha may be a superior method theoretically, in practice it is too idealistic as it "demands a stronger self-control, a more enduring solidarity of purpose, a greater capacity for passive suffering, a higher ethical development than most human beings have thus far attained.

(2) Gandhiji wants no coercion of any kind, but a satyagrahi may create a situation in which the other party feels so. During Quit India Movement (1942-44) violence broke out throughout India.

The Concept of Non-Violence (Ahimsa)

The word 'ahimsa' (non-violence) literally means non-injury or more narrowly, non-killing, and more importantly the renunciation of the will to kill and of intention to hurt any living thing, the abstention from hostile thought, word or act. In stead of regarding ahimsa as a tenet of personal motivation and action, Gandhiji could transform it into a successful technique of direct mass action. That is here we find that the individualistic message of non-violence is transformed into a tenfold phenomena—personal as well as institutional. Evil thoughts, sentiments of revenge, brutality, verbal pugnacity, accumulation of unnecessary things, falsehood, trickery, intrigues, chicanery, deceitfulness, economic exploitation, and stranglehold of others, excess of

231

emulation and destructive competition etc. are the examples of violence at the personal level. So physical punishment, conscription, compulsory recruitment in armed forces, wars etc. are the instances of violence at the institutional level-violence committed by the state.

Gandhiji distinguished between the negative and positive meaning of *ahimsa*. Gandhiji writes, "In its negative form it means not injuring any living being whether by body or mind. I may not, therefore, hurt the person of any wrong-doer or bear any ill-will to him and so cause his mental suffering. This statement does not cover suffering caused to the wrong-doer by natural acts of mine which do not proceed from ill will..... *ahimsa* requires deliberate self-suffering, not a deliberate injuring of the supposed wrong-doer.....In its positive form *ahimsa* means the largest love for my enemy or a stranger to me as I would for my wrong-doing father or son. This active *ahimsa* necessarily includes truth and fearlessness."

Gandhiji equated *ahimsa* more or less with humanity, forgiveness, love, charity, selflessness, fearlessness, strength, non-attachment, weakness and innocence; he extended the meaning of *ahimsa* a or violence to include trickery, falsehood intrigue, chicanery and deceitfulness in short, all unfair and foul means. To Gandhiji, *ahimsa* is a "quality of the disembodied soul alone." It implies an inability to go on witnessing another's pains and from it would thus spring mercy, heroism and all other virtues associated with *ahimsa*.

Gandhiji says, "Non-violence is not a retreat from all real fighting against wickedness, but a more active fight against wickedness than retaliation which, by its very nature, increases wickedness. I seek entirely to blunt the edge of the tyrant's sword, not by putting up against it a sharp-edged weapon but by disappointing his expectation that I would be offering physical resistance." Thus, non-violence as he saw it, actually presupposes the ability to strike through deliberate restraint upon one's desire for vengeance. *Ahimsa* is soul-force against all violence all tyranny and injustice; it is world's great principles which no power on earth can wipe-out.

Gandhiji said, "Non-violence is the first article of my faith. It is also the last article of my creed." Gandhiji treated non-violence as a creed and as also a policy. He laid down five simple axioms of this creed. They are :

(i) "Non-violence implies as complete self purification as is humanly possible." This means rigorous ethical discipline taken by vows.

(ii) "Man for man the strength of non-violence is in exact proportion to the ability, not the will, of the non-violent person to inflict violence." This means the acquiring of the capability of displaying *ahimsa* by renouncing nuclear weapons.

(iii) "Non-violence is without exception superior to violence" *i.e.*, the power at the disposal of a non-violent person is always greater than he would have if he was violent.

(iv) "There is no such thing as defeat in non-violence. The end of violence is surest defeat." This means that non-violence cannot fail; even if one fails, it is because of the moral inadequacy of the user; and further, if one thinks violence succeeds it is so because of taking too narrow or short-sighted a view of success.

(v) "The ultimate end of non-violence is surest victory—if such a term may be used of non-violence. In reality, where there is no sense of defeat there is no sense of victory." This implies that the victory of *ahimsa* never aims at defeating any one but merely at achieving a desirable result.

Gandhiji regarded any concession to the creed of *ahimsa* as mere concession to human weakness, deviation from the Moral Law. There may be difficulties in strictly adhering to this moral law, but one should regard it as an ideal to be reached. It is an ethical absolute based upon metaphysical beliefs, issuing in a religious conviction requiring an act of faith.

Simple Axioms of Non-violence

Joan Von Bondurant, in his book 'Conquest of Violence' gives the following principles of non-violence—

(1) Non-violence implies as complete self-purification as humanly possible.

(2) Man for man, the strength of non-violence is in exact proportion to the ability, not the will, of the non-violent person to inflict violence.

(3) Non-violence is without exception superior to violence, *i.e.*, the power at the disposal of a non-violent person is always greater than he would have if he was violent.

(4) There is no such thing as defeat in non-violence.

The end of violence is surest defeat.

(5) The ultimate end of non-violence is surest victory—if such a term may be used of non-violence. In reality, where there is no sense of defeat, there is no sense of victory.

Implications of and Conditions for the Success of the Technique of Non-Violence

(1) Non-violence is the law of human race and is infinitely greater than and superior to brute force.

(2) In the last resort it does not avail to those who don't possess a living faith in the God of Love.

(3) Non-violence affords the fullest protection to one's self-respect and sense of honour, but not always to possession of land or movable property, though its habitual practice does prove a better bulwark than the possession of armed men to defend them. Non-violence in the very nature of things is of no assistance in the defence of ill-gotten gains and immoral acts.

(4) Individuals or nations who would practice non-violence must be prepared to sacrifice (nations to the last man) their all except honour. It is, therefore, inconsistent with the possession of other people's countries *i.e.*, modern imperialism, which is frankly based on force for its defence.

(5) Non-violence is a power which can be wielded equally by all children, young men and women or grown up people, provided they have a living faith in God of Love and have, therefore, equal love for all mankind. When non-violence is accepted as the law of life, it must pervade the whole being and not be applied to isolated acts.

(6) It is a profound error to suppose that whilst the law is good enough for individuals, it is not for masses of mankind.

Non-violence is not the weapon of the weak; it is the weapon of the strong. Gandhiji says, "*Ahimsa* is not the way of the timid and cowardly. It is the way of brave ready to face death. He who perishes with sword in hand is no doubt brave but he who faces death without raising his little finger and without flinching is braver. The basic principle of non-violence rests on that what holds good in respect of oneself equally applies to the whole universe.

Normally a man should abstain from committing violence, but there may be a situation in which doing violence would be like observing non-violence. It is the duty of a person to save his life and honour. So is with the care of a country. It would be an act of non-violence to beat and hit a person who runs amuck and may kill anyone with a sword in his hand. So a country has every right to beat the foreign aggressors by the force of arms.

The *ahimsa* a Gandhiji is superior of and persuasive nature than that of Buddha, Mahavir and the Christianity due to the following reasons :

(1) Non-violence is held to be superior to violence, because it is an expression of love that accepts punishment upon itself rather than imposing it upon the opponents. Such self-sacrificing love is held to be redemptive to both parties in the dispute- morally and psychologically to the suffers and persuading and converting to the opponent.

(2) Non-violence persuades a man by appealing to his conscience and better impulses, rather than of coercing him against his will. In this way, respect is shown to the opponent's freedom and dignity and the chain of violence—hatred leading to hatred, violence to revenging violence is broken.

(3) Because it is spiritual or soul force rather than physical force, the former is considered to be the law of civilized man, whereas the latter is the law of the brute.

(4) Adherence to non-violence is more sometimes held to be a commandment of religious faith.

Gandhiji used the cult of non-violence coupled with Satyagraha against the British. He fought against the British with the arm of non-violence. He made his armament of non-violence so strong, so that the mighty Englishmen were compelled to bend upon his policies. Non-violence is the main essence of political philosophy of Gandhiji. He mixed his concept of *ahimsa* with *satya* (truth). He says, "Without *ahimsa*, it is not possible to seek and find 'truth'. *Ahimsa* and truth are so interwined that it is practically impossible to disentangle and separate them. They are like the two sides of a coin, or rather of a smooth unstamped metal disc who can say which is the reverse?"

For Gandhiji, true democracy or the Swaraj of the masses can never come through untruthfulness and violent means, for the simple reason that the natural corollary to their use would be to remove all opposition through the suppression or extermination of the antagonists. That does

not make for individual freedom. Individual freedom can have the fullest play only under a regime of unadulterated *ahimsa*.

According to Gandhiji, there is no analogy between *himsa* and *ahimsa*. According to Gandhiji, if a man fights with his sword single handed against the band of dacoits armed to the teeth, he is fighting almost non-violently. Again, according to him, if a woman use nails and teeth and even a dagger just to protect her honour it is an act of the non-violence. In the same way for the Poles (Poland) to stand valiantly against German military, vastly superior in numbers and military equipment and their strength, was almost non-violence.

In the view of Gandhiji, arms are surely unnecessary for training in *ahimsa*. One must learn the art of killing in the training for violence, so one must learn the art of dying in the training for non-violence; He who has not overcome all fear cannot practice *ahimsa* to perfection. The supporters of *ahimsa* have only one fear that is of God.

In the struggle of independence, *ahimsa* is our real equipment. Gandhiji believes that *ahimsa* can lead us to victory. What we need for this purpose is faith, that is you should not lose the right path. One should be a supporter of non- violence upon his end.

Criticism of the Concept of Non-violence

Gandhiji's concept of non-violence may be criticised on these grounds :

(1) The concept of non-violence is too spiritual to be meaningful in the sphere of politics where resort to violence often becomes a necessity. It may be practiced to the limited extent. The concept of Gandhiji has more relevance in the theoretical sphere of politics; in the practical sphere of politics the laws of Machiavelli have a relevance of their own which cannot be contradicted.

(2) While the doctrine of *ahimsa* is comprehensive enough to cover so many directions, it is also narrow enough to exclude the unbelievers in God or those who don't profess faith in any religion. It cannot appeal to the atheists who deny the existence of God.

(3) Though Gandhiji affirms that his concept of *ahimsa* has national as well as international relevance, it is said that it has hardly any relevance in the sphere of international politics.

(4) The critics opine that the cult of non-violence is not practicable always. The critics raise the point that if the entire credit is given to Gandhiji's non-violence and satyagraha, then why did he fail in South-Africa, from where he started his agitation against Britishers.

As a firm believer in non-violence, Gandhiji eloquently spoke about establishment of a non-violent society. However, he did not elaborate the details of such a society. He left the details of the government to the new society to be determined by the people according to their moral and spiritual development.

Gandhiji's Approach to Political Obligation and Legitimacy

Philosophical Anarchism of Gandhiji (Gandhiji as an Anarchist)

Political system that perceived by Gandhiji is not identical to western liberalism, socialism, communism, nationalism, cosmopolitism and so on in spite of the fact that the features of all such theories may be traced in his social and political philosophy. For Gandhiji, state stood for violence and exploitation. In the ideal state, therefore, there should be no political power for there is no state.

Anarchists opposed all constraints. For them rights of the people are everything. They don't find anything wrong in the individual using force against state.

Purest anarchy, according to Gandhi, is a political situation in which a society is organised and run on the basis of complete non-violence. We may place Gandhism in the category of religious or philosophical anarchism in view of the fact that he denounces the nature and character of political authority and in stead ultimately goes in favour of an ideal society without any instrument of coercion. G.N. Dhawan says, "Gandhi is a philosophical anarchist, because he believes that his end can be realised only in a classless and stateless democracy of autonomous village communities based on non-violence in stead of coercion, on service in stead of exploitation, on renunciation in stead of acquisitiveness, and in the largest measure on local and individual initiative in stead of centralisation." There is correlation between philosophical anarchism and political obligation in the scheme of Gandhian Thought.

Gandhi opposed all types of violence either by the state or by the people. He says that government is the best

government which governs the least. When used for good of the people, Gandhiji welcomed state action. He said that "there are certain things which cannot be done without political power." He regarded the political power not as an end but a means for ideal state. He separated violence from politics and united politics with religion. He is nearer to the philosophical anarchists like Tolstoy, Goldwin etc.

Gandhiji use the word 'religion' in a broad sense. His religion is based on truth and non-violence. He says, "Truth is my God, non-violence is the means of realising him." He talks of 'the religion which underlines all religions." He has spiritualised politics.

Gandhiji's aim is "to spiritualise political life and institutions. Politics for Gandhi, is as essential as religion, but if is divorced from religion it is like a corpse, fit only for burning and has absolutely no meaning."

The core of Gandhiji's thought with regard to politics and religion in his belief that while "politics today encircles us like the coils of a snake from which one cannot get out, no matter how one tries" the only way of wrestling with the snake is to introduce religion into politics. He firmly believed in the fundamental unity of life, and rejected the distinction between public and private, secular and sacred. To him, the interplay between politics and religion is such that his view of politics is the consequence of, and not independent of, his view of morality, and that "so long as the seed of morality is not watered by religion it cannot sprout."

Gandhian thought is based on ethical idealism. He advocated an ethical and religious approach to politics. He always talked of ethical religion. Gandhiji says, "For me there are no politics devoid of religion. Politics bereft of religion are death trap because they kill the soul." He advocated an ethical and religions approach to politics. For Gandhiji, religion meant an emphasis on the moral values of man. He always talked of ethical religion. Gandhiji says, "For me morals, ethics and religion are convertible terms. A moral life without reference to religion is like a house built upon sand. And religion diversed from morality is like a sounding brass gong only for making a noise and breaking heads." As soon as the moral basis of religion is lost it ceases to be religion. Gandhiji's religious basis of politics signified the stress on moral values. As Gandhiji's concept of state is related and intermingled with religion and anarchism, it is named as "religious or philosophical anarchism."

Gandhiji's Concept of State (Stateless society)

Gandhiji was against state and its authority. He says, "The state represents violence in a concentrated and organised form. The individual has a soul, but the state is a soul-less machine, it can never be weaned from violence to which it owes its very existence." He further says, "I look upon an increase in the power of state with greatest fear, because while although apparently doing good by minimising exploitation, it does the greatest harm to mankind by destroying the individuality which lies at the root of all progress." Gandhiji held that state is an organisation of violence and force. He had a 'hostile attitude' towards the state.

Gandhiji was against the very idea of 'state sovereignty'. Any concept of the exaltation of the absolute, uncontrolled and unlimitable power was according to him an attack on moral fibre of civilization. He regarded it as the challenge to the moral right of man to shape his destiny. But Gandhiji did not contemplate the destruction of the state, what he stood for was not stateless society but for a non-violent state. He viewed that a non-violent society does not require state authority.

Gandhiji wanted a progressively non-violent state. He writes, "I believed that a state can be administered on a non-violent basis if the vast majority of the people are non-violent. So far as I know, India is the only country which has a possibility of being such a state."

Gandhiji writes, "Political power means capacity to regulate natural life through national representatives. If national life becomes so perfect as to become self-regulated, no representative becomes necessary. There is then a state of enlightened anarchy. In such a state everyone is his own ruler. He rules himself in such a manner that he is never a hindrance to his neighbour. In the ideal state, therefore, there is no political power, because there is no state." But ideal state has never fully come into reality. Gandhiji says," such a state is perfect and non-violent where the people are governed the least. The nearest approach to purest anarchy would be a democracy based on non-violence."

Gandhiji on Democracy

Gandhiji was a real democrat and believed in the idea of decentralisation of authority. He desired that the so called society would be devoid of class and would contain a number of self-contained and self-regulated village communities. Such

villages with a panchayat would exercise full powers of administration meeting all essential needs and also defending itself. Thus, every village becomes a self-sufficient unit. They are voluntarily absorbed in a federation. The federation is a larger frame-work of autonomous villages without police, military forces, big cities, law courts, jails or industries. The life in such a federation or the village communities would be authentically rural as well as simple. Decentralisation will be the hallmark of the new society. Gandhiji believed that decentralization and voluntary cooperation are the two essential features of the non-violent society.

Gandhiji rejects the system of parliamentary democracy. He ridicules parliament as a 'sterile woman', "a talking shop" or an institution consisting of self-seeking and hypocrites. It is an organisation that has done nothing useful on its own accord and always suffered from fickle-mindedness and uncertainty.

Rama Rajya (Political Obligation and Legitimacy)

Gandhiji's idea of Rama Rajya is based upon one's adherence to *satya* and *ahimsa*. This political vision of Gandhi is ultimately based upon the classical Indian myth of the Ideal policy under Rama, the hero of Ramayana. To Gandhiji, Rama Rajya is one in which every man invokes, if not become Rama, the heroic ideal exalts the individual and even the adventurer and enables every brave spirit to feel that "the world is his oyster, which with his sword he will prise open." For Gandhiji, this is the sword of *satya* or truth which has to be used to combat every form of social and political injustice. Rama Rajya is a perfect democracy based on love, justice and equality. In it, land and state belong to the people. Its features are : decentralisation, *varna vyavastha*, non-possession, trusteeship, bread-labour. There, people live a happy and contended life. Right to resist the cruel and wicked rulers is given to all. All freedoms are guaranteed to the people. Every individual is assured of food, clothing and sufficient work to meet his ends.

In an ideal condition of Rama Rajya, there would be no discrimination between a prince and a pauper, a barrister and a *bhangi* (sweeper) and 'justice would be done even to the dog.'

The state would continue to exist in the Rama Rajya, but it would be a perfectly non-violent organisation. The scope of state activity would be reduced to the minimum possible extent. Some institutions like the army, police, bureaucracy,

courts, heavy transport and industry, big hospitals and gigantic machinery would continue to function not for the sake of suppression of individuality but for the sake of common welfare.

In Rama Rajya, individual is permitted to own property or freedom. The property owners were trustees, but if they failed to act as trustees the land and industry will be taken over by the government through enactment of legislation. Gandhiji's vision included a capitalist acting as a trustee, worker participating in industries and reposing faith in the capitalist, a decent wage to the toilers and tillers, villages equipped with cottage and small-scale industries instead of heavy industries and panchayats fully endowed with self-governing powers. He dreamt a self-sufficient village economy with Rama Rajya all pervading through out the length and breadth of the country.

According to Gandhiji, rights and duties are essential for a civilised society. In his opinion, negligence in the performance of our duties was bound to hinder social progress. In his philosophy there was more stress on duties rather than on rights. Everyone would earn his honest living by the sweat of his brow and there would be no distinction between big and small labour. The society would be classless and also without state.

Administering the State Non-violently (No Need of State Authority)

If Indians had won independence by non-violent means, it means that the bulk of the country had been organised non-violently without vast majority of the people having become non-violent. If, we could attain swaraj purely by non-violent means, it should not be difficult for us to carry on the administration without the military. Gandhiji is supporting maintaining a police force. But that police should be on our own pattern not on the British pattern. Gandhiji says, "If I maintain a police force, it will be a body of reformers." Gandhiji is sure about success through non-violent governing.

The root causes of the internal disturbances of communal, industrial, and, dacoities are mutual distrust, social injustice and grinding poverty due to economic exploitation and unemployment. So long as these causes exist, the threefold disturbances will take place in spite of armed forces. Then a constructive programme is the only means of removing these root causes. If we succeed in

ahimsa, then there would be communal harmony, the demon of untouchability would have been cast out, and generally speaking, we should have evolved an ordered society. According to Gandhiji, even for a non-violent state a police force may be necessary. The police will be servants not masters of the people. The people will instinctively render them every help and through mutual cooperation, they will easily deal with ever-increasing disturbances. The police force will be reformers. The police will use arms rarely.

Non-Violent Army

Through non-violent army Gandhiji's aim was to reduce the invaders violence to a minimum. According to Gandhiji his non-violent army will represent one of the pair-*ahimsa* out of the pair of *himsa* and *ahimsa*. In his view fear has its use, but cowardice has no use. Gandhiji is explaining it through an example. One man may not put his fingers into the jaws of a snake but the very sight of the snake need not strike terror into that person. The non-violent army need not and will have resourcefulness or understanding of the general, but they will have a perfect sense of discipline to carry out faithfully his orders. The non-violent army general should have the quality which commands the unquestioning obedience of his army. He will expect of them nothing more than obedience.

To Gandhiji, non-violence is not like a garment to be put on and off at will. Its seat is in the heart of heart and it must be an inseparable part of every being.

Distinction Between Gandhism and Communism (or Marxism or Socialism)

Gandhiji was a great constructive social scientist while Marx a great political theorist. Gandhiji a spiritual and ethical idealist believed in moralisation of politics whereas Marx interpreted the politics through economic relations. Both of them have similarities and differences in their political thought.

Comparison of Mahatma and Marx

The following are the similarities between Gandhism and Marxian Communism.

(1) Both Gandhiji and Karl Marx wanted to have a classless society in which there would be no distinction between the rich and the poor.

(2) Both considered that class consciousness had created a right in the society and thus resulted in exploitation of the poor by the rich.

(3) Both believed that state was based on violence and in its present from it had no justification to exist.

(4) Both even went to the extent of saying that state was an evil institution though Karl Marx went a step further by saying that it will ultimately wither away and reach stateless stage.

(5) Both had similar views about capital. To both, capital was theft and a few people in the society had no right to hold it and deny its use for national welfare. Both asserted that capital should be used for social welfare.

(6) Both had a very soft corner for the downtrodden and the people belonging to the working class and weaker sections of the society.

(7) Both believed in the concept of social equality.

Differences between Gandhism and Communism

The differences between Gandhism and Communism are as follows :

(1) While Gandhiji insisted upon adherence to truth and non-violence for achieving the objective, Marx did not care for the means and preferred to use force provided they could achieve the end.

(2) Marx put forward the theories of class war, the dictatorship of the proletariat, nationalisation of industries etc. Gandhiji, on the other hand, propounded the theories of *Varna Dharma*, *Satyagraha*, decentralisation, trusteeship etc.

(3) Gandhism puts emphasis on spirit whereas communism puts emphasis on matter.

(4) Gandhiji had deep faith in religion and believed that politics without religion was barren and both should go side by side. Marx on the other hand, believed that religion had no place in politics and both should be separated. For him, religion was opium for the people and a method for making the people fatalist.

(5) Gandhiji had faith in the existence of God which for him was a mysterious force and guiding our affairs. Marx, on the other hand, did not believe at all in the existence of God. For him man was the architect of his own fate. He had belief in dialectical materialism.

(6) Gandhiji attached too much importance to

individual, whereas Marx gave prominence to the society.

(7) Gandhiji rejected the present civilisation and its values, where as Marx rejected the exploitation of labour in industrial civilization.

(8) Gandhiji emphasised on a policy of non-violence. Marx believed that violence is necessary to overthrow capitalism through class-war.

(9) Gandhiji believed in democracy and *Rama Rajya* whereas communists believe in proletariat dictatorship.

(10) Gandhiji believed in social and political decentralisation, arbitration and theory of trusteeship, whereas Marx held his faith in centralisation, nationalisation of industries.

❑❑

259

238

Chapter 9

Political Obligation with Reference to Neo-Gandhian Thought

Sarvodaya (All May be Happy) as Political Obligation
Meaning of Sarvodaya

The disciples and followers of Mahatma Gandhi like Vinoba Bhave, Jayaprakash Narayana, Dada Dharmadhikari, Dhirendra Mazumdar, Shankerrao Deo, K.G. Mashruwala Sampurnananda etc. are considered as Neo-Gandhians and they are the pioneers of Sarvodaya Movement in India.

'Sarvodaya' literally means 'the uplift of all'. The name 'sarvodaya' was chosen by Mahatmaji for what he considered to be goal of all efforts in the field of public work. It means the udaya (upliftment) of all, 'udaya' standing not only for material prosperity, but for spiritual good. Sarvodaya is a principle of a new philosophical, social, ethical, economic and political order, whose aim in the words of Gandhiji's spiritual disciple Vinoba Bhave, is that 'all may be happy'. It may be defined as an extension of Gandhism.

The origin of Sarvodaya philosophy can be traced back to John Ruskin's teaching in his book 'Unto This Last,' and Tolstoy's "Bread Labour". Some components of the Sarvodaya ideology are based on the karmayoga and Adhyatma Yoga of the Gita. The saying", In the sweat of the brow shalt thou eat thy bread" expressed what is implied in the Sarvodaya way of life.

Ruskin's work, 'Unto This Last' considers the welfare of all. The statement that "the life of the labourer and the life of the tiller of the soil is the life worth living' expresses a cardinal truth of Ruskin's philosophy. The truth concerns the universality of objects, freedom of the individual and dignity of the individuality of the poor. These welfare doctrines have their origin in the memorable teachings of St. Mathew. Ruskin has indeed gone ahead of them to preach even the uplift of the Anthyodaya in which Sarvodaya attains maximum significance.

Acharya Vinoba Bhave has given a new hope to

13A

he refused to treat state as an end in itself. It was retained as an instrument of general welfare of the individual.

Secondly, his theory of popular sovereignty is another outstanding contribution. No doubt, other thinkers before Rousseau gave theory of sovereignty but none of them emphasised the doctrine of popular sovereignty. His influence is clear from the fact that in the later years it became a fashion to talk of popular sovereignty. Prof. Maxey says "It is beyond dispute that in the sphere of political Thought, Rousseau performed one service of incalculable importance. That was his formulation of a plausible and largely realisable theory of popular sovereignty."

Thirdly, Rousseau developed the concept of Nation-State by laying emphasis on the principle of common good, common interest, general will as well as unity and solidarity of the people.

Fourthly, Rousseau left deep impact on the idealist school of thought. His concept of General Will greatly influenced idealist thinkers like Kant and Hegel. The latter's Spirit of Nation was nothing but a reformed form of Rousseau's concept of General Will.

Fifthly, Rousseau gave the concept of common good which was subsequently developed by the utilitarian thinkers like Bentham and Mill into the concept of "the greatest good of the greatest number."

We may conclude this discussion with the following estimation of Rousseau's contribution to political theory by Prof. Hearns hah: "He (Rousseau) displays the people as the ultimate source of political authority, he proclaims the common good to be the proper end of government, he stresses the view that the State is a social organism; he develops the idea that as an organism, it has a common conscience and a general will; he maintains the doctrine that the true basis of political obligation is consent; he proclaims the possibility of the ultimate reconciliation of freedom and authority...He takes a high place among political idealists."

24

Edmund Burke (1729-1797)

"Like Rousseau he (Burke) was a phrase-maker of the first order, and more than Rousseau, a lord of language in the finest lineage of political thought. Yet by origin and temperament, Burke was profoundly Un-English."

—**John Bowle**

Edmund Burke is one of the few political thinkers of eighteenth century England whose fame has not declined with the passage of time. He was a great literary genius and possessed a superb intellectual power. Though Burke did not contribute many new ideas to political thought, his greatness lies in remarkable ability with which he applied the broad philosophical concepts to specific and concrete problems of state craft.

Early Life and Influences. There is controversy amongst scholars regarding the date of birth of Burke. According to the most accepted view he was born at Dublin in 1729. His father was a Protestant while his mother was Catholic. After his early education at Dublin he was sent to Trinity College in 1744, wherefrom he was sent to Middle Temple at London for the study of law. However Burke did not take much interest in Law. In 1756 he published his first treatise *A Vindication of Natural Society* which failed to make much impression. Next year he published *The Origin of our Ideas of the Sublime and Beautiful*, which received some attention. In 1759 he started the *Annual Register*—a Survey of world affairs. In 1759 he took up assignment as Private Secretary to Hamilton, the Secretary for Ireland, which provided him a chance to acquire practical knowledge about government. In 1765 he was relieved of this assignment. But after a small gap he was appointed as private secretary by Lord Rockingham, the Prime Minister of England. After some time a seat was provided to Burke in the House of Commons and he spent next thirty years in active politics. During this period he acted as the brain and an outstanding leader of the Whig Party. In 1770 Burke published his *Thoughts on the Causes of the Present Discontents*, in which he criticized the attempts by George III to revive the royal power and advocated that the parliamentary government should be run on party-lines. In the wake of the French Revolution also he wrote a number of works which

239

include his *Reflections on the Revolution in France* (1790), *Appeal from the New to the Old Whigs* (1791) and *Letters on a Regicide Peace* (1796-97).

Political Ideas of Burke. As already pointed out, Burke was not a systematic political thinker like Rousseau or Montesquieu and his ideas lie scattered in the various speeches he delivered in Parliament, the letters and addresses to constituents and his various published works. We can get an idea about his political philosophy by piecing together his various thoughts, which may be conveniently studied under the following heads :

1. Views on State. Burke held that state was not the result of the social contract. It is not a man-made machine but "an immensely complicated organism which the efforts of individual have certainly helped to shape, but whose evolution and destiny cannot be wholly understood by any individual. According to Murray, Burke believed that "the way in which a state evolves and develops is largely determined by forces which no individual can fully comprehend, and that when men make changes they should do so with restraint and caution, since the consequences of their actions cannot be foreseen and may conflict with the most fundamental interests of the community as a whole." In simple words he says that the state and its institutions are the result of the slow process of growth and we must be cautious in introducing the changes. These changes must be in harmony with the habits and spirits of the people. It may be noted that, Burke never denied the need of change in the old institutions. He merely advised caution in making changes.

Another noteworthy thing about Burke's views on state is that though he criticised the social contract theory but he never denied the social contract, even though he gave it an entirely different meaning. As Burke put it "Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state ought not to be considered as nothing better than a partneship agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with rather reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. As the ends of such partnership cannot be obtained in many generations, it becomes a partnership not only betwen those who are living, but between those who are not living, those who are dead, and those who are to be born".

Views on Natural Rights. Burke firmly rejected Locke's theory of natural right according to which men possessed certain natural rights in the pre-civil society. According to him rights exist only in the state and not outside the state. "The only rights men can actually enjoys are rights created, recognised and protected by

society. Freedom is to be found not in weakening the social bond but in strengthening it; not in setting man against the state, but in reconciling men to the state and working out natural compromises, conferring such liberty as may be consistent with the welfare of the society." Thus Burke included restrains on men as well as their liberties also among the rights.

Burke also made a distinction between the civil and political rights and insisted that whereas civil rights should be made available to all, the political rights should be given only to those who were considered capable of enjoying and exercising those rights. As Burke put it "Far as I am from denying the real rights of man...If civil society be made for the advantage of man, all the advantages for which it is made becomes his right...Men have a right to justice between their fellows...They have a right to the fruits of their industry, and to the means of making their effort fruitful. They have right to the acquisition of their parents and to the nourishment and improvement of their offspring...As to the share of power, authority and direction which each individual ought to have in the management of the state, that I must deny to be amongst the direct original rights of man in Civil Society. It is a thing to be settled by convention".

View on Revolution. Burke expressed strong opposition to the Revolution of 1789 in France because it was based on violence. It may be noted that Burke was in favour of changes and extended full support to the American War of Independence. He opposed French Revolution because it chused lot of bloodshed. Burke held that "the blood of man should never be shed but to redeem the blood of men." Again he expressed opposition to the French Revolution because its leaders menaced the very bases of the society and effected a breach between the past and the present. He felt that the French Revolutionary leaders were trying to reconstruct the French society according to their own ideas and ideals after destroying the existing institutions which represented the accumulated experience of centuries. In other words he opposed French Revolution because the people had not merely revolted against their king but also against the real French Constitution (though unwritten) and well established institutions. Thus Burke justified rebellion against a King only if he was guilty of subverting the fundamental laws and institutions, for the sake of preserving the well established institutions. It may be reiterated that Burke was not opposed to all changes. According to him change and continuity was the life blood of society and it must change. However, the changes must be imperceptible, gradual and undertaken with utmost caution. He said "A disposition to preserve and an ability to improve, taken together would be my standard of a statesman." According to one writer Burke as a political reformer "combined in himself devotion to liberty with respect for authority; hope for the future with reverence for the past".

View on British Constitution. Burke showed great admiration for the British Constitution and described it as "the highest

240

embodiment of political wisdom". He said "Our constitution is prescriptive constitution; it is a constitution whose sole authority is that it has existed time out of mind...Your king, your lords, your judge, your juries, grand and little, all are prescriptive...Prescription is the most solid of all titles,...It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it:.. Because a nation is not an idea only of local extent and individual momentary aggregation; but it is an idea of continuity which extends in time as well as in numbers and in space. And this is a choice not of one day, or one set of people, not a tumultuary and giddy choice; it is deliberate election of the ages and of generations; it is a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions and moral, civil and social habitats of the people, which disclose themselves only in a long space of time." According to Sabine, "Burke's theory of constitution and his conception of parliamentary government was based upon the actual settlement of 1688."[1]

Views on Democracy and Representation. Burke had no faith in democracy and expressed strong opposition to the principles of equality of men and sovereignty of people. He challenged the right of the people to participate equally in the political activity and expressed faith in the virtue and wisdom of the aristocracy.

He opposed the principle of universal adult franchise and considered the doctrine of popular sovereignty as utter nonsense, because no check or restraint could be exercised on the people. Further, the masses could be as oppressive as the classes. He showed implicit faith in the virtue of aristocracy, and held that aristocracy provides stability to the government and the greatness of a nation depends on the existence of a strong and powerful aristocracy. He said "To enable men to act with the weight and character of the people...we must suppose them to be in that state of a habitual social discipline in which the wiser, the more expert and the more fortunate conduct, and by conducting enlighten and protect the poor, the less knowing and the less provided with the goods of fortune." He said that while the office should in theory be open to all, in practice it should be restricted to the very few. He pleaded for greater representation for the propertied people in comparison to the poor.

Role of Representatives. With regard to the role of the representatives Burke insisted that they should not be mere delegates of the electors and should try to promote the general good of the whole community on the basis of their own judgement and conscience. He said "parliament is a deliberative assembly of one nation, with one interest, that of the whole; where no local purposes, no local prejudices, ought to guide, but the general good." Though he expected the representatives to maintain constant touch with their

1. Sabine, *History of Political Theory*, p. 609.

constituents and give full weight to their wishes and prefer their interests to his own, he did not approve of fettering their judgement by mandate or prior instructions from the electors.

Views on Political Parties. Burke was one of the first English thinkers to emphasise the importance of political parties in the working of parliamentary system of government. He said political parties are essential because by their joint efforts only the members of the legislature can promote national ends. He pleaded that full use of the talents of the members can be made only if members holding identical views act in unity on the basis of some common principles. Accordingly he defined a political party as "a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are agreed." It may be observed that Burke offered these views about political parties and their role with a view to flout George III's plans to establish his personal rule. George had condemned political parties described them as factions formed to gain unpatriotic and partisan advantages.

Attitude Towards Religion. Burke attached great improtance to religion and was a staunch supporter of the Established Church of England. According to him religion played a vital role in human affairs. To him every government or society was a part of the divine plan and no nation could stand alone. Similarly, no person could be a good citizen unless he possessed the quality of piety.

Faith in Expediency. Burke attached importance to expediency rather than abstract principles. He said that abstract principles can be helpful only in understanding abstract concepts and could not be useful for understanding the realities of life. Burke, therefore, attached great importance to the principle of expediency. However, he did not use the concept of expediency in the sense in which Machiavelli used it viz. without paying any attention to moral aspects. He never held that the statesman could adopt any means deemed necessary and useful for the realization of set objectives. He wanted the actions to conform with the basic and permanent elements of the institutional life of a people". He insisted that the statesmen should be guided by considerations of humanity, reason and justice and not mere abstract principles. He said in the House of Commons on 11 May 1792 "Circumstances are infinite, are infintely combined; are variable and transient; he who does not take them into consideration is not erroneous, but stark mad... A statesman, never losing sight of principles, is to be guided by circumstances; and judging contrary to the exigencies of the moment, he may ruin his country forever".

Burke attached more importance to expediency than what was legally correct. He condemned the policy of the Government of Lord North towards the American colonies which prompted them to revolt. He said that "in determining government policies considerations of expediency and commonsense were better guides than the

~~282~~
241

doctrine of rights." He conceded the right of the British Parliament to levy taxes on the colonies but questioned the propriety of the exercise of this right under the existing conditions. He said "The question is not whether you have a right to render your people miserable, but whether it is not in your interest to make them happy. It is not what a lawyer tells me I may do, but what humanity, reason and justice tell me I ought to do." Burke's stand on India as well as French Revolution was also based on principle of expediency.

Burke's Conservatism. According to Sabine "Burke is rightly regarded as the founder of self-conscious political conservatism. Nearly all its principles are to be found in his speeches and pamphlets ; an appreciation of the complexity of the social system and of the massiveness of its customary arrangement, a respect for the wisdom of established institutions, especially religion and property, a strong sense of continuity in its historical changes and a belief in the relative importance of individual will and reason to deflect it from its course, and a keen moral satisfaction in the loyalty that attaches its members to their stations in its various ranks. The point is not, of course, that before Burke there was no conservatism, but it is almost true to say that there was no conservative philosophy."[1]

John Bowle also describes Barker as "the greatest prophet of English conservatism. Likewise Ivor also says "Burke gave to the philosophy of conservatism perhaps the fullest and the most eloquent expression the world has ever heard." The Conservatism of Burke was on account of two factors. First, his desire to uphold the political privileges of the Whig Party to which he belonged and secondly on account of his implicit faith in the Divine Will. His Conservatism is evident from the following features of his philosophy.

Firstly, Burke had great regard for tradition and favoured the preservation of the old institutions. No doubt he favoured changes in these institutions but insisted that the reforms should be carried out with equity. He said "If I cannot reform with equity, I will not reform at all". Further he expressed faith in the helplessness of the individual against the current of the historical evolution. Therefore, he virtually denied the possibility of radical changes in the existing institutions.

Secondly, his views on the origin of the state also bear testimony to his conservative outlook. He rejected the social contract theory regarding the origin of the state and asserted that state was the result of growth. Though subsequently he admitted that the state was a contract but he described this contract as a partnership in all science, partnership in all art, a partnership in every virtue and in all perfections" and thus robbed it of the true spirit of a social contract. As John Macunn has observed "The contract he (Bruke) has in mind always involves those slowly evolved, habitual, intimate living ties between the members and classes of body politic which are so clearly not the product of any explicit act of contract between man and man or class and class that they have driven our sociologists

1. Sabine, *History of Political Theory*, p. 617.

to lift society above the categories of laws and plunge it deep in the catagories of biology."[1]

Thirdly, Burke's conservatism is evident from his blind admiration for the British Constitution and his opposition to all efforts at parliamentary reforms. Lack of faith in popular sovereignty and universal suffrage, coupled with the belief that the political powers ought to be in the hands of responsible propertied classes further confirm his conservatism.

Fourthly, Burke did not have any faith in equality and justified inequality in the economic as well as political fields. In the economic sphere he justified inequality on the basis of theory of prescription and supported claims to property on the basis of long use and enjoyment. Similarly he did not believe in political equality and did not favour common people's participation in the political activities. Instead he held that political stability and greatness of a nation could be possible only if a strong and powerful aristocracy exists in the country.

Fifthly, Burke's conservatism is also borne out by his deep faith in religion. He saw a divine purpose behind all human institutions and asserted that a state which ignores God and God's law was bound to meet with disaster.

Finally, his views about the French Revolution, specially his wrath over the destruction of ancient political, religious, social and economic institutions, are a clear proof of his conservatism. He expressed horror over the revolutionary methods.

Liberalism in Burke's Philosophy. Though Burke was essentially a conservative political thinker his political thought had "decided strain of liberalism". According to McGovern "Burke's dislike of radical and sudden change, his violent attack upon the principle of French Revolution, the reverence he felt for monarchy and the House of Lords, his opposition to a wide suffrage and to parliamentary reform, tend to make us forget that after all Burke belonged to the liberal tradition. Burke made many heated attacks upon the political ideas of Rousseau and Paine, the more extreme liberals, but compared with the doctrines of King James I, of Filmer or of Hobbes, the political philosophy of Burke was truly liberal."[2]

It is true that Burke bitterly opposed the French Revolution but it is also true that he was opposed to all kinds of oppression. He bitterly criticised the British government's tyrannical conduct in Ireland, America and India. He showed anxiety to preserve the liberties of the citizens. He held monarchy in high esteem but insisted that the Kings must not go beyond their constitutional rights. He even favoured the deposition of the tyrant kings. Again he sought to restrain the power of the King by insisting that the king should

1. John Macunn, *The Political Philosophy of Burke*, p. 86
2. McGovern, *From Luther to Hitler*. p. 111.

242

126

not appoint his personal friends as ministers and the ministers should be jointly responsible to the king as well as the Parliament. Thus we find that Burke's philosophy was a combination of liberalism and conservatism.

Estimate and Contributions. It is indeed very difficult to give a fair estimation of Burke as a political thinker because he never presented his political philosophy in a systematic manner and his ideas lie scattered in various speeches, letters, addresses and works. In fact Prof. Sabine is of the opinion that Burke did not have any specific political philosophy and merely offered reactions to the problems which faced him. He says "It is perhaps stretching a point to say that Burke had a political philosophy at all. His ideas are scattered through his speeches and pamphlets, all called out by the stress of events, though they have the consistency that is the stamp of a powerful intelligence and settled moral conviction. Certainly he had no philosophy other than his own reaction to the events in which he took part and little knowledge of the history of philosophy. He was therefore unaware of the relation of his own ideas or of the system of natural law that he opposed, to the whole intellectual history of modern Europe. He could not have given systematic form even to his own reflections on political and social morality, still less could he trace their bearing on the larger questions of religion and science of which they were a part."[1]

Whatever philosophy Burke had, also suffers from serious contradictions. For example on the one hand he laid emphasis on the observance of the spirit of law, in actual practice he insisted on the observance of the letter of laws with regard to the colonial problems. Again, his love for ancient institutions went to such an extent that Burke favoured retention of Rotten Boroughs, which had since outlived their utility. His love for old institutions made him quite immobile. He was so keen to preserve the old institutions that he refused to congratulate the French revolutionaries unless they assured him that the old institutions would be preserved. Burke's admiration for the English Constitution was also quite unjustified. He insisted on the preservation of the existing privileges and stoutly opposed the principle of equality. He also adopted different standards for judging the American and the French Revolutions. While he fully sympathised with the former he bitterly condemned the latter.

Despite the above shortcomings in Burke's political philosophy it cannot be denied that he made valuable contributions to the development of political philosophy. Maxey regards Burke as the greatest political thinker of the English race. According to Gettell "Burke's contribution to political thought was his insistence on the value of studying actual institutions and on the evolutionary nature of successful reforms. No other writer of the time possessed so full an understanding of the complexities of political life. His limitation was his tendency to worship the system that had existed and to

1. Sabine, *History of Political Thought*, p. 618.

undertate the value of ideas as a stimulant to progress... He represented in England the reactionary philosophy which set in all over Europe after the Reign of Terror and the Napoleonic wars. In his exaltation of passion and imagination over the logical reason of man, he was in line with the school of Hegel and Savigny in Germany and De Maistre and Bonald in France."[1]

According to Prof. Hearnshah "The most conspicuous general feature of his political outpourings are, first his avoidance of abstract political speculations and his denunciation of the metaphysical treatment of practical affairs; secondly, his insistence on the empirical nature of the art of government; thirdly, his appeal to his history and experience as the only satisfactory guides in administrative matters, fourthly, his emphasis on consideration of expediency rather than on arguments based on rights, indebatable problems of policy; and finally the essential moderation of all his opinion even when he expressed those opinions with extreme immoderation of language".

Prof. Laski has given a very fair estimation of Burke thus "It is easy to praise Burke and easier still to miss the greatness of his effort. Perspective apart, he is destined doubtless to live rather as the author of some maxims that few statesmen will dare to forget than as the creator of a system which, even in its unfinished implications, is hardly less gigantic than that of Hobbes or Bentham. His very defects are lessons in themselves. His unhesitating inability to see how dangerous is concentration of property is standing proof that men are over-prone to judge the rightness of a state by their own wishes... His disregard of popular desire suggests the fatal disease with which we neglect the opinion of those who stand outside the active centre of political conflict... There is hardly a greater figure in the history of political thought in England looking out for the relentless logic of Hobbes, the acuteness of Hume, moral insight of Green; he has a large part of the faculties of each. He brought to the political philosophy of his generation a sense of direction, lofty vigour of purpose, and a full knowledge of its complexity, such as no other statesman has possessed."[2]

In the light of the various contributions of Burke highlighted by various scholars, we can re-count his contributions to political thought as follows.

1. Firstly, he contributed to political philosophy the theory of conservatism. Though there was conservatism before Burke, but there was no conservative philosophy before him.

2. Secondly, Burke attached great importance to history and experience for the understanding of the political phenomena, and thus restored the historical method to its proper place. It may be noted that before him Vico and Montesquieu had also applied

1. Gettell, *History of Political Thought*, pp. 303-04.
2. Laski, *Political Thought from Locke to Bentham*, pp. 213-14.

~~287~~
243

historical method for the study of political institutions but the credit for raising it to proper place goes to Burke.

3. He avoided political speculation and insisted on the study of the actual institutions and on the evolutionary nature of successful reforms.

4. Fourthly, his views on colonial and imperial issues were quite liberal in so far as he insisted that the government should be co-operative and a mutual restraint should be exercised in the relations between the rules and the subjects. According to Gettell "His theories of colonial administration and of the treatment of subject races were a half-century in advance of his times".

5. Finally, he made the state a living organ by refuting the theory of natural rights and asserting that the civil rights are the creation of the state, which was also responsible for their protection. He viewed the state, as a practical concern rather than as an abstract concept of pure reason.

~~265~~

244

25

Utilitarian Thinkers

"The term Utilitarianism, designative of philosphical theory in ethics and in politics, is a very modern one; but the thing that it represents is very old. It represents interest in the welfare of mankind, wedded to practical efforts to ameliorate the conditions of human life on rational principles, and to raise the masses through effective State legislation."

—**William L. Davidson**

Utilitarianism is essentially an English philosophy which played an important role in the first half of the ninteenth century in effecting reforms of far-reaching character in the legal, economic and political spheres. Though the various utilitarian thinkers sharply differed in their ideas, yet they possessed a common view point and their thought is animated by the same spirit. They also held faith in certain common principles.

Before we discuss the main features of the utilitarian philosophy, it may be pointed out that though this philosophy originated only in the ninteenth century, the things which it represented were quite old. The earliest traces of this philosophy can be traced in the writings of Richard Cumberland in the seventeeth century. Cumberland denied the rationalist doctrine of innate moral ideas and treated general welfare as the highest good. The philosophy was given more concrete shape by Francis Hutcheson who first advocated the principle of "the greatest happiness of the greatest number". The other political thinkers who laid emphasis on this philosophy were Priestley and Paby in England and Helvetius in France. But the credit for giving a systematic exposition of Utilitarianism for the first time goes to Bentham, even though the term found currency through J.S. Mill.

Main Principles of Utilitarian Philosophy

In the first place the utilitarians hold that man's actions are motivated by two considerations viz. to obtain happiness and avoid pain. As Bentham put it "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them to point out as to what he ought to do, as well as to determine what we shall do".

127

~~256~~ 245

Obligation, Consent, and Locke's Right to Revolution: "Who *Is* to Judge?"*

ROBERT C. GRADY, II
Eastern Michigan University

I

A critical point in a theory of political obligation is individual judgment as to whether the limits of the obligation are reached. This is a problem of evaluation: when and under what conditions an individual can judge the status of his political obligation (even whether he has an obligation); how, with what form of expression, he can act on his evaluation; whether indeed, theoretically speaking, such judgmental activity is permissible. And when public goods and political organizations are defined and justified in terms of individuals' needs, wants, or rights, consent must be integral to theorists' arguments about authority, legitimacy, and obligation.[1] Consent, however, may be used in different ways; and even theorists most commonly cited in support of dissent (a "negative" form of evaluation), for example, often have developed theoretical models which in fact systematically preclude this evaluative activity. This may be expected with theorists who are thought to be "conservative." It is often surprising with "liberal" theorists, but it is not inexplicable. Contemporary analysts of past, and sometimes paradigmatic, theorists must pursue one (or both) of two tasks: they must examine the different ways in which concepts, say, consent, are used by both theorist and analyst (implicitly concepts often are used by the analyst differently than by the theorist); and they must analyse how a theorist's argument unfolds and how different parts complement and support one another rather than relying on one or two isolated citations (perhaps believed typical) to infer that a theorist does in fact take a particular position – e.g., a position supporting dissent.

This paper analyses the problem of individual evaluation or judgment of political obligation in the *Two Treatises* of John Locke, who traditionally is considered to be the leading exponent of the liberal theory of consent.[2] As is well known,

*The author thanks George J. Graham, Jr, Avery Leiserson, and E.B. Portis for comments on portions of the essay, the Earhart Foundation for financial support for the Locke research, and the anonymous referees provided by this journal for useful criticisms.

[1]See J.P. Plamenatz, *Consent, Freedom and Political Obligation* (2d ed. New York 1968); J.W. Gough, *John Locke's Political Philosophy* (Oxford 1950), ch. 2; cf. Joseph Tussman, *Obligation and the Body Politic* (New York 1960), 71–3 ff.; Peter Winch, "Man and Society in Hobbes and Rousseau," *Hobbes and Rousseau*, ed. Maurice Cranston and Richard S. Peters (Garden City, N.Y. 1972), 233–53, at 244–8.

[2]John Locke, *Two Treatises of Government* (hereafter, *Treatises*), ed. Peter Laslett (2d ed. Cambridge 1967). See George H. Sabine, *A History of Political Theory* (3rd ed. New York 1961), ch. 26; Gough, *Political Philosophy*; Sterling Power Lamprecht, *The Moral and Political Philosophy of John Locke* (New York 1962); and, most importantly, the summary and revision of the traditional interpretation in Peter Laslett, introduction, *Treatises*. Also, cf. Hanna Pitkin, "Obligation and Consent – I and II," *American Political Science Review*, 59 (December 1965), 990–9; 60 (March 1966), 39–52: and Tussman, *Body Politic*, from which we draw below.

Canadian Journal of Political Science/Revue canadienne de science politique, IX, no. 2 (June/juin 1976). Printed in Canada/Imprimé au Canada

Locke uses the social contract device as the format for consent; and he develops a "right to revolution" to counter breach of contract. Commonly accepted interpretations of his rationale for the social contract may suffice: Lockeian man enters society to preserve his "property," broadly construed, from the "inconveniencies" of the state of nature in which his holdings are "very unsafe, very unsecure."[3] In support of this transformation, Locke attempts to justify civil freedom, derived through the law of nature and natural rights, on the basis of the on-going consent of the members of the society. In so doing, he claims to discredit "wrong Notions concerning Government" and to justify the political order in terms of "the Consent of the People" based on "their Just and Natural Rights" whereby "every one is bound by that consent to be concluded by the *majority*."[4]

The case for obligation based on consent is particularly problematic since arguments can be developed along two analytically distinct lines, lines which also can be distinguished in specific contextual or practical cases. One is that consent alone is the sine qua non for legitimacy, hence for obligation; the other is that consent is merely the vehicle for transforming substantive reasons or purposes for legitimacy into an organizational construct which is obligatory. Although both arguments can be viable, the importance of consent theorists cannot rest merely on the proposition that they justify political obligation through consent as such. They must argue that one consents aware of one's ends and with the intent that, as part of the agreement, one's purposes for consenting to the organization are to be carried out. (This is not to imply that organizational ends become subordinated to individual ends, although something like this takes place when the "public interest" is conceived as simply the sum of private interests. Instead, the individual defers to, or accepts as his, organizational goals.) Without additional qualifications, then, one apparently is entitled to expect that the theorist will provide for an individual's evaluation whether his commitment is fulfilled, hence whether his obligation remains.

Consent theory, however, does have qualifications. Specifically, the criteria used to justify the political organization and the obligation must be applicable to the (potential) evaluation, otherwise these criteria can be made groundless on any arbitrary individual (or group) judgment. Therefore, consent theorists justify not only political organization and political obligation; they justify also public necessity over private or individual action. This is an important qualification. The priority of public necessity over individual action, i.e., private action, must be justified on the grounds that private action is partial or a breach of mutual commitment with the other individuals in the public arena, that individual action is either "random" – simply not mutual or not in common with the rest, regardless of intention – or disruptive of public necessity and public good by design. This judgment by public authority, however, must be made *from* grounds which *are* common or mutual. That is, there must be guarantees in turn that "public necessity" is not articulated by a body which is *partial* vis-à-vis the individual. Political obligation, therefore, becomes problematic precisely at the point where the individual role is faced with public necessity, the source of potential conflict.[5]

[3]See *Treatises*, II, 13, 90–91, 101, 123, and citations in fn. 2, above.
[4]*Treatises*, preface; I, 81; II, 19, 96, 122 (quotations are from the preface and II, 19).
[5]Ellis Sandoz, "Political Obligation and the Brutish in Man," *Review of Politics*, 33 (January 1971), 95–121, at 106–7

L'obligation, le consentement et le droit à la révolution selon Locke : « Qui en est juge ? »

La justification de l'obligation politique dans la théorie du consentement requiert que ce consentement soit fondé sur l'accomplissement de certains objectifs (tel la préservation de la propriété) faute de quoi il peut être retiré, l'autorité politique ayant perdu sa légitimité. Bien que l'on ait traditionnellement considéré Locke comme étant le principal interprète de la théorie libérale du consentement, ses Deux Traités *démontrent qu'il s'opposait à ce que des individus puissent retirer leur consentement, c'est-à-dire faire la révolution. Pour lui, en effet, le maintien de la société requiert que les individus transfèrent à la majorité le droit de juger des abus de confiance commis par les gouvernants. Il devient alors possible que des gouvernants astucieux évitent l'avènement d'une révolution sanctionnée par la majorité en satisfaisant les intérêts de diverses coalitions majoritaires. De la sorte, les individus qui veulent retirer leur consentement en prétendant que leurs droits ont été violés, peuvent être traités de mécontents déraisonnables qui mettent en danger la stabilité sociale. Locke ne saurait donc être considéré comme un théoricien du consentement puisque sa conception du consentement aboutit à sacrifier les droits des individus au profit des intérêts de la majorité.*

Although one of the presumed advantages of consent theory is that it allows one to justify, or to rationalize, his political obligation in terms of his own legitimizing of the political order and thus allows one to evaluate or to determine when, and on what grounds, one's obligation may be abrogated, a cursory reading of traditional consent theorists such as Locke, buttressed by recent interpretations, leads to the provisional conclusion that their justification arguments are concerned only with the question of consent as a procedural rule and not with reasons for consenting: *if one has consented, the political order is legitimized and one is obligated.*[6] To the extent that political obligation is conditional solely upon the question of whether I have consented to or authorized a particular political order or representatives for that regime, it is quite plausible to argue, as Joseph Tussman does, that raising questions which might lead to civil disobedience or to a denial of the obligation is symptomatic of "moral disorder" for which the individual is "beyond the help of political or moral theory and in need of psychiatric treatment." This evidently would be true of disobedience for any arbitrary reason since for consent theory generally, and in Tussman's language specifically, consent is consent to be governed, an act of "voluntary subordination."[7] But when a question of disobedience arises on grounds associated with why one did authorize, or would have authorized, the representatives, more than only the question whether one has consented is involved. The reasons or purposes for giving consent, for legitimizing the political order, and for being obligated are introduced. To the extent that consequent disobedience, a product of an individual evaluation or judgment, is consistent with criteria for consenting, it is plausible to speak not of "moral disorder" but of *"civic disorder," the political order in need of treatment.*[8]

[6]See Claude Ake, "Political Obligation and Political Dissent," *Canadian Journal of Political Science*, 2 (June 1969), 245–55; Plamenatz, *Consent, Freedom and Political Obligation*, pp. 6–25; Tussman, *Body Politic, passim.*

[7]Tussman, *Body Politic*, 28–30, 37–9, 25–7; also 46, 83, 85

[8]Arguments that government can be viewed as the responsible party regarding disobedience or illegitimate opposition go back at least to Plato's portrait of causes of regime breakdown and can be derived from Aristotle, *Politics*, 1301a-1315b. For a comprehensive statement, see

Indeed, a number of contemporary writers direct themselves to criteria for giving consent, to the goodness or legitimacy of the regime, rather than simply to the issue of whether consent has been given.[9] Hanna Pitkin and Michael Walzer, for example, have argued that the question is not whether one has consented but whether the government is legitimate and worthy of one's consent.[10] To go beyond the procedural matter of whether consent has been given to substantive questions of why consent should be given and obligations created does indeed raise questions which, in Pitkin's terms, involve the "nature of the government" or "hypothetical consent," consent fully possible and plausible within the individual's purposive framework. More than that, as Richard Flathman makes clear, it raises questions concerning not only the relationship between an individual and his governing body but the relationships between an individual and other individuals within the political order, questions concerning the relationships of one individual to his associates as they, singly and together, judge whether consent should be given.[11] The act of "voluntary subordination," therefore, is not simply a Hobbesian notion of authorization (subordination) carte blanche but rather a notion that the authorization has justified, and individually justifiable, limits. Inasmuch as one must be in the position to determine whether the government is legitimate in order to give consent, that is, to evaluate or to judge the political order and the status of the obligation, the secondary but necessary question becomes: *can one indeed make these evaluations*? Questions emerging from these forms of analysis thus revolve around the question of evaluation: *is the government or the political order legitimate; indeed, can I evaluate whether it is legitimate; if so, can I carry through or act upon the outcome of my evaluation?*[12]

The significant arguments of both Tussman and Pitkin (with some restatement of Tussman by Pitkin) are derived from Locke as the leading consent theorist in the tradition of liberal theory. Pitkin is quite correct in demonstrating that "traditional consent theory" is inadequate so long as it rests upon the criteria of past consent and procedures such as concurrence through the majority-rule principle for indicating that consent has been given. Instead, as indicated above, consent theory can be adequate only if it contains justification criteria pertaining to the "nature of the government" or to what Tussman calls "public purpose."[13] Since this implies that an individual must be in the position to evaluate the "nature of

---

Carl Joachim Friedrich, *Man and His Government* (New York 1963), chs. 11, 19, 34, also 27–8.

[9]See S.I. Benn and R.S. Peters, *The Principles of Political Thought* (New York 1964), 376–91; Richard E. Flathman, *Political Obligation* (New York 1972); Friedrich, *Man and His Government*, 276–9; Plamenatz, *Consent, Freedom and Political Obligation*, postscript to second ed., 167–82; D.D. Raphael, *Problems of Political Philosophy* (New York 1970), ch. 4; John Rawls, *A Theory of Justice* (Cambridge, Mass. 1971).

[10]Pitkin, "Obligation and Consent – I," 996–7, 999; "Obligation and Consent – II," 40–5, also 50–2; Michael Walzer, *Obligations* (Cambridge, Mass. 1970), xii, 50, 91, 95–8, 102f, 112–14, 118, 130–2, 177 ff.

[11]Flathman, *Political Obligation*, chs. 4, 7

[12]The classic case for raising these questions is made by Plato. See his arguments, with Callicles and Thrasymachus, against establishing the political order solely on the grounds of satisfying the populace, i.e., on consent alone: *Gorgias* 481c–486d, 488b–521e; *Republic* 339b–42e, 344d–54b. See also the last days of Socrates where he is condemned by a "legitimate" but unjust ruling body: *Crito* 52c–d, 54b–d.

[13]Pitkin, "Obligation and Consent – II"; Tussman, *Body Politic*, 25–9, 43–6, 67–9, 73

the government" in order to assess whether consent should be given, or withheld, the assumption that dissent, even civil disobedience, is a necessary condition of liberal democracy is straightforward.[14] Indeed, with respect to Locke in particular, Claude Ake recently has gone so far as to argue that under certain conditions there is an *obligation to disobey* which is based upon Lockeian premises.[15] But while consent theorists in general, and Locke specifically, *ought* to develop the grounds upon which the individual can evaluate his commitment, his political obligation, it is not clear that the individual *can* assume this activity. And this is the central issue of this paper (and the point at which Tussman, as initially indicated, seems to be aligned with another aspect of Locke). If Locke is the paradigmatic case for justifying civil society and its ends through consent, he is not the model theorist for individual evaluation of one's political obligation. For although he attempts to identify civil freedom, derived through the law of nature and natural rights, on the basis of the on-going consent of the members of society, there appears to be some ambiguity in a reading of Locke concerning not the fact of the evaluation of individuals' political obligation or commitment but the source of the evaluation, individuals or "society."[16] The issue turns on what Locke intends when he says that "every one is bound by that consent to be concluded by the *majority*." Can one speak of evaluating the *nature of the government*, with the subsequent elaboration of *civic disorder*, or does Locke's position leave only *moral disorder* as the condition appropriate to the individual actor?

II

> The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions ... Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another.[17]

With these words, Locke indicates the standard for life in a state of nature – and the standard upon which men can enter society. In the state of nature where men appear to be naturally free and equal, the law of nature, known by individual reason, is binding or obligatory. Reason directs actions according to the law of nature, that is according to perceptions of the law of nature.[18] Yet for "equal and

[14]See Christian Bay, "Civil Disobedience: Prerequisite for Democracy in Mass Society," *Obligation and Dissent*, ed. Donald W. Hanson and Robert Booth Fowler (Boston 1971), 222–42; Carl Cohen, *Civil Disobedience* (New York 1969); Donald W. Hanson, "What Is Living and What Is Dead in Liberalism?" *American Politics Quarterly*, 2 (January 1974), 3–37.

[15]Ake, "Political Obligation and Political Dissent," 253–5

[16]E.g., Benn and Peters, *Principles*, 385–91; Willmoore Kendall, *John Locke and the Doctrine of Majority Rule* (Urbana, Ill. 1965), 87–9, 101–11; cf. Sabine, *History of Political Theory*, 538, and Sheldon S. Wolin, *Politics and Vision* (Boston 1960), 309–12. Kendall's monograph develops the thesis of Locke's "absolute" majority with more rigour than is customary, and his work must be recognized as seminal for the "critical" literature on Locke.

[17]*Treatises*, II, 6

[18]Ibid., I, 87–8; II, 4–8, 12, 16, 23, 25–6, 56, 59, 63, 66, 86–7, 124, 128–9, 134–5, 149, 159, 183, 198, 212

independent" men, how significant is Locke's secondary statement of the law of nature: that men are "*to preserve the rest of Mankind*" up to a limit, the limit being whether their own preservation "comes not in competition"? In the terminology of Rousseau, what is the nature of the "chains" which men perceive? How might these constraints, perceived by reason, be justified? Indeed, can they be justified?

For Locke's individual both in the state of nature and in society, the relationship between liberty and necessity is critical. *Natural liberty* is possible only upon a recognition of natural necessity, or the necessities imposed by nature, as defined by the *law of nature*: "The *Freedom* then of Man and Liberty of acting according to his own Will, is *grounded on* his having *Reason*, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will."[19] Likewise *civil liberty* is possible only upon a recognition of civil or political necessity as defined by the *public good*.[20] Indeed, for Locke, civil liberty, those rights left untouched by the civil law, is the highest practicable form of liberty possible since natural liberty must give way to the necessities of civil life. Thus to be under civil constraint is not to be unfree; to be under constraint is to be in the position of deciding upon alternative courses of action within whatever limits are imposed. The issue of civil liberty and civil restraint is the issue of political obligation.

The presentation of Locke's justification of society and his argument for obligation is straightforward and well known. Political obligation is grounded upon a transfer of a right. Specifically, the individual's executive power under the law of nature is transferred to society. This is the paramount natural right by which one may carry out the provisions of the law of nature and which includes punishing others who may violate that law. In return, the individual receives civil rights or liberties for which he is obligated to society. The act of the transfer involves giving express consent in the form of a contract (termed by Locke a *compact*) to the legitimacy of society and its ends. Since "the great and *chief end* ... of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*" as far as is possible,[21] the act of joining into the compact amounts to an agreement among individuals to this purpose. Actually, the agreement is two-fold, part positive, part negative. Positively, individuals agree to the preservation of property, which is defined broadly to include life and rights; negatively, and as a necessary condition to the first, they agree to the avoidance of the "inconveniencies" of the state of nature, a possible state of war in which each man is final judge for himself whether the preservation of "*the rest of mankind*" "comes not in competition" with his own. Moreover, the compact is irrevocable since the crucial right transferred – the executive power giving society the right of legislation and punishment – is an absolute right which is transferred in its entirety to avoid the "inconveniencies" attendant when each man is judge in his own case. The obligation to society, or political obligation, is thus absolutely binding. Within the framework of the social compact, then, society can do anything within the bounds of the law of nature that is necessary to preserve property. This includes the regulation of individuals' property to preclude the "competition"

[19]Ibid., II, 63. Also, ibid., II, 17, 22–3, 57, 59
[20]Ibid., I, 64; II, 22–3, 57, 63, 129–31, 135
[21]Ibid., II, 124

which could arise from individuals judging their own cases.[22] By thus defining and upholding the public good through the executive power transferred to it in toto, society defines political necessity, which serves as the boundary for civil liberty.

Although Locke carefully avoids the term "sovereignty," the proposition that Locke's "society" is his sovereign – the final political authority – is obvious. But how can "society" exercise this sovereignty? Simply because unanimous decision-making is unlikely, majority rule is necessary. And in agreeing to the compact, individuals do agree to binding decisions as specified by a majority: "When any number of Men have so *consented to make one Community* or Government, they are thereby presently incorporated, and make one *Body Politick*, wherein the *Majority* have a Right to act and conclude the rest."[23] The character of Lockeian society therefore depends upon the majority, which, for example, makes the decision concerning the Fundamental Law of Government as to the choice of a particular form of government.[24] Thus in speaking of society, or of "the people," as being acted for and bound (concluded) by the majority, Locke places the locus of sovereignty in majority rule. It should be emphasized that Locke's "sovereign majority" is not a constant, operative institution. A majority for Locke – or for anyone else – is a highly fluid notion, given to constant change in size and composition from time to time or issue to issue; in point of fact, it is more accurate to speak of a majority coalition – or of a coalition of minorities.[25] What Locke does, then, is place the sovereignty of "the people" in the *procedure* or *principle* of majority rule, the device through which individuals may express their consent or with which they may concur tacitly.

On the presumption that his preservation is secured and the "inconveniencies" of a state of nature are avoided, it appears appropriate to conclude that Locke's individual is placed in an obligatory framework within which his questioning the legitimacy of majority-rule decisions is improper if not itself illegitimate. For to do this, the individual takes upon himself the presumption that he may be judge in his own case, and this would give society the legal (contractual) rationale for applying against him the Executive Power of the law of nature, modified to its particular civil law structure. But the *necessity* of majority rule is not sufficient for inferring that the majority does adequately, and accurately, interpret the law of nature, that it does operate within the bounds of the law of nature. The question, therefore, must be raised whether Locke's individual can assess the role of the

[22]The central passages in Locke's justification are at ibid., II, 87–91, 95–9, 123–31, but this paragraph also draws on I, 43, 67, 81, 92–3, 119–26; II, 2–3, 13–14, 21, 77, 94, 105–12, 117, 119–22, 134–5, 138, 143–8, 159, 171, 222. The critical point here is that the right of judgment in one's own case is given up since "Property is to be regulated by the Laws of the Society" (II, 120), I.e., individual rights are delineated and secured by society: ibid., II, 3, 6, 30, 32, 35–8, 45, 50, 87, 119–20, 129–32, 134, 158, 159, 163–4, 171, 205, 208; and see Kendall, *Doctrine of Majority-Rule*, 68–74, 103–5; Laslett, introduction, 103–4 ff.; Wolin, *Politics and Vision*, 310.

[23]*Treatises*, II, 95. See ibid., II, 82, 95–9, 120, 127–8, 132, particularly II, 98, for the rationale rejecting unanimity, and II, 82, 96, which underscore that majority rule is a necessity, not a derivative of natural right.

[24]Cf. Kendall, *Doctrine of Majority-Rule*, chs. 6–7; Sabine, *History of Political Theory*, 538; Wolin, *Politics and Vision*, 309. On the majority's judgment concerning the Fundamental Law of Government, see *Treatises*, II, 132, 134–5, 149–58, 212.

[25]This is intended to be used in the exact sense used by Robert A. Dahl, *A Preface to Democratic Theory* (Chicago 1956), 132.

majority: can one evaluate the status of one's political obligation and maintain that obligation as a commitment? Evaluation, in short, raises the question of the right of revolution, of "who is to judge" or the "appeal to heaven" in Locke's terms.

Cursory reading of *Two Treatises* leaves one with the impression that Locke is ambiguous as to *who* decides to exercise the right of revolution: the individual or a majority of society. For whereas his discussion of the individual in relation to civil liberties, equity, and the like is detailed, this specific and critical problem seems to be ignored. Nevertheless, as the next section shows, Locke proves to be exceedingly clear on the problem. It is pertinent to observe that Locke usually speaks of *obeying someone* rather than of *having an obligation* to someone. The sense of the first is that of constraint; the sense of the second, commitment.

III

In keeping the sovereignty of society or of "the people" distinct from government power, Locke can argue that government is the representative of society, a distinction upon which the right to annul obligations to government stands.[26] This enables him to develop the notions of a breach of trust and of a right to revolution. The individual transfers his natural right, the executive power to enforce the law of nature, to society, which in turn entrusts the government with maintaining the public good. Whereas the right with which the government is entrusted and the obligation thereto is revocable upon breach of trust, the right the society has and the obligation thereto is irrevocable so long as the society exists. The only way society ceases to exist is by physical dispersion brought about by foreign conquest as opposed to society voluntarily withdrawing its existence by, for example, the individuals voting it out of existence, something that is impossible since individuals no longer have the right to make such decisions. The crucial point, therefore, begins with the case of a breach of trust by the government, previously authorized as legitimate.[27]

Perhaps Locke's classic statement of "the people's" right to revolution is found toward the end of the *Treatises* in the following paragraph: "Here, 'tis like, the common Question will be made, *Who Shall be Judge* whether the Prince or Legislative act contrary to their Trust? ... To this I reply, *The People shall be Judge*; for who shall be *Judge* whether his Trustee or Deputy acts well, and according to the Trust reposed in him, but he who deputes him, and must, by having deputed him have still a Power to discard him, when he fails in his Trust?[28] In entrusting the government, individuals consent (expressly or tacitly) to the proposition that government can take whatever actions are necessary to achieve the public good so long as they are taken within the bounds of the law of nature, the limits of the trust. These actions may include occasional harm to particular individuals for

[26] *Treatises*, II, 107, 110–12, 132, 134–42, 143, 147, 149–68, 171; Laslett, introduction, 106–7, 118–9

[27] On the dissolution of society, see *Treatises*, II, 211, and ch. 16; even with the dissolution of government the majority still remains and thus the reasons for the original social compact and its bonds remain (ibid., II, 243). On breach of trust specifically see ibid., II, 221 *et seq.*, and ch. 18; and on revolution, II, 149–53, 155–7, 161, 168, 176, 192, 196, 202–10, 211–43.

[28] Ibid., II, 240

the greater public good, since society, and its trustee, government, legitimately may interfere with and regulate property if the action is within these limits.[29] Revolution, then, depends not on the consent (or dissent) of this or that individual but on the *interpretation* of the public good, i.e., on the social or political application of the law of nature framework. The initial questions, then, indeed are *who* is to judge that the public good is not pursued or that the government acts illegitimately in relation to the public good, and *when*, or under what conditions, does it take place? These are central questions for Locke; and although he does seem ambivalent in answering the first (positing variously the judgments of *any* solitary individual and of "the people"), his final position on both is straightforward.[30] The conditions under which government is judged to be in breach of trust occur whenever *the majority* ("the people") concludes that the government is not preserving property and thereby minimizing the "inconveniencies" of the state of nature: when the government "are properly, and with the greatest aggrevation, *Rebellantes* Rebels" by putting itself in "a state of War with the People" whereupon "the People ... have a Right to resume their original Liberty, and, by the Establishment of a new Legislative (such as they shall think fit) provide for their own Safety and Security, which is the end for which they are in Society."[31]

Given *when* and by *whose* judgment revolution is appropriate, the additional question of *how* it takes place gets to the heart of the individual's judgmental role. As indicated thus far it is contingent upon the people, that is, upon a majority decision; and Locke's statements offer decisive evidence for this position over against an *individualist* right to revolution. His most inclusive statement of the right to revolution is found in his chapter on prerogative. It warrants examination in full.

> The old Question will be asked in this matter of *Prerogative*, But *who shall be Judge* when this Power is made a right use of? I Answer: Between an Executive Power in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no *Judge on Earth*: As there can be none, between the Legislative, and the People, should either the Executive, or the Legislative, when they have got the Power in their hands, design, or go about to enslave, or destroy them. The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to *appeal to Heaven*. For the Rulers, in such attempts, exercising a Power the People never put into their hands (who can never be supposed to consent, that any body should rule over them for their harm) do that, which they have not a right to do. And where the Body of the People, or any single Man, is deprived of their Right, or is under the Exercise of a power without right, and have no Appeal on Earth, there they have a liberty to appeal to Heaven, whenever they judge the Cause of sufficient moment. And therefore, tho' the *People* cannot be *Judge*, so as to have by the Constitution of that Society any Superiour power, to determine and give effective Sentence in the case; yet they have, by a Law antecedent and paramount to all positive Laws of men, reserv'd that ultimate Determination to themselves, which belongs to all Mankind, where there lies no Appeal on Earth, *viz.* to judge whether they have just Cause to make their Appeal to Heaven. And this Judgment they cannot part with, it being out of a Man's power so to submit himself to another, as to give him a liberty to destroy him; God and Nature never allowing a Man so to abandon himself, as to neglect his own preservation:

[29]Cf. *ibid.*, I, 43; II, 87, 89, 94fn, 98–9, 134. (See fn. 22, above.)
[30]On his variation on the first question, see ibid., II, 20–1, 87, 89, 94, 97, 161–8, 171, 181, 208–10, 240–1.
[31]Ibid., II, 227, 222; also, II, 138–9

And since he cannot take away his own Life, neither can he give another power to take it. Nor let any one think, this lays a perpetual foundation for Disorder: for this operates not, till the Inconvenience is so great, that the Majority feel it, and are weary of it, and find a necessity to have it amended. But this the Executive Power, or wise Princes, never need come in the danger of: And 'tis the thing of all others, they have most need to avoid, as of all others the most perilous.[32]

The picture Locke paints is a case of tyranny pure and simple, the rulers "exercising a Power the People never put into their hands." There are three points in this statement which should be considered.

First, Locke says that not only the "Body of the people" but "any single Man" can judge whether the case of the government is such that he might appeal to heaven, his judgment being that there is no umpire on earth. One might assume this to be evidence of an individualist right to revolution, since it is, as Locke emphasizes several times, "out of *a Man's* power so to submit himself to [tyranny]." But one might suppose also that Locke is stating, on its face, an absurdity when he says that *any* individual can evaluate the case of the government. While an individual must realize that the preservation of others' property is a means to the preservation of his own, since he cannot expect to have his own preserved without reciprocation, it is not self-evident that Locke assumes individual action to be altruistic or "other-regarding."[33] Thus, although the evaluation of government action is contingent initially upon the individual's perceptions of *his* particular property and interests, as indicated previously Locke makes it clear that this particular right, the right of judgment in one's own case, is in fact the right given up to the majority upon entering society.

Moreover, the practical, *effective* evaluation of government must depend upon the majority: "For if *the consent of the majority* shall not in reason, be received, *as the act of the whole*, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: But such consent is next to impossible ever to be had."[34] For "any single Man" to make the judgment is one matter. For any single man to make the judgment and make it stick is another. *Who* will heed any single man if everyone else is satisfied with the government's case? If he can muster a majority, then he (it) can proclaim that the government violates the public good. But until then, any single man has his property preserved according to the definition of the public good; and the public good can be defined to exclude any single man who would prejudice the property of the rest. Hence it is "the People" who "have no other remedy ... but to *appeal to heaven*." They "have a liberty to appeal" whenever they "judge the Cause"; "they" have "by a Law antecedent and paramount to all positive Laws of men [i.e., by the law of nature], reserv'd that ultimate Determination" to "themselves" to judge whether "they" have "just Cause to make their Appeal." Since it is "the people" and since only a majority can "act and conclude" the rest, successful revolution depends

[32]Ibid., II, 168

[33]Locke does assume that men will submit the dictates of their passions to reason and thus can make reciprocity calculations within the law of nature framework. See ibid., I, 58; II, 63, 124, 136, 143, 181, 230. This is not, however, the same thing as the assumption that individual men will be "other-regarding," an assumption around which Laslett, introduction, 108–16, develops a "doctrine of natural political virtue" for Locke; that position is at odds with the text below.

[34]*Treatises*, II, 98; also, II, 82, 96

upon developing a majority coalition on the side of the revolutionaries who act through the majority-rule principle against the "rebel," the government.

Second, the majority coalition will not respond to claims by a few individuals that their property is being violated. For majority action is never generated until "the Inconvenience is so great, that the Majority feel it, and are weary of it, and find a necessity to have it amended." The majority does not act until or "whenever they judge the Cause of sufficient moment." What is "sufficient moment?" There are two interrelated facets to Locke's answer. A few men are not likely to act if, counting the odds, they think their action will be suicidal. Additionally even a majority will not act as long as government inequities visited on others do not appear to be harmful of its interests:

> yet the *Right of resisting*, even in such manifest Acts of Tyranny, *will not* suddenly, or on slight occasions, *disturb the Government*. For if it reach no farther than some private Mens Cases, though they have a right to defend themselves, and to recover by force, what by unlawful force is taken from them; yet the Right to do so, will not easily ingage them in a Contest, wherein they are sure to perish; it being as impossible for one or a few oppressed Men to *disturb the Government*, where the Body of the People do not think themselves concerned in it, as for a raving mad Man, or heady Male-content to overturn a well-settled State; the People being as little apt to follow the one, as the other.[35]

Individuals within a majority coalition recognize that stability is more important to their interests than correcting trust violations in the cases of a few arbitrary acts: "the Inconveniency of some particular mischiefs, that may happen sometimes ... are well recompenced, by the peace of the Publick, and security of the Government ... It being safer for the Body, that some few private Men should be easily, and upon slight occasions exposed."[36]

The utility of each man within the majority preserving his own interests takes priority over the reciprocal or mutual preservation agreed upon in entering society, in joining the compact. For to remedy trust violations visited upon a few is to risk introducing into society the "inconveniencies" of the state of nature. Thus the need to account for others is manifest only when it is obvious that the condition of others is a sign of one's own future state: "For till the mischief be grown general; and the ill designs of the Rulers become visible, or their attempts sensible to the greater part, the People, who are more disposed to suffer, than right themselves by Resistance, are not apt to stir. The examples of particular Injustice, or Oppression of here and there an unfortunate Man, moves them not."[37] Over and over Locke argues that the "mischief" must "be grown general," that it must be of "sufficient moment" for the majority to act. When the "mischief" is so general, however, as to have "extended to the Majority" or to "seem to threaten all," then "how they will be hindered from resisting illegal force, used against them, I cannot tell."[38] Locke is presenting two types of statements: empirical

[35]Ibid., II, 208; also, II, 209. II, 210 and 225 go on to speak of *the people* recognizing "a long train of Abuses": the point is that *no man alone* can, or will, if he is wise, attempt revolution or disobedience. Indeed, it begins to appear that no man would risk even dissent, faced with being perceived as "a raving mad Man, or heady Male-content"; rather, conformity is rationally in his self-interest.

[36]Ibid., II, 205

[37]Ibid., II, 230. Cf. also, ibid., II, 161, 176.

[38]Ibid., II, 209

propositions of what probably will happen in relation to a majority; prudential counsel to "the people" to act only when success is reasonably sure (and also, prudential counsel to the government, as indicated in the next point). Apparently, therefore, *trust* encompasses not simply the preservation of property as the public good; it encompasses stability, thereby security.

Third, Locke recognizes that the *government* can avoid all of this in the first place. In the last sentence of the extended quotation he notes that not only is it the most dangerous possibility but it is something "wise Princes, never need come in the danger of."[39] Although Locke must intend that the public good be bounded by the law of nature, it is significant that the initial statement of the public good and the understanding of whether it is maintained are contingent upon the application of the majority-rule procedure; and there are no grounds for inferring that majority rule parallels, or approximates, the law of nature. It is probable, therefore, that a "wise" government will conduct its domestic affairs in such a way that it "satisfies" the majority, i.e., it is likely that the government will take the sort of actions which ensure stability and thus preclude revolution. Since a "wise Prince" understands what the majority can do, it is most likely that the government will try to satisfy the demands of what it perceives to be the majority: attempting to account for majority interests, which stand out by contrast to other interests, it likely will ignore or treat as expendable interests of individuals which exist beyond the majority coalition. It is likely also that there will be at least as many possible substantive policy options available to the government as there are possible majorities (i.e., combinations of individuals within the bounds of society capable of making a majority). The options, then, would be straightforward on the occasion that a "new" majority decides that the government, legitimate vis-à-vis the "old" (former) majority, is seditious.

Locke's prudential counsel to the government, and to "the people," reinforces the two preceding points with respect to the individual whose interests do not fall within the spectrum of interests bounded by either majority. Individuals whose interests lay beyond those of the majority (e.g., a minority group, ignored by the government which tries to satisfy what it perceives to be the majority) may find themselves in the uncomfortable position of satisfying the conditions for sedition or rebellion simply because their interests are different from the majority's, particularly if they try to assert what were their interests under the "old" majority. Attempts to protect interests or alleged rights against a government which caters to the new majority – actions which ultimately would constitute revolution but which in all probability would be manifested initially in dissent or disobedience – involve a specific type of risk. Such actions may "seem to threaten all," the majority which legitimizes government policy. The individual's appeal to heaven against the government is, as well, an appeal against the majority. At best he will be considered a fool or a "heady Male-content"; at worst, seditious. "Revolution" for "any single Man" is a meaningless concept since his action is directed not simply against the government but against society, against the majority which does not share his perspective.

[39] Cf. also ibid., II, 158, 209, 223–5, 230.

IV

In Locke's justification of society, a unanimous action, at only one point, institutes majority rule. Anyone not in on the initial action, which, since it is hypothetical, includes almost everyone, must accept majority rule or face the consequences. By putting the individual into a position of evaluating, through his continual and his continuing consent as a member of the majority, whether "the great and *chief end*" of society is served by government, Locke reduces the definition and scope of the social end to a matter of majority will each time it makes a decision – for example, at elections or with "revolution." And to the extent that government can play the role that "wise Princes" must play, the question of revolution against government is rendered inoperative. The purpose, in short, is a matter of the majority having its way.

Because revolution depends upon an evaluation of the circumstances by a sufficient number of men – because revolution is *majority* revolution – there are two implications to the Locke text which have to do with how the legitimacy of an action or of a property sphere (which is derived from action) is determined. The initial implication arises from Locke's point that the validity of an action depends upon the reasoning behind the action. If it is valid, it is true and derived from the standard for truth, the law of nature. The symbolic function of "a raving mad Man, or heady Male-content" for individuals within society is that this person has not reasoned correctly. He has failed to arrive at the truth, and consequently his action based upon his fallacious reasoning is illegitimate. Whether it is legitimate is resolved by the rest of the men in society who constitute a majority or by the "wise" government which seeks to maintain the support of the majority coalition. But more importantly, to say that the legitimacy of any act depends upon the majority is to say that in practice the majority has a monopoly on truth, *at least civil or political truth*. That is, since what is successful or good, civilly or politically, is a product of majority will, the majority, in defining the political good, defines what is politically true. In light of this, the third point of the preceding section is even more compelling. It should be expected that a "wise" government's interpretation of the law of nature in the face of majority rule will in all likelihood reflect conditions conducive to the context of the particular regime's civil law. More precisely, the government's interpretation of the law of nature should turn out to be an interpretation of public necessity as (it sees it) defined within a given regime. The result is policy designed to ensure the preservation and stability of the present political order – a truism, in light of the functions of the majority.

The second and major implication is straightforward. The rational pursuit of self-interest within the confines of the regime does not mean that one innocently may err. When someone dissents from government action (e.g., arguing that the government breaks its trust in entailing his property for a proclaimed public good), if his dissent is peculiar to him, the majority not being of a like mind, it is *he* who is wrong in relation to the public good. As he is wrong, so he is a person espousing a political untruth. And what is untrue in relation to the public good is seditious, just as government breach of trust is unwarranted and thus rebellion.

The problem of "civic disorder," raised previously, is therefore ruled out because whatever the individual can, and probably does, perceive as the range of his actions is defined by the majority. In order to maintain "civic *order*" rather than *perceptions* of "civic disorder" it would seem that inculcating a relatively broad base of civic apathy would have utility – both from the standpoint of government "wisdom" and from the perspective of the majority's preservation coming "not in competition" with "heady Male-contents."[40] Otherwise, instead of civic disorder, there is, and is only, what Tussman has called a problem of "moral disorder." This is the upshot of Locke's reference to "the People" ignoring "a raving mad Man, or heady Male-content." There is no question whether the person is "mad" per se or "mad" in relation to objective standards of nature or natural law. He is "mad" first and finally in relation to majority perceptions. Whoever risks the appeal to heaven risks incurring the label of "heady Male-content" – a fool, possibly one who is seditious.

Thus for the individual who finds that the validity of his reasons for acting are denied simply because others have reasons which are different – each being no better individually, only the numbers making them better and thereby valid – the entire process of entrusting government and legitimizing the format for attaining the public good, the majority-rule principle, falls into question as far as his property interests are concerned. In the relationship between the individual and his governing body, the "truths" or standards upon which he can rely in evaluating the "nature of the government" or in determining whether he could give "hypothetical consent," in Pitkin's terms, are displaced in favour of the standards established by the majority or its "wise Prince." Moreover, in doing this, the relationships between men and men in the social context, noted previously as necessary concomitants to the evaluative activity, are obscured if not removed as crucial relationships in determining the status of political obligation. What ought to be conceived as obligatory because mutual in scope and based on mutual commitments is better stated in the case of Locke as "obligatory" because constraining – as noted earlier, an *obedience to* someone rather than an *obligation* held *by* individuals. For while preservation and stability, in a word, order, may be construed as *the* base line goal for any regime, implementing the conditions for order should be done from the perspective of mutuality, not partiality; i.e., the conditions must provide for an order common to all.

Surely it is possible to argue that the procedure of giving consent – expressly consenting through the majority-rule procedure, or tacitly acquiescing – is the essence of the good regime. But because it does not account for substantive goods – because there can be, for example, legitimate majority tyranny under Lockeian premises or, at least, the legitimizing of conformism in the face of ostensible individual rights – one might very well find oneself accused of being a "heady Male-content" (Locke) or of portraying "moral disorder" (Tussman).

[40]For an empirical rationale for this, see Bernard Berelson, et al., "Democratic Practice and Democratic Theory," *Voting* (Chicago 1954), 305–23; Seymour Martin Lipset, *Political Man* (Garden City, New York 1963), 64–79. Deference on the part of the people was fundamental to Locke's English society, as was the fact that a large proportion of the populace simply did not count in calculating "the people" of Locke's concern, for the social order clearly was patriarchal. See Peter Laslett, *The World We Have Lost* (2d ed. New York 1971), ch. 8, esp. 185–6 ff.

And yet he may find himself in this position for reasons he cannot explain, since on *his* account of the *reasons* for consenting under the contract *he* is consistent and the procedure has gone awry. To be sure, it is Locke's argument of justification that the majority (and the government) *ought* to act within the bounds of the law of nature. But the difficult question is *whether they will do so*, both because of the interest of a majority coalition in preventing "competition" and threats ("inconveniencies") to its security and because the law of nature is interpreted from the context of an extant, and status-quo oriented, regime. In the case of *government rebellion*, a remedy is provided: majority revolution, although here Locke specifies the government's role in such a way that this revolution seems out of the question. But what of what we justifiably can term *majority* rebellion? Although it is the majority that interprets and applies the law of nature, there is no guarantee that what it does represents an adequate, or an accurate, version of the law of nature. The majority can act *nolens volens*, and the individual gets lost in the shuffle.

Locke's position can represent only the displacement of the "good" regime with what, in another context, has been indicated to be the "*merely* legitimate" regime.[41] His position, moreover, allows us to join the issue as to whether one can speak of evaluating what Pitkin calls the "nature of the government" with the subsequent elaboration of "civic disorder" or whether one is reduced only to the point of "moral disorder" for the individual actor. Locke's position is clear, and Tussman has described this not so felicitous state of affairs with a baldly accurate statement: "The right to disobey and to revolt seems ... to get lost in the question 'who is to judge?' If we answer, 'The Court' (or the government) then disobedience still has its place as putting an appeal in process, but must give way to adverse judgment. The disobeyer is the community's self-appointed test case. But the right to revolt, undeniable in principle, has been buried in this shuffle, as Hobbes buried it. The Court, on this view, takes its place."[42] And who is the "Court"? The anointed of "wise Princes," of the "people" – but not of the individual. "Shuffle" describes not just what Tussman's Hobbes does but what Locke does as well. Disobedience and revolt, even evaluation, are not all that get buried; though Locke appeals to the individual as the source of the legitimizing process, in the ensuing shuffle it is the individual himself who gets buried.

Although Locke commonly is recognized as an "individualist" (at least as far as his justification for "leaving" the state of nature is concerned), and although he does mention the individual and can be interpreted as implying that one has an evaluative role, even a right to revolution, within the extant, justified political order, he in fact places the individual under the thumb of the majority-rule principle. His appeal to *individual* rights obviously has popular appeal, something of which Locke was doubtless not unaware.[43] Yet it is important to keep in mind

[41]John H. Schaar, "Legitimacy in the Modern State," *Power and Community*, ed. Philip Green and Sanford Levinson (New York 1970), 276–327, esp. 283–90, 291 ff., and Hannah Arendt, *Between Past and Future* (Cleveland 1963), ch. 3. Cf. Winch, "Man and Society," 246–8. See also, fn. 12, above.

[42]Tussman, *Body Politic*, 46; also, 83–5. See, however, Pitkin, "Obligation and Consent – II," 51–2.

[43]See Leo Strauss, *Natural Right and History* (Chicago 1953), 206–12 ff, 220–3 ff. Cf. *Treatises*, I, 7.

the significant disjunction between self-evident (known by reason), natural rights of individuals and civil rights, rights granted by society. For to carry through on individual rights is to carry through on the substantive goods of politics: individual preservation, and preservation of individual activity, including reason and evaluation. But for Locke these goods cannot be guaranteed; they only can be hoped for – as if the populace were to develop a consensus of unanimity, the impossibility of which Locke recognizes as necessary to settling upon the majority-rule procedure.

> applicable to the wide range of different types of legal relationship . . . and can contribute to making a reality of the universality of international law.[1]

I would like to explore whether and in what sense the idea of interdependence can serve as the normative foundation of international law. I will first show that interdependence in the sense Jenks seems to define it is a trivial, and hence useless, concept for purposes of understanding the foundation of international law. I then wish to demonstrate why the obvious alternative to interdependence, classical positivism, fails as well. Finally, I will try to provide a more plausible foundation of international law by rescuing a concept of interdependence that differs somewhat from Jenks'. I trust, however, that the view that I shall offer will be faithful to Wilfred Jenks' substantive vision of international law and the international community.

Interdependence

The idea of interdependence is rhetorically contrasted by Jenks to the idea of independence or sovereignty, long considered as the primary normative concept from which the very notion of international law derives. Unlike independence or sovereignty, the concept of interdependence directs our attention not to the opposition of interests or the clash of fundamental states' rights, but to the unavoidable need that nations have of cooperating with each other. Jenks does not develop this idea further, but one could say that interdependence thus defined has a double effect. First, it creates a prima facie obligation on states, an obligation to advance something beyond, or in addition to, the national interest. States must look out for the welfare of others because they are bound together in the same enterprises—common survival and prosperity. Second, that prima facie obligation pervades the interpretation of all international legal obligations. In the Jenkian vision interdependence becomes an interpretive principle for deriving legal obligations in hard cases, the underlying policy that animates every positive rule or principle of international law.

But this view encounters substantial difficulties. One could say, perhaps, that their interdependence is what makes states inclined to agree to international legal rules and principles in the first place. But then the basis of obligation would just be consent (custom and treaty), even if what motivated states to consent in the first place was the realization of their interdependence, their need for each other. On this view, consent is the basis of the law of nations, although interdependence is still maintained as a possible prior motivation, or causal origin, of the agreement or customary practice. Interdependence then becomes superimposed and tautological, and consequently devoid of explanatory power. The theory, thus understood, can hardly provide a test for international obligation: any international legal norm (customary or conventional) can be said to be the result of states' interdependence, but we would still need to determine in each case whether the actual acts constitutive of custom or treaty (the consensual acts) have taken place.

So maybe the idea of interdependence needs to be qualified and refined if it is going to provide a nontrivial basis of obligation in international law. One could perhaps say that the degree of interdependence determines the kind and number of matters that states ought to feel obligated to agree upon—the substantive scope of obligation. Thus, one could say, with Jenks, that the problems posed by scientific and technological innovation are such that can only be solved by concerted action, by cooperation. Interdependence thus would dictate the issues or problems upon which states would have great interest, and maybe a prima facie moral obligation, to negotiate and seek

[1] Jenks, *The Challenge of Universality*, 53 ASIL Proc. 85, 88 (1959).

the establishment of appropriate legal principles. This approach is correct; it is also irrelevant. It is one thing to say (uncontroversially) that growing interdependence has made it desirable or even necessary for states to agree to, say, a convention to control marine pollution, and a very different thing to say that the fact of their interdependence somehow is the normative basis of that obligation (what obligation: to protect the environment? to negotiate a treaty?). Here again, the basis of obligation would be consent.

Maybe one could be more radical and say, with Hume, that the degree of interdependence (or interest) determines the degree of binding force of international obligations—more interdependence, more intensity of interest, hence more stringent obligation; less interdependence, less intensity of interest, hence less stringent obligation. But this view of interdependence is highly problematic. Not only are we not sure about what the notion of degrees of binding force is supposed to mean; more decisively, the view that particular obligations may depend on the degree of interdependence leads to unacceptable results. If interdependence is the basis of obligation in this sense, then states that depend less on others would benefit from a correspondingly lesser allegiance to international law. To put it differently: if the basis of a state's obligation is its interest in upholding international law because it realizes that it depends significantly upon other states, that obligation would decrease with the decrease of the degree of dependence. Jenks apparently was aware of this, since he felt it necessary to warn us that "interdependence implies obligations for the strong and the weak alike."[2]

The problem is this: the question of how much states depend on each other is an empirical one, so the mere assertion of interdependence as the basis of international law either says nothing (it just says that states, some more than others, depend on others for their prosperity or subsistence); or, it makes legal obligation dependent upon the contingent degree of interdependence. For example, the United States is noticeably less dependent upon other nations than they are upon it. Should we then conclude that the United States may breach a legal obligation, to use Hume's words, "for a more trivial motive," i.e., that the basis of legal obligation is less stringent for the United States? Surely Jenks did not mean, nor would we accept today, such a result. The existence or stringency of international legal obligations cannot be contingent in this way upon the degree of interdependence.

But the difficulty does not end there. Not only can a low degree of interdependence motivate a state to ignore its international obligations; a high degree of interdependence may have exactly the same effect. We have seen only recently Western democracies respond in a hesitant, almost servile manner to Iran's unlawful threats and acts of terrorist violence, presumably because of fear of losing trade partners or strategic allies. Western leaders apparently regard their nations as being so dependent upon others that they end up departing from their international obligations, in this case firmly to condemn the unlawful threats and confront the wrongdoers. It is not clear, then, that it is such a good thing to have nations be too dependent upon others: the will of law-abiding nations to respect the law (that is, to act justly) may be weakened and they may easily become hostage to nations that are not so inclined.

At best, interdependence might be a useful (if vague) historical explanation of why international law came about, but adds nothing to its justification. To insist upon confusing causal origins with justification is to commit what logicians call the genetic fallacy. The basis of obligation is simply the fact that states have agreed, for whatever

[2]Jenks, *supra* note 1, at 88.

reasons, including maybe the realization of their interdependence, to those rules and principles. The basis of obligation would then be the implied or tacit consent of states. I must conclude that interdependence as an independent foundation of international law is either trivial or morally implausible, and hence cannot provide an independent basis of international obligation.

Consent

Can Jenks' noble vision be rescued in some way? I think it can, but before doing that it is necessary to show why consent theory and other forms of positivism do not work either. There are two forms of consent theory which, following modern social contract language, I will call respectively the theory of actual consent, and the theory of hypothetical consent. In turn, the theory of actual consent can be subdivided into the view that states consent from interest or that states have fundamental rights and consent in order to enshrine them in a system of international cooperation. I shall concentrate first on the theory of actual consent, leaving for later the discussion of hypothetical consent. For reasons that I hope will become apparent, I regard an appropriately defined theory of hypothetical consent as the correct way to approach our problem.

Consent theorists claim that international law is grounded on the actual consent of states, both implied over time (custom), and express (treaties and other international agreements). As indicated above, the theory may be subdivided into two versions: the first is the theory that states are in a state of nature, where might makes right, and where states, pursuing only their national interest, eventually subject themselves to international law. The second version of actual consent conceives of states as having fundamental rights (not just goals or interests), and agreeing by custom or treaty to limit them for the sake of international cooperation (including the control of force).

While the theory of actual consent in either of its versions has considerable merit, on closer analysis it is indefensible as a theory of international obligation.

Let us first address the "fundamental rights" version of consent. This theory presupposes that states have some fundamental moral rights (usually derived from the idea of sovereignty or state autonomy) and that it is precisely this feature that identifies consent as the sole proper source of international obligation. If a state is "free" or "autonomous," or "sovereign," it can only be obligated through its voluntary submission, that is, through agreement. But this idea, popular and widespread as it is, is just indefensible. To say that a state has fundamental moral rights is to use rights-language completely out of its original and proper context. That view presupposes the state's status as a moral being analogous to a person, capable of holding rights just as individuals hold rights. But states are not persons in precisely the sense in which personhood is crucial to the idea of rights. Rights are grounded in individual autonomy. To refer to individual rights is to allude to the sphere of individual autonomy and choice that individuals retain after they have agreed, or would ideally agree, on the structure of civil society, i.e., the state. A morally justified state is the state in which this sphere of autonomy is relatively large—where people enjoy more extensive human rights. A morally justified government is one that faithfully enforces this social contract and does not overstep the side constraints imposed by human rights.

This analysis, however, just cannot be transposed into international relations. One would have to say that a state is free to do the things it did not agree to delegate to the basic structure, i.e., international law. But those so-called rights are not individual rights, by definition. They do not refer back to notions of individual autonomy and respect for persons. On the contrary, because international acts of states are acts of

governments, these so-called states' rights allude exclusively to prerogatives of governments. That is why the alleged fundamental rights of states consist exclusively of "hands-off" rules: sovereignty, nonintervention, "freedom" to pursue their own social, political, and cultural "development," and so forth. The analogy is supposed to be that just as individuals are to be thought of as autonomous beings, states can be thought of as autonomous corporate entities. This analogy is not only conceptually indefensible, it is morally perverse, in two ways. First, it glorifies government and state power at the expense of human rights of citizens of the state, that is of rights in their original sense. The "freedom" of the state (for example, to adopt any political system it wishes to adopt) means, more often than not, the demise of individual freedom. Second, that notion enshrines and justifies the pursuit of the so-called national interest at the expense of the rights of persons in other states. If human rights are to have some meaning, it has to be that of a side constraint to the pursuit of policies, not only by their own government, but by foreign governments as well.

In short, the idea of rights of states under international law makes sense only if we treat them as derivative of the basic and original notion of individual rights. This is so because morally justified governments are those that respect human rights and genuinely represent their people. Only where delegation of powers has actually occurred are we able to say that the government's acts are acts "of the state" in a moral sense. As a consequence, international legitimacy is dependent upon domestic legitimacy.

Similar objections can be raised against the theory of consent of states based on interest, not fundamental rights. On this view, states create law by their consent (through treaty or custom) even though the states have no preexisting natural rights. Yet again, our intuition that consent creates obligation is based on our notions of individual free will and responsibility. We believe that the reason why you should be bound by your promise is that you chose freely, that you had indeed a choice, and that you were aware of the consequences of your choice; in short, that you are (to a large extent) morally autonomous. But it is clear that governments do not possess these qualities. Their moral existence is vicarious, ephemeral, and subordinated. They are, in the most important ethical sense, our servants. If this analysis is correct, why would the consent of governments be entitled to special normative deference, just because they happen to be in power? What is the principle (other than mere assertion) behind the binding force emanating from the consent by rulers? Again, we must see if there is any analogy with individual consent as the basis for contractual obligation. And that analogy fails: the notion of individual autonomy, itself the basis for the moral rationality of consent, can only be predicated of individual persons. It does not make sense, morally or conceptually, when predicated of governments or states, unless there has been an actual delegation of the right to consent, that is, unless the government has in fact been authorized by citizens to act on their behalf. So while this version of consent theory does not presuppose states' "fundamental rights," it does presuppose that the state is a valid consenting agent; and so the same objections raised against the "fundamental rights" version are in order here. In order for a theory of consent to be morally compelling as the basis of international obligation, the consenting agent has to be somehow morally entitled to consent; and it is plain that some governments are so entitled and some are not. It just cannot be presumed (as traditional international legal theory does) that *all* governments are automatically empowered to represent the interests of the citizens over whom they rule.

A Fresh Suggestion: Hypothetical Consent

I suggest thinking about the foundation of international law in terms of social contract theory, of hypothetical consent. If actual consent cannot lay the foundations for international obligation, maybe we want to give special foundational status not to *any* consent, but only to *rational* consent. (This idea, of course, is traced back to Kant.) We want to give allegiance to principles of international justice that would be agreed upon in a fair bargain, in an "original position" where constraints would be introduced so as to reach agreement which is fair to all. In a sense, the move from actual to hypothetical consent is a shift from positivism to natural law theory, in its social contract version. For we would no longer say that the consent of states is the basis of obligation, but rather that international law (including instruments and practices that states have actually consented to) must be seen and interpreted in the light of the principles of international justice that would result from that hypothetical, original contract.

A theory of hypothetical consent as the basis for obligation maintains that just international principles are those that would be agreed upon by rational agents in an original position. The situation thus imagined is characterized as one that provides every party with the opportunity to participate fairly in the agreement. This conception raises a number of difficult issues: what do we mean by rational agents—representatives of actual states; representatives only of just states; or just individuals agreeing to a global scheme (including agreeing whether or not to have states at all)? Most importantly, which international principles would be agreed upon by the parties in the original position? How do current international law and practice fare under such principles?

The most famous and influential theory of hypothetical consent, of course, is John Rawls' *A Theory of Justice*. Rawls argued that the international original position would be one where state representatives would negotiate without knowing what state they represent (the famous "veil of ignorance"). For Rawls, the parties would choose the familiar international legal principles of equality of states, nonintervention, and nonaggression. I have discussed elsewhere at some length some difficulties with Rawls' position, especially with respect to the rule of nonintervention. I argued then that (1) parties in the original position would not be representatives of states, but just individuals speaking for themselves; (2) the first and most important principle of international law and justice that the parties in the original position would establish is that of the sacredness of human rights—not nonintervention, self-determination, or similarly state-oriented principles; (3) in particular, because of the second point, the parties in the original position would agree on a limited right of humanitarian intervention to remedy serious human rights violations.

I want here to expand on proposition (2): that the first principle of international justice that would be chosen by the parties in the original position is the principle of respect by all governments of basic civil and political rights.

Following Rawls, we will assume that parties in the original position will try to advance their rational interest, as represented by a set of primary goods. These are: rights and liberties (or better still, liberty interests), power and opportunities, income and wealth, and self-respect. A preliminary issue, of course, is who participates in the bargain. For if the parties are individuals, we might get one set of principles for the law of nations; whereas if the parties are (as Rawls suggests) representatives of states, we might get a different set of international legal principles. I now believe that the choice of model as to the parties does not affect significantly the result.

So the first model, the parties in the Rawlsian original position are individuals. They are in the original position as autonomous, moral agents, trying to agree on principles of justice among nations. These parties do not know their social position or wealth; nor do they know what group—national, ethnic, or otherwise—they belong to. They know they have a conception of the good, but they do not know what that is. They are thus aware that they are about to choose principles of global justice for a world in which these disparate conceptions of the good can be pursued by them. The idea is to agree on a set of principles that can serve as a framework to adjudicate mutual global claims. One could perhaps imagine them reasoning as follows.

First Principle: International Human Rights

I do not want to live in a world in which there are states where liberty interests are ignored, because I might end up being a citizen of one of those tyrannical states. Therefore it is rational for me to agree to a set of international human rights principles, and to international mechanisms and institutions (such as international human rights courts) to protect them should they be violated by governments.

Second Principle: Separate States

Part of my liberty interests are community interests; that is, the interest to form relatively discrete national groups with their own cultural, historical, and political cohesiveness (that is, it would not be rational for me to agree to, say a world federalism, where presumably the interest of members of my group to govern themselves, and thereby decide their own policies in a framework of respect of the rights of all, would be ignored). Also, if a world federalism went wrong, there would be no asylum, no safe harbor, no refuge. Hence, a world consisting of separate nation-states maximizes the probabilities of global protection of liberty interests.

In addition, the parties in the original position would also agree to a limited principle of nonintervention (among minimally just states); to the prohibition of war except in defense of basic human rights (self-defense being also a war for human rights); and to principles of international distributive justice. Determining the content of those principles is very difficult; but in any case I believe that the lexical priority of liberty holds: the parties in the original position would not, I submit, choose to subordinate their liberty interests (their human rights) to economic gain. That is not to say that current international economic arrangements are acceptable; on the contrary, I believe there are good reasons to believe that the theory of international justice that I am suggesting would yield principles that would require an extensive reform of present international economic and financial structures. I cannot, however, pursue these matters here. Suffice it to say that international human rights are agreed upon in the original position as the foundation of the law of nations, and economic and social arrangements are subordinated to the achievement of minimal global respect for those rights.

Now on the model that Rawls suggests, where the parties in the original position are not individuals speaking for themselves, but representatives of nations, the process of choice of principles would be the same, except for the second principle: choice of a world divided into separate nation-states. For in the Rawlsian version, nation-state would be considered as a given. So the thesis of this paper, that international human rights would be the first set of principles the parties would agree upon, is not affected by defining the original position in the way Rawls does. This is particularly evident when we realize that in Rawls' vision, the representatives of states have already chosen the principles of domestic justice, which of course embody the priority of civil and

political rights. It would be therefore incongruous for those parties, when choosing principles of justice for the law of nations, to overlook international human rights. One would think that the parties, who represent states but do not know which, would want to insure themselves against the possibility that they might end being citizens of tyrannical states, as explained above.

Conclusion: Interdependence Again

So hypothetical consent seems to take us farther than its main competitor, actual consent. The theory is much richer in its normative consequences, since it provides us a philosophical vantage point from which to judge the justice of actual institutions and the best way to interpret international legal materials. But we could take up again the question posed earlier: why would individuals (or representatives of just states) want to agree on anything to begin with? Why not settle for the state of nature in international relations? After all, arguably we have lived many centuries without international law, so it does not seem to be such a necessary feature of an orderly social life.

I would like briefly to suggest, however, a reason why individuals would want to agree on principles of justice for international law. And I will borrow again from John Rawls' great work: the parties know (as part of their general knowledge of the laws of economics and sociology) that in the global arena there is an identity of interests, since international cooperation makes possible a better life for all than any nation would have if each were to live only by its own efforts. There is, of course, conflict of interests since individuals and nations are not indifferent as to how the benefits of social cooperation are distributed, as all of them would prefer a larger share. International law is designed to regulate both conflict and cooperation, and while the Rawlsian hypothetical agreement is itself the basis of obligation, the reason the parties would want to enter (hypothetically) into the agreement described is the realization of their interdependence. To put it differently: the reason there is any international law at all is because of the knowledge of the parties that they can achieve more (lead better lives) by engaging in social cooperation. Instead, which rules and principles are actually binding in international law will depend on how they cohere with the principles of international justice resulting from the hypothetical original contract.

So Jenks was not so wrong after all. While the concept of interdependence (the acknowledgment by parties in the original position that it is in their interest to agree to some set of international legal institutions), is itself incapable of providing a test for identifying binding rules and principles of international law, it is still an important concept, a building block, for the scheme of ideal rationality here suggested as the normative basis of the law of nations.

One last thought. I realize that my suggestion of the privileged place of international human rights in a theory of international justice may have far-reaching consequences. First, the theory entails the moral imperative to reform much of current international law, mostly in the direction of reinforcing international human rights mechanisms. It also necessitates a whole rethinking of prevailing notions of intervention and sovereignty, as well as a major reform of the international economic order. Second, if the theory is correct, it follows that much of the state-centered international law prior to the Second World War was morally defective. So be it. Classical international law was morally flawed in the same sense as the ancien régime was morally flawed: the latter consisted mostly of rules that privileged the nobility at the expense of everyone else. Similarly, classical international law (and much of current international legal discourse) glorifies government prerogatives at the expense of the rights and interests of individuals. Yet we should never forget that all law, including inter-

national law, is made to solve the problems we, individuals, confront as autonomous moral agents; and that every set of institutions should make room for our imprescriptible entitlement to basic personal dignity.

DISCUSSION

CHARLES W. T. STEPHENSON:* In terms of looking for universal principles, I guess that what you are really talking about is categories, very useful things—subcategories which divide and separate, or inclusive categories, which bring things together. When I looked at the inclusive categories into which you might put the social contract, there are a lot. The first example that comes to mind, based on the story of the Dutch boy who kept his finger in the hole in the dike, is where you have 12 men in a boat and 12 holes in the bottom. If one of the individuals withdraws his finger from the hole, then the other 11 will feel entitled to react very strongly. This mutuality of perceived needs—the mutual need to survive—provides a very strong basis for agreement. This mutual self-interest is perhaps an extreme but nonetheless common example of the basis of agreement among states.

Professor TESÓN: I agree with that. This tells us that nations would rationally want to agree to a rational legal system. I think however that this alone does not determine the substantive content of those international obligations. We need to define those positions more clearly to see what principles of international justice would yield. I would say the first motivation that rational policy would have under a system of international law would be the mutual interest of interdependence. Primary interests would be in wealth, power, liberty, etc.

C. G. ROELOFSEN:** Professor Tesón mentioned as an example that the repair of a dike after a tempest represents a clear common interest of all concerned. However, Dutch history suggests that on some occasions people are none too displeased with a breach in the dike, provided it has occurred at their neighbor's expense and they themselves are thereby provided with a convenient harbor! Does not the "common interest" theory of Professor Tesón represent a new version of the famous "social character of humanity" assumed in traditional natural law theories?

Professor TESÓN: I have no objection to being called a natural lawyer in that sense.

AUGUST REINISCH:*** You first elaborated on the social contract theory, proposing that it would first concentrate on human rights as opposed to sovereignty. You disputed the present theory of consent of states as expressing the wills of states as adequate. I think we all agree that these are merely fictitious, legal metaphors. I would be interested in what you think such a contract would be in a situation where people have to agree on principles; what expresses the consent of the state, what legal rules would you submit in this case?

Professor TESÓN: I think it is a big challenge for any social contract theorist to come up with plausible principles on international justice. I think that it would be rational for them to agree to a strong system of international human rights. I also believe that even though they would not agree to sovereignty, I do believe partners would want to live in communities with cultural ties and history. So, they would agree for a number of reasons, to discreet, separate states as opposed to a world federation. As a consequence of the two principles, they would also agree that nonintervention should be eliminated. I think that nonintervention as a rule is accepted only

*U.S. Agency for International Development.
**Professor of Law, Utrecht University.
***New York University School of Law.