Political Legitimacy: The Quest for

the Moral Authority of the State,

A Philosophical Analysis

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Introduction

Every complex form of human society confronts the problem of what makes state power rightful or legitimate, the question of whether and why holders of state power have the authority to command and enforce the obedience of those subject to it and why the latter in turn have a corresponding obligation to obey. The problem of legitimacy of state power assumes significance once the origin and exercise of the order of domination of the state has been substantially challenged or has been widely experienced as oppressive and unjust.

When the order of domination of the state is widely experienced as oppressive and unjust, people may obey the command of political authority from pre-moral motives such as fear, desire, custom or mere attachment to a ruler. However, an order of domination is not likely to be stable over time unless those subject to it recognise that when holders of state power claim the right to command, the claim is a legitimate one, that is, that it takes place in the context of values. Therefore, for an order of domination to be stable over time, the content of command must be based on valid norms that rulers share with the ruled and are justifiable to the latter.

These norms prescribe the terms which are important for establishing and maintaining the order of domination, for defining the appropriate relationship between the state and its citizens and limiting state power by way of guaranteeing the basic rights of its citizens and providing for the separation of powers. Thus, the fundamental problem of the political order of domination of requires us to consider these terms in answering the question of whether and why power is rightful. But the problem is more salient and more pervasive in modern society.

In order for us to better understand the problem of political order of the modern state as it presents itself today, we will first look at the historical development of the modern state in order to uncover the metaphysical foundation of values and beliefs that hold the state together, before turning to a discussion of the justification of the state to rule in terms of its purpose.

To start with, we wish to state that the problem of the order of domination of the state could not have arisen in the ancient Greek times of the *polis* or city-state. For the city-state was experienced then as a natural cosmic order in which the citizen was situated, provided with a station and a purpose. In this community, the citizen had rights and obligations; but these rights were not attributes of a private personality and these obligations were not enforced by a state dedicated to the maintenance of a framework to protect the private ends of its citizens.

Rather, a citizen's rights in the Greek *polis* or city-state belonged to his station; his obligations flowed from the need to realise his own purpose in line with his station;[1] and so, the obligation to obey authority was never in doubt in ancient times. In addition to this, the Greek city-state came into being for the sake of life. But once it existed, the city-state had as its purpose the good life. The good life, that is to say, the sum of all approved common purposes of religion, morals and art, as well as internal order and defence were all regarded as the function of the ancient city-state. In this sense, the city-state was not a state in the modern sense, which leaves much of the good life of citizens to social agencies and individuals.

In view of the foregoing, the natural starting point for a discussion of the basic problem of the political order of domination of the state we consider is not the Greek city-state but, the

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[1] George Sabine, *A History of Political Theory,* 4th ed., Hinsdale, Illinois: Dryden Press, 1987, p. 31.

impersonal Roman state of republican times. The Roman state was conceived in terms of law that recognises the rights of all human beings and exists for the public good. Hence, political authorities were to be obeyed because they exercised certain offices that were conceived of as having been created for the public good, not for the person who exercised the office.

Law not only formed the basis of the Roman state, whose revival in Renaissance Italy was central to the development of the modern state, as we know it today. It also supported the growth of the Roman Empire. As Roman political power and wealth grew, Roman customary law developed into the *ius gentium* or law of peoples based on practical universal principles of good business practice regarded as honest and fair that governed economic and political relations between Romans and non-Romans within the expanding Roman Empire.

However, the expansion of the Roman Empire was followed by several centuries of eventual stagnation and paralysis. Lacking a steady supply of slaves and tribute from newly conquered peoples, it could not pay for its vast army, large bureaucracy and extensive public works. Hard measures were undertaken to meet increased costs that included an increase in taxes and the use of force to extract them which created extreme conditions of poverty of many people.

As the unmanageability of the immense, far-flung imperial territory and harsh methods taken to counter it created extreme conditions, the Romans begun to turn away from the official paganism or belief in many gods. Seeking relief from economic misery, the impoverished masses turned mostly to Christianity because of its clear ideology that emphasized, among other things, the equality of all humans in the sight of God and the concern for the poor.

Initially the state allowed people to follow Christianity provided they still formally recognized pagan Roman gods, fearing that failure to do so would negatively affect their loyalty to the Roman Emperor, seen as the representative of the people to the gods. But when Christians refused to formally recognise pagan gods, they were seen as the enemies of the state. The Christian belief in the universality of one God and its idea that all people everywhere were equal in the eyes of God represented loyalty and obligation ultimately to God.

Christianity insisted on retaining a religious identity separate from the secular rulers of Rome. Therefore, the persecution of Christians followed because of the fear of the Romans rulers for those who refused to worship the pagan gods and thus recognise their loyalty to the Roman rulers seen as their representatives to the pagan gods and instead worshiped a non-nationalist and higher divinity to which they became ultimately loyal and had an obligation.

However, despite, and perhaps because of, the persecutions the number of Christians increased. The stature of the church also increased when successive Roman Emperors embraced and declared Christianity official and outlawed paganism. Hence, with the disintegration of the Roman Empire, the Christian church which had before rarely been a factor in politics filled the void left by the Roman Empire as a form of organized rule that did not recognise the territorial boundaries to its authority over its community of believers.

The fall of the Western Roman Empire in the 5th century changed the configuration of Europe as the invasions by semi-nomadic Germanic tribes from the Baltic region separated the western Roman Empire from the rest of the Mediterranean where the Eastern Roman Empire (Byzantine Empire) survived another one thousand years. The Germanic kingdoms and chieftains that followed the Roman Empire were themselves fragmented into semi-autonomous political-military units that bore little resemblance to the modern state.

The Germanic kingdoms and chieftains were ruled by kings or chieftains chosen by the still-living chieftain and confirmed through the act of acclamation by an assembly of leading warriors of the tribe. Thus loyalty was based on persons, which meant that followers were loyal only to a certain king or chieftain from a certain clan. Politics and power did not operate according to the same logic in Germanic tribes as it did in the Roman Empire that was based on loyalty to impersonal laws that guided the exercise of the power of the state.

The barbarian kingdoms had no formal political organization, no specialized administrative departments, no civil service and no standing army, as did the Roman Empire. Governance was handled by the king's household, which was not a problem when the kingdoms were small. But as they grew larger, kingdoms were broken up into subunits of counties governed by representatives of the king, counts, who ruled the counties independently as they were better able to mobilise military resources than the king and defend themselves turning counties into personal property which also saw the rise of dominant families in counties.

The strong monarchy of early Germanic kingdoms fragmented into semi-autonomous political military units which came to be treated as private domains of those whom the king had appointed to indirectly administer them. In other words, royal power across Europe decomposed into feudalism which was a system of personal and cliental relationships of lord and vassals introduced to legitimise the modern state by contrasting conditions of the two.

The practices of the feudal epoch did not constitute a "state" in any formal sense. Feudal governance lacked key features of a state such as permanent structures for decision-making, a standing army or an extensive administration that operated according to codified law. Most important though, people were personally loyal to counts and kings. Their identity as human beings was not bound up with a secular political order to which all belonged.

Feudalism as a social world of "overlapping and divided authority" was a pyramidal structure with the king at the top of the pyramid as the sovereign or overlord of the entire kingdom and princes and knights below him as vassals who were bound to the king by the oath of loyalty to offer him military service in return for protection and the use of land - a fief – loaned to him. Vassals also had to provide the king with advice on, say, whether or not to go to war.

The king prevailed as conqueror, tribute-maker and rentier and not as head of state. He was sovereign only as *primus inter pares* "first among equals", and therefore his authority was limited by the clearly recognized rights and privileges of the three estates of the clergy, the nobility and the bourgeoisie who provided the king with advice on, say, whether or not to go to war and had to consent to the request of the king for financial resources, especially for war.

The clergy was thus equal in status and power to the kings and counts of secular nobility. This could be seen from the many dioceses and religious orders that acquired a substantial amount of wealth and land which created tensions between the church and feudal kings who often tried to control the appointment of the clergy in order to deprive them of their property.

The Church which had rarely been a factor before the collapse of the Roman Empire became the most powerful organization in Medieval Europe. The Church served not only the cultural function of preserving Roman inheritance of classical philosophy and science, but also the political function of providing a practicable bond of union of different peoples and places. Hence, the Church gradually came to be identified more with the medieval political order.

In this sense, the unity that existed during medieval times came not through identification with the political association of the state but through a system of religious rituals and ceremonies institutionalised by the church through Western Europe. This unity not only retarded the emergence of an understanding of a territorialized state. It also made available a powerful alternative political identity across otherwise politically fragmented lives of medieval peoples in which the political was subordinate to the religious as was reason to faith.

The subordination of the political to the religious resulted in the limitation of the sovereign power of the kings who continued to express their claims to power in terms of their being representatives of a universal Christendom in Europe. However, the rise of Christianity brought with it the problem of conflicting church loyalty, as situations arose in which the jurisdictional lines between the church and the state were far from being clear at all.

The development of the Holy Roman Empire presented the first real challenge to papal power giving rise to a dispute between *imperium* and *sacerdotium* or the secular and religious which came to be known as the Investiture Controversy. The controversy was in a legal sense a powerful struggle over the proper boundaries of authority of the king or pope.

The investiture controversy began as a dispute in the 11th century between the Holy Roman Empire and the papacy of Gregory VII over the appointment of church officials which, prior to the controversy, while theoretically a task of the church, was in practice performed by secular authorities in order to maintain a balance of power with the church.

This was in conformity with the Gelasian theory of the two swords summing up the teachings of the early Christian fathers of human society as divinely ordained to be governed by two authorities, the spiritual and temporal authorities, wielded by priests and secular rulers. The institution of the church and its higher, or longer term moral responsibility and the institution of civil authority and its functions of keeping internal order within society and protecting it from external forces were to be balanced within a single mystical body of a Christian state.

However, the problem of conflicting Church-state loyalty arose chiefly because a substantial amount of wealth and land was usually associated with the office of the bishop or abbot and bishops and abbots were themselves usually part of secular government by virtue of their literate administrative resources. In this situation, it became beneficial for feudal kings to appoint clergymen to office who would be loyal to them. So, kings appointed clergymen who cared little for their spiritual offices leading to a degradation of the church's spiritual role.

The feudal degradation of the spiritual role of the church was challenged by the wave of reform which spread with the growth of the congregation of monasteries subject to the abbot of Cluny. Cluniac monasteries formed an order centralized under the control of a single head subject only to the papacy and were thus seen as qualified to be the medium for spreading reform in the church so as to make it an autonomous spiritual power.

Therefore, with the increased consciousness for the independence of the church, there was a demand for the purification of the church for permanently raising the papacy from the degradation into which it fallen, and for an autonomous control of the pope over church offices. The Gregorian reformers felt most keenly the threat to the spiritual office occasioned by the involvement of the clergy in the business of administration of secular government.

Pope Gregory VII prohibited the lay investiture of bishops or part played by secular rulers in the appointment of the higher clergy. Gregory realised this would not be possible so long as

the king maintained the ability to appoint the pope. So, he together with other churchmen loyal to the Gregorian cause declared through a church council in Rome that secular leaders would play no part in the election of the pope, but a college of cardinals would do this.

Emperor Henry IV challenged the ruling in his letter to Pope Gregory with an attempt to secure the deposition of the pope and call for the election of a new pope. Gregory in turn responded to the letter by excommunicating and deposing the Emperor on grounds of the duty of a spiritual authority to exercise moral discipline over every Christian, even the emperor.

By implication, the emperor lost his spiritual place and was dismissed into the secular order. He was subject, in regard to the fulfilment of his Christian duties, like everyone else, to the verdict of the pope's spiritual authority on which his legitimacy would depend, while the spiritual authority of the pope was not subject at all to the verdict of the worldly authority.

The revolution that took place here involved the secularisation of both the king and the political order that was dismissed at the same time with him from the sacred and sacramental sphere, and as such set free on its own course, to its own development as a worldly enterprise. The investiture conflict constituted politics in its own sphere; politics was no longer capable of a spiritual but a worldly that is a natural rights justification.

The break with the old order was expressed in Pope Gregory's excommunication of the king removing him from the Church. In effect, the excommunication order carried with it the right to depose the king and absolve subjects from their allegiance or loyalty to him. Hence, to create pre-conditions for the exercise of his office again, the king had no choice but to apologize and submit himself to the Pope and reconcile with the church.

As Pope Gregory revoked the excommunication of the king, he limited himself to reconciliation of the king with the church and the neutralization of the political consequences of the revocation of the excommunication, and therefore the reinstatement in royal office. The pope was no longer concerned with taking over the secular functions of government. He was more concerned with the independence of the church in spiritual matters.

The secularisation of politics was in its first stage only able to realise spiritually more through the church regaining its autonomy than the political order realised historically. After the investiture conflict religion was still without doubt the foundation for a minimum amount of existential common ground of homogeneity between rulers and ruled. Even the movement towards the development of the modern state occurred first of all in this context.

A movement away from religion as a foundation for a minimum amount of existential common ground of homogeneity between rulers and the ruled first took the view of Thomas Aquinas of a natural rights justification of politics against the absolute and abusive authority of both spiritual and secular rulers. Thomas of Aquinas and later Christian thinkers sought to limit the absolute and abusive authority of the spiritual and secular rulers by making the people the ultimate source of authority. This saw the revival of the Roman republican ideals of a distinct political realm separated from the status or standing of the prince or pope.

This new spirit of politics emerged most forcefully among republican theorists in the city states of Renaissance Italy. From the 13th through to the 16th century, powerful Italian states struggled to establish their independence from both the Catholic Church and the Holy Roman Empire believing that all power is liable to be corrupt, to serve the interest of the individual or

group at the expense of the community as a whole. Thus the only way to ensure power serves the common good is to leave the whole body of citizens in charge of their own public affairs.

Within the republican tradition of thought we encounter for the first time a vindication of the idea that there is a distinct form of 'civil' or 'political' authority which is wholly autonomous, which exists to regulate the public affairs of an independent community, and which tolerates no rivals as a source of coercive power within its own *res publica*. In short, it is here that we encounter the familiar understanding of the state as a monopolist of legitimate force which found expression in the political thought of the Florentine writer, Niccolo Machiavelli.

This view of "civil government" was of course taken up in France, and England at an early stage in their constitutional development as national monarchies began to emerge in France, England and Spain. The political task of the new monarchs was to centralize administration and law and subdue the medieval representative institutions of the clergy, the nobility and the bourgeoisie that obstructed it. For this they needed standing armies and revenue from taxes. Larger territorial political units emerged, and political-military power became concentrated in the institutions and offices of the king and his court. As a result public officials eventually replaced individuals who held political power as a private possession, and the centralized medieval monarchy, the precursor of the modern territorial state, came into being.

As power and authority came to be concentrated more in the institutions and offices of the king and his court, they were increasingly depersonalised which involved the development of uniform impersonal laws and the development of the idea of state sovereignty. Medieval Kings claimed a different kind of sovereignty from kings in feudal states. Authority came to be vested in the state itself and in the person of the king for as long as the king represented the imagined unity of the state. The king was not simply "first among equals" but a separate overarching sovereign whose power was free from the control of all others.

However, it took several centuries for the principle of state sovereignty that unified political rule within a specific territory to develop. The authority and growing power claimed by centralized monarchs were contested throughout the period of the renaissance and beyond by the Catholic Church as well as the nobility of most European kingdoms.

Moreover, kings continued to frame their claims to power in terms of their being representatives of a universal Christendom in Europe and claim the authority to bring their coercive power of the state against heretics inside and outside their jurisdiction, setting the stage for a prolonged period of religious persecution and confessional war against the Protestant reformer movement across Europe.

The Christian reformation and the religious and political violence it spawned between Catholics and Protestants was an important catalyst for the transformation of medieval monarchies into an idea of sovereignty that unified political rule within a specified territory in ways that broke with the traditions of medieval Christendom.

The Reformation was a movement of revolt against the Catholic Church by those who considered it corrupt, more concerned with maintaining its power and privileges than with guiding the spiritual salvation of Christendom. Protestant reformers, led by the German monk, Martin Luther, argued that salvation depended on individual faith alone and thus emphasized the private, personal relationship between the individual person and God which obviated the need for Catholic Church's rituals and the official hierarchy of the clergy.

Once the religious split between Catholics and Protestants became obvious, European Christendom was faced with the question of how possible it was for different religious confessions to live together with each other in a common political order. By virtue of the significance religion had for the political order as foundation for a minimum amount of existential common ground of homogeneity between rulers and the ruled that lent legitimacy to the state, the conflict between Catholics and Protestants was both religious and political.

For both Catholics and Protestants, the conflict was about which one of them professed the true faith or pure gospel; as a fight about truth, the conflict allowed for no compromise. After the determining conditions of spiritual and worldly violence that theologians and canonists on both sides of the confessional divide fostered, it was considered the responsibility of the worldly political order to openly suppress error with its own means and punish heretics.

Heresy was therefore determined by the church but punished by temporal rulers as a civil crime. The inquisition was in this case a judicial institution established by the Catholic Church that gave the papacy the legal power to seek out and try people guilty of heresy as per canon law while secular rulers had the power to do the coercive work of punishing offenders.

It was the responsibility of the secular order to punish both rebellious heretics that fanned political unrest as well non-rebellious heretics that did not fan political unrest, as both were considered blasphemous. This understanding of faith as a legal-like relationship and the continuous working tradition of the *polis*-religion precluded a culture of civil tolerance.

In view of the above, it was thus unavoidable that the question of religion became a matter of politics. In the 16th and 17th century, Europe experienced horrifying Wars of Religion between Catholics and Protestants; political and religious interests, exertion for the true faith and a striving for the extension of claims for political power crossed and combined with each other.

This religious-political conflict took place specifically in three different places in Europe with different outcomes: in Spain, in France, as well as in the Holy Roman Empire. From these Wars of Religion followed the second stage of secularisation of the pure worldly and political foundation and legitimation of the state, settling the separation of religion and politics.

The separation of religion and politics, first used by popes to justify church supremacy, now developed its strength in the direction of the primacy and supremacy of politics. The demands of the church on civil authority to suppress error with force and punish heretics that ensued in the wake of the confessional split, contained the threat of permanent political conflict.

However, because politics placed itself above the demands of conflicting religious confessions for the true faith that was left to be a matter for the church, it emancipated itself from these demands and actually allowed for a peaceful political order, security of life and property to be restored. It is within this context that we understand the development of the position of power of the king of France as a neutral authority standing above the warring religious confessions and the Edict of Nantes guaranteeing for the first time in the state the existence of the Catholic and Protestant religion and the freedom of religion of individuals.

Within the foregoing context in which politics is placed beyond the question of the true faith we also understand the principle of *cuius regio eius religio* (that a subject's religion should be that of his ruler which in turn is transferred down to the people as a private affair) which was implicit in the *Peace of Augsburg* and was explicit in the *Peace of Westphalia* in the Holy Roman Empire. We further understand within this context the idea of state sovereignty that

unified political rule within a specified territory at the turn of the 16th and 17th century and the political thinking of Thomas Hobbes that resolves the representation of the territorial state.

From the *Peace of Westphalia* arose the problem of how to imagine and represent a combined religious, moral and political authority in a secular, earthly entity confined within territorial boundaries. The predominant solution to the crisis of representation of territorial state was the attempt made by Hobbes's contract theory to imagine the state as a body politic.

Having reasoned that in the state of nature or a situation where no absolute sovereign state exists anarchy is the logical consequence of independent individual judgments that became prominent during the Reformation, Hobbes concluded that the only way to overcome such anarchy is to make a single body out of the several bodies of citizens whereby they give up their right to govern themselves in a contract to a *Leviathan* by virtue of which he has the absolute power to effectively secure citizen's peace, their lives, property and families .

With Hobbes, as we shall see, we arrive at the view that if there is to be any prospect of civil peace, the fullest powers of sovereignty must be rested neither in the people nor in the rulers but always in the figure of a *Leviathan* or artificial man. It was as a result of his insistence to establish an impersonal form of sovereignty whose power remains distinct not merely from the people who originally instituted it, but also from the rulers that the concept of the state as we have inherited it was first articulated and went on to be further developed by later thinkers.

John Locke disagreed with Hobbes's location of absolute sovereign power in the state or monarchical government. He believed the power of the state is a trust and a delegation by the majority of the people to institutions of government by contract to do in a convenient way on their behalf things that they find inconvenient to do themselves: the legislative power' to do whatsoever a person thinks fit for the preservation of himself and others within the permission of the law of nature,' which is the provision that 'no one ought to harm another in his life, liberty and estate' and the executive 'power to punish crimes committed against the law'.

People find it inconvenient to exercise the right to legislative and executive powers in the state of nature due to the lack of 'an established, settled, known law,' a 'judge with authority to determine all differences according to the established law,' and the 'power to back and support the sentence when right, and to give it due execution'. These defects of the natural state will lead to disputes in the administration of justice, as people will disagree about whether or not an offence has been committed against the natural law, as they will be biased against others in judging that their right has been infringed upon and punishing offenders. Or, they may simply lack the power to protect their rights and liberties when infringed upon.

In order to overcome the defects of the state of nature people agree in a contract to transfer the rights to exercise the legislative and executive powers each had in the natural state ' into the hands of the community'; they agree in common intention to put themselves under whatever specific form of government that the majority of the people may choose. This gives authority to the institutions of government to make laws, administer justice, and execute laws made.

Government is created through a trust arrangement by which equally free persons entering into a contract delegate the right to exercise their legislative, judicative and legislative powers to government as a fiduciary agent to do for them things they find inconvenient to do in the natural state. Therefore, the powers of government are limited by the purpose for making the contract: the preservation of the natural rights of individuals to life, liberty and estate.

Absolute arbitrary power, or government without settled laws with penalties for preserving property (which Locke used broadly to refer to life, liberty and estate), and the use of the force of the community in the execution of such laws, as well as the defence of the state from foreign injury, cannot be consistent with the purpose for which the state was set up.

Contrary to Hobbes, Locke recommended that the legislative and executive powers be wielded not by a single body but by the different branches of government, giving as his reason for the doctrine of the separation of the two powers the common one that both powers in the same hands may tempt persons charged with the making laws to exempt themselves from their execution when they pleased. An absolute sovereign would not have to seek impartiality and could ignore natural rights. Hence the need for a separation of powers.

Of the powers, legislative and executive, Locke proposed that the former is supreme, for what can give laws to another must be superior. In other words, the executive has no authority independent of legislative control, except in the case of prerogative when it is proper for the executive to exercise discretion where the public good is at stake. But executive prerogative can still be limited by laws of the legislature, for it exists for the public good.

Both the legislature and the executive are merely the fiduciary agent and executor of the supreme power of the people for the more effective promotion of their own good. Hence, Locke's conclusion that the community retains its right to exercise the legislative power that it only delegates to government as a trust. When this power is abused it reverts to the community acting through its majority. The sovereignty of the people over government is thus expressed in the election of representative legislative bodies and in the right to remove them.

However, the French-speaking Swiss philosopher Rousseau found this to be an unwarranted limitation of a people's legislative power to govern itself as it saw fit to a single act of setting up a supreme legislature. He rejects the view the sovereignty of the people can be represented at all by a legislative body, which, like all other partial associations will develop a pseudo-general will of its own, directed towards its special interests. This implies people will be subordinated to the will of an interest group more inclined towards its own interests and that they cannot, therefore, be expected to voluntarily obey the state or institutions of government.

In other words, where the sovereignty of the people is represented, the people will not be free to govern themselves according to the general will, directed to their common good, not the good of a particular group. Sovereignty, argued Rousseau, belongs to the people as a whole body, while government is only an agent delegated powers to carry out particular applications of the law people make which can be withdrawn or modified as the will of the people dictates.

The only free government is a direct democracy in which each person gives himself up entirely together with his natural liberty and property to the political community and in return receives the civil liberty to participate actively and directly with others in making laws to defend and protect with the whole common force the person and property of each one of them, and in which each while uniting himself with all, may still obey himself and remain as free as possible by voluntarily obeying the laws of the state he helped put in place.

Rousseau's idea of popular sovereignty made him to be one of the most influential and explicit proponents of the liberal, democratic principles of the French Revolution that paved the way for a new social and political order of a liberal theory of the state that was principally significant for bringing the development of the modern state, as it arose in the wars of religion, and was thought of by Hobbes, to its completion and extension beyond Europe.

The revolutionary movement proclaimed the *Declaration of the Rights of Man and of the Citizen* of 1789 and established the new French constitution of 1791 which put together summarized the principles of a new social and political order of a liberal theory of the state. Against the old feudal societal order and the religiously legitimated political order, the new French constitution and the *Declaration* proclaimed universal principles derived by reason and of natural right as the basis for a new social and political order.

These principles appear in the inalienable human rights and general freedoms (of the person, of thought, speech, the press, work and property acquired through labour and not as a result of one's social class as was with the old societal feudal order). These rights and freedoms come to be seen as prior to the political order. They involve the detachment of the individual from the attributes of birth and status of the family and the release of the individual to full self-referential development on the basis of the equal treatment of individuals subjects by law.

Equality of right is immanent in the law. Law eliminates the particular differences of the individual and guarantees his abstract, general freedom. It proceeds from the right of every citizen to participate personally or through his representative in its foundation. Therefore, subjects come to be seen in the liberal state as bearers of rights, as a body, really a nation.

The concept of being French began to be associated more with equal rights and freedoms rather than with being a subject of the French king. French nationalism was about escape from the old oppression of the monarch and church and the right of participation in the government of the polity that was considered to be a common enterprise that required to be run by all.

The idea of a 'nation' or a 'people' distinguishable from other people by the objective criteria of a common language, culture, race, origin and history gained currency in the 19th century as a basis for the political order of the state that was expressed in the idea of a nation-state.

However, the idea of a 'nation' or a 'people' later lost its binding force, not only in many European states where in clarifying boundaries of the state it was used by authoritarian regimes to deny freedom to identifiable outsiders to the dominant ethno-national group seen as representing the population of the entire territory of the state.

Even in young Asia and African states, to which the territorial state was extended by the need for formal political control and resource exploitation by European states that occasioned the drawing of territorial boundaries, the binding force of the idea of a nation, that was based on shared common experiences of a colonised people of colonial domination and exploitation and the demand for an escape from this, was of a temporary duration, as it ceased with the granting by colonial European powers to colonised peoples the equal right to self-rule.

Given the multi-ethnic nature of the newly independent Asian and African states, there has been need for the development of an ethnically neutral basis for state identification that guarantees rights to individual members of all ethnic groups. This reinforces the view for basing the political order of the state on individual rights and freedoms of those making up the state that is crucially important in specifying the moral norms that rulers share with the ruled, and by which the power of the state is justified to those subject to it as being at all legitimate.

The problem of legitimacy, as we shall explain it, is then that of demonstrating by *a priori* means how the state can have the right or moral authority to impose its laws and to enforce its

borders, and claim that all those residing within the territory of the state, have a general obligation to obey the commands or orders of the state to which they are subject.

The problem with authority is not in the right to decide one's action while conceding an equal right to all, as we shall demonstrate. Rather, it is in the duty to obey the state whether those subject to it agree with it or not. In line with the theoretical view of authority we will adopt, one should obey commands of the state whether or not one agrees with them because one believes that these orders can guide one better than oneself. In this sense, to have authority may mean to have the state's commands acknowledged by those at whom they are directed.

The recognition of the power of the state as rightful or legitimate by obeying its commands is not merely to the advantage of rulers in the consolidation of their rule. The primary motivation is to establish moral principles that serve to define when the state has the moral authority to do the things involved in ruling, principles that set limits to what the powerful may do if they are to maintain their authority over those subordinate to them and which define the appropriate relationship between rulers and the ruled.

The useful starting point in thus specifying what legitimacy consists in that we shall consider is to recognise that it presupposes the existence of a legal system and of power as force exercised according to legal rules, as well as the justification of legality by conferring on power the special moral attribute of authority for it to be maintained.

Legality, as we shall see, has long been held since the time of Max Weber as the basis of the legitimacy of the modern state. In constructing legitimacy from the dimension of legality, the state is spokes of as legitimate insofar as it acquires and exercises power in accordance with impersonal rational rules. Of course laws may assure the regular exercise of power.

However, laws are not by themselves morally binding and worthy of the willing obedience of citizens subject to the state without a consideration of the purpose for which power is exercised, the means available to citizens to ensure government is responsible and responsive to the purpose for which power is exercised and the moral content or norms justifying power to those subject to it. This is what will lead us into a discussion of the three forms of legitimacy: functional, affirmative and moral legitimacy.

From a discussion of the normative criteria for the justifiability of legal rules, we shall develop a societal needs moral justification of the moral authority of the state to rule according to which the state is justifiable to citizens subject to it by the currency of moral norms in society derived from settled convictions of the community that they share with the dominant where the fact that they share them enables society to get along and efficiently meet its social needs and those of its members in improving their welfare.

I.   The State.

One of the fundamental problems of the modern state is that of defining it. As Pierson observes, 'we think that we know the state when we see it, (when it flags us down on the motorway, sends us a final tax demand or, of course, arranges for our old age pension to be paid at the nearest post office') yet it proves extremely difficult to bring it under some brief but generally acceptable definition'[1] to say what we exactly mean by the word state.

More empirically-minded political scientists and sociologists look to institutions of government and the political system of rule or regime in defining the state. Political philosophers are more concerned with uncovering the metaphysical foundation of values and beliefs supporting it and from which it grew in the attempt to properly understand the fundamental problems of political order that present themselves in the state of the present.

The analysis of the modern state characteristically raises two kinds of questions. The first and more normative or evaluative question is: What should the state be and what should it do ? This invites us to consider the proper terms for establishing and maintaining any political authority, for defining the appropriate relationship between the state and its members and the acceptable limits of state action. The second and more 'fact- based' or empirical question asks: what are states actually like ? This invites us to consider the organization of the state.[2]

Initially, we think about these explanations in terms of those which focus upon the organizational *means* of the state and those which concentrate upon its *functions*. In practice, the two approaches cannot be so neatly separated; they overlap. What the modern state is as a matter of fact does imply something about what we can reasonably suppose that it should be.[3]

Our point of departure in understanding the modern state will be with the 'fact-based' question, though the more evaluative claims will not be far away. For, in trying to understand the fundamental problems of political order that present themselves in the state of the present, that is the modern state, we will at the same time be uncovering the metaphysical foundation of values and beliefs supporting it and from which it grew historically. But before we do this, we consider conceptions of the modern state by first looking at the origin of the word state.

I.I.   The Conception of the State

1.1.1. Etymology.

The word state derives from the latin *stare* (to stand) and *status* (a standing or condition).[4] Following the revival of Roman Law studies in 12th century Italy, the word *status* was used to designate the legal standing of all sorts and conditions of men, with rulers being described as enjoying a distinctive "estate royal," *estat du roui,* or *status Regis.*[5]

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[1] Christopher Pierson, *The Modern State,* London: Routledge, 1996, p.5.

[2] *Ibid.,* pp. 6-7.

[3] *Ibid.*

[4] Andrew Vincent, "Conceptions of the State" in *Encyclopedia of Government and Politics,* Vol. 1. 2nd ed.
  Mary Hawkesworth and Maurice Kogan eds., p. 39.

[5] Quentin Skinner, "The State," in *Contemporary Political Philosophy,*
  eds., Robin E. Goodin and Philip Pettit, Oxford: Blackwell Publishers Ltd., 1997, p.3.

The high estate of the ruler was usually acquired through family, rank and most importantly property. This is where we also find the subtle linkage with the word 'estate'. The English word 'state' is, in fact, a contraction of the word 'estate'. This is similar to the old French word *estat* and the modern French *etat*, both of which can imply a profession or social status.[6]

The high estate of the ruler was intimately connected with display. In other words, those in authority had insignia, crests and so forth illustrating their stateliness. Furthermore, the ruler or ruling persons of such standing had potentially the greatest authority and power.[7] Such authority was often seen, in the 13th century classical view of what it means for a *civitas* or *res publica* to attain its best state, as the guarantee of justice, the common good and hence the peace, and happiness of the subjects.[8] The *status* of the ruler was thus linked to stability (of a realm or commonwealth), which derived from the same root.[9] This personal view of political power was later to be revived by proponents of absolute monarchy in the 17th century.

The decoupling of the person of the ruler from the realm or commonwealth over which he ruled, which began with the vital tradition of Italian renaissance republicanism in the 16th century asserting the civic autonomy and independence of the Italian cities from the external interference of the Empire and the Church, came about in the 19th century with the development of the modern state as an apparatus of power existing independently of the status of those who control it, as Skinner points out.[10]

The modern state as we know it today is a political form of order that arose in Europe from the 13th up to the end of the 18th, and part of the beginning of the 19th centuries from specific pre-conditions and impulses of European history and has since then, so to speak, detached itself from its concrete conditions of origin and spread out over the whole world.

There are, therefore, two sides to the development of the state that we shall consider. There is the historical side to the development of the state, as well as the detachment of this political form of order from its concrete conditions of origin (that is, its spiritual-religious determination and formation), which is authoritatively presented in the German sociologist Marx Weber's classical ideal type theory or pure form of the state.

I. I. 2. Max Weber's Ideal Type Theory of the State**.**

In his 1918 long lecture *Politik als Beruf* (*Politics as Vocation*)*,* Max Weber argued against defining the state sociologically in terms of its ends (of, say, realising human virtue or serving spiritual salvation and eternal peace in the afterlife, as in ancient Greece and the medieval *res publica christianus,* respectively[our emphasis]) or its actual tasks, since 'there is scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive and peculiar to political associations: today the state, or historically, those associations which have been the predecessors of the modern state.'[11]

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[6] Andrew Vincent, "Conceptions of the State," p.39.
[7] *Ibid.*
[8] Skinner, " The State," p. 4.
[9] Andrew Vincent, "Conceptions of the State," p.39.
[10] Skinner, "The State," p.11.
[11] H.H. Gerth and C. Wright Mills (trans. and eds.), *From Max Weber: Essays in Sociology,* London: Kegan Paul, Trench, Trubner & Co., Ltd. 1947. p. 77.

Rather, Weber defined the modern state in terms of the specific means peculiar to it, as to every political association, namely, the use of physical force. 'Every state is founded on force,' Weber quotes Trotsky at Brest-Litovsk. 'If no social institution existed which knew the use of violence,' he reasons, 'then the concept of state would be eliminated, and a condition would emerge that could be designated as anarchy in the specific sense of this word.'[12]

'Of course,' Weber emphasized, 'force is certainly not the normal or only means of the state - nobody says that - but force is a means specific to the state. Today the relation between the state and violence is an especially intimate one. In the past, the most varied institutions – beginning with the sib - have known the use of physical force as quite normal.'[13] Here, we understand Weber as making specific reference to historical predecessors of the modern state that were internally involved in embattled relations with the armed segments of its population.

The crucial defining feature of the modern state for Weber is that it is 'a compulsory association'[14] which, unlike its predecessors, 'successfully claims the *monopoly of the legitimate use of physical force* within a given territory.' Using our own words, the modern state is a nation-state in embattled relations with like-states rather than with armed segments of its population. We notice here that in defining the modern state, Weber placed emphasis on territoriality and violence or physical force as two distinctive features of its history.

Weber understands the success story of the modern state specifically to mean that, 'the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.'[15] So, for instance, the law of the state might permit individuals to use violence in defence of self or property. The state might also delegate certain tasks requiring the use of force to other bodies, such as law enforcement to the police. In both cases, 'the state is considered the sole source of the *right* to use violence,'[16] according to Weber.

'Like the political institutions historically preceding it, the state is,' for Weber, 'a relation of human beings dominating other human beings, a relation supported by means of legitimate (that is, considered to be legitimate) violence. If the state is to exist, the dominated must obey the authority claimed by the powers that be.'[17] In this sense, domination is a reciprocal relationship between rulers and ruled, in which the actual frequency of compliance is only one aspect of the fact that the power of command exists.[18]

Weber defines power (*Macht*) as 'the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests'. He thus views the concept of power to be sociologically amorphous to embrace all conceivable qualities of a person and all conceivable combinations of circumstances which may put him in a position to impose his will in a given situation.[19]

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[12] *Ibid.,* p. 78.
[13] *Ibid.*
[14] *Ibid.,* p. 82.
[15] *Ibid.,* p. 78.
[16] *Ibid.*
[17] *Ibid.*
[18] Reinhard Bendix, *Max Weber: An Intellectual Portrait,* New York: Dobleday & Company, inc., 1960, p.295
[19] Guenther Roth and Claus Wittich, eds., *Max Weber: Economy and Society*, Berkeley : University of California Press, 1978, p. 53.

The concept of domination must hence be more precise and can only mean the probability that a command with a specific content will be obeyed by a given group of persons.[20] The effect of this specification is to separate power based on command, whether accidental or formally organized, from power based on coercion (*Zwang*) grounded in the possession of facilities (weapons of all kinds) by means of which physical violence (*Gewalt*) may be exerted.

However, the definition of domination is still too imprecise for Weber's purposes. He therefore makes a further distinction between domination by virtue of a constellation of interests (in particular by virtue of a position of monopoly) and, domination by virtue of authority, that is power to command and duty to obey.[21] He thus distinguishes, quite carefully, between legitimate and illegitimate domination, and thereby recognizes that power can come from the control of resources. But he is more interested in legitimate domination defined as:

> [T]he situation in which the manifested will (*command*) of the ruler or rulers is meant to influence the conduct of one or more others (*the ruled*), and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled had made the content of the command the maxim of their conduct for its very own sake.[22]

The ruled may accept a command from a variety of possible motives including : a sense of duty, fear, 'dull' custom, personal advantage, attachment to the ruler's values, emotional or ideal motives of solidarity.[23] A system of domination will not be stable over time, however, unless the ruled accept that when the ruler claims the right to command the claim is a legitimate one, that is, that it takes place in the context of values/beliefs. In Weber's words, the command must be accepted as 'a "valid" norm'[24] shared between the rulers and ruled.

Weber identified three ideal types of domination. The validity of the claims to legitimacy can be based on the following grounds:

1. *Rational* grounds – resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal domination);

2. *Traditional* grounds – resting on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional domination);

3. *Charismatic* grounds – resting on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him (charismatic domination).

In the case of *charismatic domination*, it is the charismatically qualified leader as such who is obeyed by virtue of personal trust in his revelation, his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma.

In the case of *traditional domination*, obedience is owed to the person of the chief who occupies the traditionally sanctioned position of authority and who is bound by tradition. But here the obligation of obedience is a matter of personal loyalty within obligations of custom.

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[20] *Ibid.*
[21] *Ibid.*, p. 943.
[22] *Ibid.*, p. 946.
[23] *Ibid.*, pp. 946-7
[24] *Ibid.*, p. 946.

In the case of *legal domination*, obedience is owed to the legally established impersonal order. It extends to the persons exercising the authority of office under it by virtue of the formal legality of their command and only within the scope of authority of the office.[25]

Weber then goes on to discuss the organizational structures that implement and correspond to given systems of domination. In his view, beliefs in the legitimacy of a system of domination are not merely philosophical matters. They can contribute to the stability of an authority relationship, and they indicate very real differences between given systems of domination.[26]

The best known of the organizational structures of domination is the pure type bureaucracy that implements the rules of legal domination. Thus, it has the following characteristics:

- A continuous rule-bound conduct of official business.
- A specified sphere of competence (jurisdiction).
- The hierarchical organization of offices; that is, each lower office is under the control and supervision of a higher one.
- The administrative staff consists of officials who have demonstrated an adequate technical training.
- Members of the administrative staff should be completely separated from ownership of the means of production or administration.
- A complete absence of appropriation of his official position by the incumbent.
- Administrative acts, decisions, and rules are formulated and recorded in files.[27]

The bureaucratic administrative staff emphasizes the abstraction and impersonality of the legal norms by which the exercise of power is legitimated.

By contrast, traditional domination gives rise to one of four organizational structures of patriarchialism, patrimonialism, sultanism or feudalism. Weber's main interest lies in patrimonial bureaucracy and feudalism, which most immediately precede modernity. Patrimonial bureaucracy is a system of absolute and undivided rule and in which power is exercised through a coterie of notables or personal retainers – household officials, relatives, personal favourites who are subject to the customary or arbitrary commands of their master. Their loyalty is ensured by the granting of benefices, which are rights to 'own' offices and to which material rewards are attached. By contrast, in a feudal society, officials – vassals, tributary lords – are not personal dependents but socially prominent allies who have given an oath of loyalty and have independent jurisdiction by virtue of the contract they possess.

Charismatic domination does not give rise to an organization. Officials are selected in terms of their own charisma and personal devotion, rather than in terms of status, personal dependence or special qualifications. The theoretical significance of charisma lies only in its capacity to disrupt established claims to authority on the one hand, and its instability and consequent capacity to provide a context for new claims to authority on the other.

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[25] *Ibid.,* pp. 215-216.
[26] Reinhard Bendix, *Max Weber: An Intellectual Portrait,* p. 297.
[27] Guenther Roth and Claus Wittich, eds., *Max Weber: Economy and Society,* pp. 216-219.

Weber warns that the typology of legitimate authority is only an ideal type construct for analytical purposes of the forms of domination there are . No pure instance of it could survive with any measure of stability. Socio-historical instances always include impure mixtures of the forms of domination. However, Weber's interest is not in the classification of organizations implementing the forms of domination but in the transformation of society from power structures based on claims to tradition to the form based on claims to rationality. Power structures based on claims to charismatic personal qualities are only interesting because they operate to effect the transition in a situation of crisis of a particular form of domination.

For our purposes, we wish to state here that, without the socio-historical side to the process of development of the modern state, we cannot properly understand the modern state as it has become and presents itself to us today. It does not allow us to put into proper perspective the fundamental problems of political order that present themselves in the state of the present.

In order for us to better appreciate the fundamental problems of political order that present themselves in the state of the present, we will present the modern state in its wider historical context as having arisen from a two-stage process of secularisation in the investiture conflict and the declaration of the neutrality of the state. In using the concept secularisation, we will steer clear of the varied political associations with the concept and understand it in its original sense vis-à-vis legality or illegality, legitimacy or illegitimacy to mean the withdrawal or release of a thing, a territory or an institution from church-spiritual control and rule.

2.   The Origin of the State.

2.1.   The Ancient Roman State

2. 1. 1.   Background

Our starting point for the historical development of the modern state is a discussion of the ancient Roman state. We discuss the Roman state for two reasons :

(i)   to show how the unique circumstances associated with the collapse of the Roman Empire, as an outgrowth of the ancient Roman state, gave rise to conditions that led to the emergence of the European medieval monarchies, which themselves eventually became the first territorial states.

(ii)   to show how it could be treated by the Renaissance and early legal defenders of modern sovereignty as the origin of the modern impersonal state.

The political history of Roman rule can be divided into two periods: (1) The Roman Republic: spanning from the founding of the city of Rome in 508 B.C. to the rule and assassination of *Julius Caesar* (49-44 B.C.), and (2) The Empire: spans from the rule of Emperor *Caesar Augustus* to the defeat of Rome by the Visigoths in 410 AD.[28]

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[28] Walter C. Opello, Jr. and Stephen J. Rosow, *The Nation-State and Global Order, A Historical Introduction to Contemporary Politics,* London: Lynne Rienner Publishers, 1999, p. 13.

2.1.2. The Roman Republic

In the first republican period of the Roman state, politics was characterised in Roman political imagination by the political dominance of the city of Rome on the Italian peninsula. Roman mythology and history marked Rome as a special place and justified the political rule of the *patricians* who were men of high birth and property (giving them a distinctive "estate royal," *estat du roui,* or *status Regis* or high estate) who could trace their ancestry to one of the original clan heads appointed to govern the city of Rome by its mythical founder Romulus.[29]

The Roman Republic was a mixed state between democracy and aristocracy meant to check and balance each other. Whereas the Roman state was governed by the *Senate,* composed entirely of the *patricians*, senate allowed the wealthier plebeians, or ordinary people, to gain access to the *Consul,* the highest office of magistrates in the Republic. It also created the *Tribunate* to give the poor a voice in the governing of Rome and protect them against the unjust acts of patrician officials which brought about political conflict between them.

In addition to the institutional flexibility of the Republic, a flexibility always kept from bending too far by the senate, the Roman state managed political conflict and allegiance through the oratory of its politicians and their skill at playing the "seamier side of politics… patronage, bribery, vote-buying, tampering with electoral bodies, and the sale of public contracts."[30] So long as politics remained centred in the city of Rome itself, this political practice managed to maintain order and secured for Rome significant wealth and power.

The governing practices of the Roman state focused on two attributes of the patrician class: *virtus* and 'nobility of birth and ancestry'[31]. The respect given to ancestry associated power and authority with *patriarchy*; that is the supremacy of the father of the family and the legal subordination of wife and children. In law, the power of the father was nearly absolute: only he could own property and make contracts. Moreover, the attribute of *virtus* relegated women to the private world of the household, and constructed their public role as "civic cheerleaders, urging men to behave like men, praising heroes and condemning the cowardly."[32]

The patrician attribute of *virtus* or "manliness" militarised Rome. Faced with the military threat of the Carthaginians and mountain tribes, and in need of more fertile farm lands for its largely agricultural economy, the Roman Republican state early had a well-disciplined and effective army composed of all male citizens of Rome. By 275 B.C., the Roman army conquered the Italian peninsula, defeated the Carthaginians in the *Punic Wars* (264-202 B.C.), and conquered Greece and Macedonia between 201 and 146 B.C.

Conquest was a serious business whose success demanded the single-minded attention of those who could subject their own desires to the needs of the Roman republican state. In this sense, the *civic virtue* of the ruling class carried with it both honour and a sense of duty to

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

[30] Sheldon S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* Boston: Little, Brown, 1960, p. 83. ; Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 14.

[31] E. Badian, *Roman Imperialism in the Late Republic,* 2nd ed., Ithaca, New York: Cornell University Press, 1968, p. 8.

[32] Jean Bethke Elshtain, *Women and War*, Chicago and London: University of Chicago Press, 1987, p. 121.

look after the affairs of the state, inclining the class to define the essence of politics in terms that went beyond private interests of members of the class. [33]

The above is most evident in the political thought of Marcus Tullius Cicero (106-43B.C) the great Roman statesman and lawyer who sums up in his political writings the basic notion of the impersonal state of his time to which we still resort, which is based on law that recognizes the rights of all humans, and which exists for the common good of all citizens in the state and not for the person exercising the power of the state, who is also subject to the law of the state.

The definition of the state which Cicero puts into Scipio's mouth in the first book of the *Republic* is instructive . This definition opens with the deceptively simple phrase, *res publica res populi.* Cicero calls the state the 'public thing' or the 'thing of the people', 'the affair of the people' that is equivalent in meaning to the older English use of the word commonwealth:

> *The commonwealth is the affair of the people; but the people is not any and every sort of human association brought together in any fashion whatever, but an association of many united together by consent to law and a partnership for the common good.[34]*

The commonwealth or state exists to secure the common good of all its citizens. To have power meant to act for the common good. But alongside of the common good, Cicero sets the *consensus iuris,* the setting up of laws, as the hallmark of the state; 'for indeed', he adds in another passage, 'I cannot conceive of a people unless held together by consent to law'.[35]

Like Aristotle, Cicero saw the state as the product of human nature: 'the prime cause of this coming together is not so much man's weakness as a kind of human gregariousness.' But, unlike Aristotle, Cicero emphasized not so much the 'good life' it fosters, but the structure of the state, the plan which governs it, the normalization of human relations it ensures.

> *Every people, which is such an association of many as I have described, every city which is an ordering of the people, every commonwealth which, as I said, is the affair of the people, must if it is to last, be governed according to some plan. And this plan must first and always be referred to the cause which brought the city into being.[36]*

Now, the forms of political association may vary according as power is in the hands of one, few, or all. But all political associations alike have one thing in common, according to Cicero. They must use force on the basis of a binding rule of regular procedure: for a government is acceptable only 'if it secures the bond which first joined men together in the partnership of the commonwealth'. That bond is the bond of the law, for it is law that holds society together.

The foregoing passages from Cicero's *Republic* show how intimately linked for the Romans were the idea of law and the notion of the state. However, it is important to observe that Cicero's definition of the state may well not be a strictly juridical definition. In stressing the acceptance of law as a requisite of the state, as a condition of the state's existence, Cicero very properly did not have in mind the acceptance of any law, whatever its content.

Just as unjust laws are not laws, so a state cannot be a state without justice. This, at any rate, was the interpretation which, according to St. Augustine, Cicero himself, through the

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[33] Walter C. Opello Jr. and Stephen J. Rosow, *The Nation-State and the Global Order*, p. 15.

[34] *Republic*, I, 25

[35] Alexander Passerin D'Entreves, *The Notion of State,* Oxford: Clarendon Press, 1967, p. 75.

[36] *Ibid.*, p. 76.

mouthpiece of Scipio, gave to his definition of the state as based on *consensus iuris*.[37] Clearly, if this interpretation is accepted, the state is defined not only in legal, but also in moral terms: the requisite of law leads straight on to a moral evaluation of the quality of law.

Undoubtedly, Cicero's *consensus iuris* can be taken to mean both 'respect for justice' and 'consent to law', and in the former case his definition must be understood as a request for a further justification of the state in terms of justice or the Greek Stoic doctrine of natural law, of that 'true law', which he himself described in the following statement, in which it came to be universally known in Western philosophy from his day down to the 19th century, as

> *right reason in agreement with nature; it is of universal application, unalterable and eternal. By its commands this law summons humans to the performance of their duties; by its prohibition it restrains them from doing wrong. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely ...[God] is the author of this law, its promulgator, and its enforcing judge.[38]*

Under this law all human beings, as Cicero insists, are equal. It is properly binding on all because all humans, endowed as they are with the capacity to reason, can understand it.

> *Reason, which alone raises us above the level of the beasts and enables us to draw inferences, to prove and disprove, to discuss and solve problems, and to come to conclusions, is certainly common to us all, and, though varying in what it learns, at least in the capacity to learn it is invariable.[39]*

All humans are equal in the possession of the capacity to understand God's moral or natural law, discriminate between right and wrong and thus attain to virtue. There are no humans who, under the guidance of nature, cannot attain to virtue. The same virtues are pleasing, the same vices are detestable to all peoples; all humans can be made better by learning the natural law.

Cicero goes so far as to suggest that it is nothing but perversion caused by bad habits and foolish thoughts that prevents humans from being in fact equal.[40] Contrary to Aristotle, Cicero argues that not merely citizens are equal, but all humans. Even the slave whom Aristotle treats as a living implement, in Cicero's view of the natural law, is entitled to a measure of equality. The slave is a human being with the capacity to reason and has rights that must be respected.[41]

The political deduction that Cicero draws from this is that it is impossible for the state to have any existence at all unless it is founded upon and represents the highest justice. Justice requires that the law of the state recognize the rights of all human beings without which human dignity is impossible and protects human beings in the enjoyment of them. Only to law with such moral quality can human beings be expected to give their deserving consent.

However, in terms of pure definition, it is the emphasis on the element of law, not on the quality of law itself, that particularly matters. In this more restricted sense, the importance of Cicero's definition can be said to lie in the fact that it definitely inserted the idea of law in the

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[37] *Ibid.*, p. 77.
[38] *Republic,* III, 22.
[39] *Laws,* I, 10, 30.
[40] *Laws,* I, 10, 28-29.
[41] R. W. Carlyle and A. J. Carlyle, *A History of Medieval Political Theory in the West,* Vol. 1, London: William Blackwood and Sons Ltd, 1903, p. 8.

notion of the state – from which it was not to be dissociated again. And it is precisely in this sense that that definition may be said to be still in the minds of all those who refuse to reduce the state to mere force, but conceive of it as power exercised within the framework of legality.

But there are in the passages just quoted a further notion which call for consideration. This is the idea that there exists in any given political community a supreme power from which the law emanates, and that this according to where it resides, determines not only the form of government, but the very structure of the state. In the traditional Roman view, this supreme power resided in the people, and laws, accordingly, were the expression of people's will.[42]

This principle, that all power derives from the people does not interest us as a political principle, as implying a preference for a 'democratic' regime, founded on popular sovereignty. Among Roman lawyers, the principle has a markedly 'juridical' or legal, not a political, meaning. That principle enabled them to present all the various sources of law as stemming from a common root. They held to it faithfully by construing the power of the prince as being an emanation from, and a conferment of, the original power of the Roman people.

> *What the prince has decided has the force of law, inasmuch as by a special enactment concerning his government the people has conferred to him and upon him the whole of its government and power.[43]*

The important point here is the notion that there is in the state a power which, whether held by the people or by the prince, is the source of law, and thus higher than law itself. This notion can only be properly understood in terms of law itself - as a legal, not as a political, principle. It must not be interpreted as affirming an arbitrary power in the state in the sense that at a certain point, beyond and above the law, the ultimate decision is a matter of force alone.

Rather, it should be taken as a recognition that power, when considered more especially from the point of view of the actual holder of power, is conditioned by law. In other words, it may be absolute but cannot, by definition, be arbitrary. Indeed, this is the only way to understand how, in the Roman doctrine, power was conceived as force controlled by and subject to law, and yet as the source of law, and thus superior to the law which is its own creation.[44]

Clearly, the fact that the lawgiver was the creator of the law did not mean that he was, because of this 'lawless'. The 'state' remained throughout, in the Roman view, a legal structure: and that this was the case is still more apparent if we compare the Roman view with the view represented by Plato and Aristotle and by Greek thought generally, of the exceptional man who may be superior to the law, and indeed be a 'a law unto himself'.

Whilst in the case of Greek political thought it was the personal qualities of an individual which made the bondage of the laws superfluous, in the Roman case, it was the office which conferred a particular position on the lawgiver in respect of the law, regardless of his personal qualifications. But the 'office' itself was created by the law. In a theory of this sort, power appears as something completely impersonal. This, too, is a consequence of the legal approach to the state, of the conception of power as the lawful exercise of force.[45]

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[42] D'Entreves, *The Notion of the State*, p. 77.
[43] *Ibid.*, p. 78.
[44] *Ibid.*, p. 79.
[45] *Ibid.*, p. 80.

The rule of law or the view that law should rule, and not men, was set forth by Cicero in certain famous passages where he discussed the relation between law and power. Speaking in the *De Officius,* of the 'duties of magistrates', he described them in the following terms:

> *The proper task of the magistrate is to be aware that he represents the state and that he must uphold its dignity and honour, respect the laws, define rights, and constantly bear in mind the things that are placed in his trust.*[46]

This view is further developed in a passage from the *De Legibus* :

> *Here you can see what is the power of the magistrate: he must lead, and command what is right, useful, and in accordance with the laws. For as the laws govern the magistrate, so the magistrate governs the people and it may truly be said that the the magistrate is a speaking law, whilst the law is a silent magistrate.*[47]

In Rome, political authorities were to be obeyed because they lawfully exercised certain offices, which were conceived of as having been legally created for the public good, not for the person who exercised the office. The idea that the public good was to be associated with political office rather than the particular office holder would make possible the reference to Rome as an original source of the bureaucratic and legal authority of the modern state. [48]

Roman law not only formed the basis of the Roman state, whose revival in Renaissance Italy was central to the development of the modern state. It also supported the growth of the Roman Empire. Roman law, like most systems of ancient law, was at the start *ius civile* or the law of the city. This early law, as Sabine observes, combined religious ceremonial and ancestral formularies which made it inapplicable to anyone not by birth a Roman.[49] In law, the person and property of the foreigner in Rome were not protected but at the mercy of the citizens.[50]

However, as Roman political power and wealth grew, there came to be a larger body of foreign residents in Rome who had to transact business both among themselves and with Romans. This, Sabine states, necessitated the development of another system of law parallel to the Roman law of the city, known as *ius gentium* or the law of the peoples that was based on practical universal principles of good business practice regarded as honest and fair that justices used to settle legal disputes involving the Roman and non-Roman business class.[51]

The *ius gentium* or law of the peoples was endowed with a more authoritative status by being embedded in the Stoic conception of the law of nature binding on all men. The law of nature held up an ideal of reasonableness and equity as a means of evaluating law at a time when positive law was likely to be narrowly customary. The use of equity as a principle of criticism grew out of the realisation that justice could not be identified with the positive *ius civile* which disadvantaged slaves, women and foreign residents presumed to be of a lower nature.

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[46] *De Officius*, I, 34, 124.
[47] *De Legibus,* III, 1, 2.
[48] Walter C. Opello Jr. and Stephen J. Rosow, *The Nation-State and the Global Order* p. 15-16.
[49] George Sabine, *A History of Political Theory*, 4th ed., Hinsdale, Illinois : Dryden Press, 1973. p. 154.
[50] Perry Anderson, *Passages from Antiquity to Feudalism,* London: New Left Books, 1974, p. 66.
[51] *Ibid.*

2.1.3. The Roman Empire

The imperial expansion of the Roman republican state was driven in good part by the need for additional land in order to grow its economy. The state's revenues were mainly drawn from agriculture, and its more ambitious public works from public buildings, aqueducts and bridges to wide, paved roads were funded from tribute paid by conquered peoples. Moreover, the Roman economy was dependent on a continuous supply of slaves whose primary source was conquered territory. Further, important social reforms, say grain subsidies and distribution of provincial lands to the poor were paid for by wealth from Roman colonies.[52]

The Roman Empire, which expanded greatly under *Caesar Augustus* (r.27-14 B.C.), reached its greatest territorial extent during the reign of *Trajan* (r. 98-117 A.D.). The Roman Empire was administratively divided into Italy proper and the provinces. The city of Rome and the Italian peninsula were governed by the Senate, the supreme council of the empire, whilst the eastern and western provinces outside of the peninsula were governed by the emperor.[53]

The practice of Roman imperial policy was not the same in all of its provinces. On the Italian peninsula and in the eastern provinces, especially Greece and Asia minor, as well as Egypt, Rome established its domination indirectly by using its ideology of civic virtue and manipulating local rulers through its policy of *divida et impera*. In the West, Roman imperial policy required more direct forms of rule which often amounted to the brutal and violent repression of the largely semi-nomadic tribes of Celtic peoples whom Romans called "barbarians" meaning foreigners,[54] taken not to be of the same rational cultivation as Romans.

The expansion of the Roman Empire was followed by several centuries of its eventual decline and fall. Having conquered Britain, all of Europe and the Middle East, and much of North Africa, the Roman Empire in time became stagnant and paralysed by the unmanageability of this immense, far-flung imperial territory.[55] Under *Hadrian* (r.117-138), it ceased to expand.

Lacking a steady supply of slaves and tribute from newly conquered peoples, the Roman Empire could no longer pay for its vast army, large bureaucracy, and extensive public works. Consequently, hard measures were undertaken to meet these increased expenses which included the increase in taxes and the use of force to extract taxes which impoverished many ordinary people, leaving the patricians to be the only ones who were well off.[56] Deteriorating economic and material conditions of Imperial Rome had an effect on existing religious beliefs and traditions of ideas and put the loyalty of the people to the emperor in serious doubt.

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[52] E. Badian, *Roman Imperialism in the Late Republic,* p. 44 ff.

[53] Walter C. Opello Jr. and Stephen J. Rosow, *The Nation-State and Global Order,* p.18.

[54] *Ibid.*

[55] T. Z. Lavine, *From Socrates to Sartre,* New York: Bantam Books, 1984, p. 77.

[56] Solomon Katz, *The Decline of Rome and the Rise of Medieval Europe,* Ithaca, New York: Cornell University Press, 1955, pp. 1-24.

3. The Christianisation of the State.

3.1. The Rise of Christianity.

The official state religion of Rome was paganism. Romans believed in the many gods of the Greco-Roman pantheon, such as Jupiter, Juno, Minerva and Mars, as well as dead emperors who had been deified. These gods were tied to the life-world of the Romans and were seen as protecting Rome itself.[57] Roman Emperors had a supreme religious function. They were seen as representatives of the people to the gods, or they might themselves be regarded as divine.[58]

As the disintegration of the Roman Empire and the harsh methods taken to counteract it created extreme economic conditions, Romans began to turn away from official paganism. They turned either to ancient natural and fertility gods from pre-Roman times or to oriental religions. Initially, the state allowed people to follow these new religions, provided they still formally recognized the pagan gods of Rome and the cult of deified dead emperors,[59] fearing that failure to do so would adversely affect their political loyalty to the Roman emperor.

The followers of these new religions were largely, but not exclusively, from the lower and most economically distressed classes of Roman society, especially slaves and the very poor, who were desperately looking for relief from economic misery. One of these oriental religions was a Jewish sect founded by Jesus of Nazareth in the Eastern province of Judea. At first, his disciples preached among Jewish communities elsewhere in the empire's eastern portion. After the death of Jesus, his disciples began to preach in the western portion of the empire.[60]

Christianity was a revolutionary social movement that spread rapidly, especially among lower social classes as well as aristocratic women, because of its theology which was clear-cut as it pitted good against evil; universalistic since it emphasized the equality of all humans in the sight of God; satisfied the psychological and emotional needs of its followers through its belief in life after death, as well as emphasized concern for the poor (through charity).[61]

At first the Roman state tolerated Christianity. However, because Christians refused to formally recognize the pagan gods of Rome, they came to be seen as enemies of the state. Its monotheism or belief in the universality of one God and its idea that all people everywhere were equal in the eyes of God represented loyalty and obligation ultimately to God.

Subject to the Roman Empire, Christianity insisted on retaining a religious identity separate from its rulers. The words of the Gospel that were used to express this differentiated loyalty were (Matt. 22:21): 'Render therefore to Caesar the things that are Caesar's and to God the things that are God's.' Persecution of Christians followed precisely because the imperial authorities feared those who refused to worship the divinity of the Roman state in favour of a non-nationalistic and higher divinity which lacked geographical (and cultural) boundaries.[62]

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[57] Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 21.
[58] David Miller, ed., *The Blackwell Encyclopedia of Political Thought*, New York: Basil Blackwell Inc., 1987, p. 67.
[59] Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 21.
[60] *Ibid.*
[61] Solomon Katz, *The Decline of Rome and the Rise of Medieval Europe,* Chap. 3.
[62] David Miller, *The Blackwell Encyclopedia of Political Thought,* pp. 67-68.

However, despite, and perhaps because of, the persecutions, the most of which came during the 3rd century when many thousands were tortured and put to death, the number of Christians increased during the 4th century. The prestige of the church increased a few years later when the Emperor *Constantine* embraced the Christian faith, and after the Emperor *Theodosius* declared Christianity the official religion of the Roman Empire and outlawed paganism.[63]

As the Roman Empire disintegrated, the Christian Church replaced the politico-military institutions of Rome with its canon law, ecclesiastical courts, and administrative hierarchy of priests, bishops, and cardinals. The capital of the empire became the capital of the Catholic Church. In effect, the Church had become the Roman Empire,[64] a form of organized rule that did not recognize the territorial boundaries to its authority over its community of believers.

3.2.   The Germanic Invasions

The fall of the Western Roman Empire in the 5th century changed the configuration of Europe, as invasions by semi-nomadic Germanic tribes from the Baltic region separated it from the rest of the Mediterranean, where the Eastern Roman or Byzantine Empire survived another millennium until it fell to the Ottoman Turks in 1453. The fragmentation of the centralized Roman administration into semi-autonomous political military units by the successor Germanic kingdoms, combined with the universalism of the Catholic Church, produced the political space we call Western Europe which later gave birth to the modern-day state.

The Germanic tribes, which settled in the West alongside the Roman population, often found the *ius gentium* or imperial law designed for the government of diverse peoples irrelevant to the needs of their economy based on agriculture and animal husbandry whose major concern was survival. Land was the property of everyone. The regulation of land possession and the respective rights of jurisdiction and administration, once the preserve of the Roman centralized system, became in an agrarian economy the domain of decentralized centres of power or assemblies, dominated by military kings who waged war to protect their kin.[65]

Many of the clans making up Germanic tribes were matrilineal (that is, they traced descent and inheritance through the female line) which gave women important public roles as leaders of the clan and involved them in decision-making.[66] Finally, because the tribe was seen to be the family writ large, there was no distinction within the tribe between the public and private.

However, where tribes settled within the Empire, there grew a new society, which brought together Roman and Germanic institutions and practices. In many places, Germanic peoples abandoned communal ownership and accepted the Roman idea of private ownership. Increasingly, women were subordinated to men as Germanic tribes accepted Rome's patriarchal inheritance laws that relegated women to the private world of their household.[67]

For their part, the Romans gradually accepted the Germanic practice of *comitatus* which was a band of young men who attached themselves to a military king to whom they pledged unswerving loyalty. As more Germanic peoples were drafted into the Roman army, most

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[63] Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 22.
[64] *Ibid.*
[65] David Miller, *The Blackwell Encyclopedia of Political Thought,* p. 329.
[66] Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 23.
[67] *Ibid.*, p. 25.

generals during the last centuries of the empire were of Germanic origin. Gradually, loyalty to Rome was replaced by personal loyalty to a particular commander. Thus, the chain of command from the emperor downward was broken and the Roman Imperial state was left without a reliable means of defence.[68] This opened it to full-scale Germanic invasion.

Germanic peoples were ruled by kings or chieftains who were military, political, and religious figures expected to lead the tribe into combat, settle disputes and act as intercessors with the gods through religious rituals. Successors were chosen from among a chief's direct, male descendants by the still-living king or chieftain, but had to be confirmed through acclamation by an assembly of the leading warriors of the tribe. Thus, loyalty was based on persons, which meant that followers were loyal only to a certain king or chieftain from a certain clan.[69]

Politics and power did not operate according to the same logic in barbarian tribes as it did in the Roman Empire. The King or chief was the leader of the tribe. He did not have the power to command the obedience and actions of persons in the tribe. Rule was a matter of performing religious rituals, maintaining peace among the tribe's clans and leading the tribe into battle, activities that accorded the chieftain honour and respect and, hence, authority.[70]

After the conversion of Germanic peoples to Christianity, the Catholic Church was called upon to consecrate, and thereby authenticate, a new chieftain. According to the Catholic Church, and in accordance with the age-old theory of the divine right of kings, a king was appointed by God to maintain order, protect the weak, support the Church and defend the faith. Thus, barbarian kings in the collapsed Western Roman Empire held secular authority under the sacred authority of the Church – in contrast to the Eastern Roman Empire where the emperor, seen as representing Christ on earth, held both secular and sacred authority.

Consequently, in the West, kings wielded secular power, which they acquired through heredity, and the Church wielded sacred power, which it acquired, in its view, from God. Therefore, a political imagery emerged here that defined politics both in terms of the clan-based, personalized, lateral connections of Germanic tribal rule and in terms of the trans-local, depersonalised, and hierarchical politics of the Roman Catholic Church.[71]

The Germanic kingdoms had no formal political organization, no specialized administrative departments, no civil service, and no standing army, as did the Roman Empire. Governance was handled by the king's household, which was not a problem when the kingdoms were small. As they grew larger, the kingdoms were broken up into subunits called *counties,* and a representative of the king, called a *count*, was selected to govern each one. Counts ruled their counties as the king ruled the kingdom: they had full military, judicial, and financial power.[72]

This way of governing had a serious setback in that counts might always have been tempted, as Tilly observes, to use their independent military resources on behalf of their own interests while paying little attention to the interests of their nominal sovereigns.[73] Few Kings were able to raise an army quickly enough to be effective against bands of fast-moving invaders.

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[68] Joseph R. Strayer, *Feudalism,* Princeton, NJ: Van Nostrand Press, 1965, p 156.

[69] Reinhard Bendix, *Kings or People: Power and the Mandate to Rule.* Berkeley and Los Angeles, CA: University of California Press, 1978, p. 21-35.

[70] Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 30.

[71] *Ibid.*

[72] Strayer, *Feudalism,* pp.29-30.

[73] Charles Tilly, *Coercion, Capital and European States, AD 990-1990,* Oxford: Blackwell, 1990, pp. 39-40

Thus, when local counts defended themselves, they turned the land they defended into their personal property and not the king's. Great families began to take root in specific counties.[74]

The only institution surviving the collapse of the Western Roman Empire was the Roman Catholic Church, which preserved the Roman cultural inheritance and remained the primary source of learning in its domain until the 13th century; the bishop of Rome, known as the pope, became the leader of the western church. His supremacy was never accepted in the east.

In the year 800 AD, Charlemagne, king of the Franks, who subdued western Germany, large parts of Italy and chunks of surrounding countries, was appointed and crowned in Rome as king of the Holy Roman Empire by Pope Leo III, who wanted to cut the remaining ties with the Byzantine Empire. The Holy Roman Emperor would in turn appoint the Pope. The Holy Roman Empire lasted a millennium that saw a further fragmentation of Germanic kingdoms which weakened the Holy Roman Empire and the development of the Catholic Church.

Thus, the strong monarchy which was associated with the early Germanic kingdoms was fragmented into semi-autonomous political units which eventually came to be treated as private domains of those whom the king had appointed to indirectly administer them. These units could be bought and sold, divided among heirs, mortgaged, and given in marriage.[75] In other words, royal power across Europe eventually decomposed into feudalism.

3.3.   The Feudal Polity of Estates.

The political-military practices in the fragmented successor barbarian kingdoms have been known since the 17th century as feudalism. The word feudalism is based on the medieval Latin *feudum,* which was borrowed from the old German *fee*, a commonly used term in the Middle Ages which meant cattle or land held under certain obligations. [76]

Even though the word components are from the Middle Ages, the concept of feudalism was not invented until the 17th century, in the modern era. The word feudalism as a system of personal and cliental relationships of lord and vassal was introduced to legitimise the modern state by contrasting the modern conditions of the 17th century with the pre-modern conditions of the previous age(s) that were surpassed by the modern ones.

The political-military practices of the feudal epoch did not constitute a "state" in any formal sense. Feudal governance lacked key features of a state, such as permanent structures for decision-making, a standing army, or an extensive administration that operated according to codified law. Most important, though, people were personally loyal to counts and kings, their identity as human beings was not bound up with a secular political order they belonged to.[77]

Feudalism as a social world of 'overlapping and divided authority' was a pyramidal structure of individuals bound together by oaths of loyalty. The king was at the top of this pyramid and was the sovereign, or overlord, of the entire kingdom. Several dukes or princes, who held

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[74] Strayer, *Feudalism*, p 34

[75] *Ibid*., pp. 15-20.

[76] Gianfranco Poggi, *The State, Its Nature, Development and Prospects,* Cambridge: Polity Press, 1990, p. 36.

[77] Opello Jr. and Rosow, *The Nation-State and Global Order.,* p. 34.

huge tracts of land within the kingdom, were his direct vassals. At the bottom of the pyramid were the simple knights, who held sufficient land to maintain themselves and their families.[78]

The glue that held the feudal "state" together was the vassalage defined as "a system in which a free man binds himself personally to a lord, offering him loyalty and military service in return for protection and the use of property (usually land)."[79] It was entered into by doing homage, which was a ceremony in which the lesser man, kneeling before the greater man with hands joined as if in prayer, pledged himself and his loyalty to the greater man.[80]

The core constituent relationship of feudalism was the personal bond between lord and vassal, with land (and its people and product) – the *fief* – being loaned by the king or lord in exchange for the military support of the vassal. However, the vassal also had to provide the king or lord with "counsel" or advice on, say, whether or not to go to war.

The king prevailed as conqueror, tribute-taker and rentier, not as head of state that durably and densely regulated life within the feudal realm. He was sovereign only in the sense of being *primus inter pares* "first among equals", and therefore his authority was limited by the clearly recognized rights and privileges accruing to the three estates of the realm – the first estate of the clergy, the second estate of the nobility, the third estate of the bourgeoisie. [81]

Together, the crown and estates governed the feudal estate (a medieval version of the modern state). This was made possible through the *great council*, composed of members of the three estates that represented their estates as corporate groups such as the nobility and clergy, which eventually included other corporate groups such as lawyers, professors, and physicians.[82]

Thus the feudal "state" was constitutional in that the three estates represented the realm of the king, voiced protest, restated rights, gave advice, and agreed to financial requests. But, since the king needed the consent of the estates to gain access to their financial resources, especially for war, a struggle ensued between the crown, on the one hand, which needed the money, and the council of estates, on the other hand, which had it to give out but expected justification.[83]

The clergy that included the bishops and abbots of its religious orders and the knights, masters, and grandmasters of its military orders were equal in status and power to the kings and counts of secular nobility. Many dioceses and religious orders acquired a lot of wealth and land. The military orders were powerful as they were made up of armed monks.

The great power and wealth of the church created tensions between the church and feudal kings, as the latter frequently sought to control the appointment of the clergy and looked for an opportunity to deprive them of their rightful property. The threat of excommunication was usually enough to persuade an unwilling king to bend to the wishes of the church.[84]

The clergy served an important politico-cultural function in medieval Europe. They comprised its intellectuals, and as such they interpreted the meaning of scripture, elaborated Church doctrines, and carried on the traditions of classical philosophy and science inherited

[78] R. W. Southern, *The Making of the Middle Ages,* New Haven, CT: Yale University Press, 1953, p. 16-17.
[79] Jeffrey Burton Russell, *Medieval Civilization,* New York: John Wiley& Sons, 1968, p. 86.
[80] *Ibid.,p.204.*
[81] Pierson, *The Modern State,* p. 43.
[82] D'Entreves, *The Notion of the State,* Oxford: Clarendon Press, 1967, p. 90.
[83] Sidney Painter, *The Rise of Feudal Monarchies,* Ithaca, New York: Cornell University Press, 1951, pp. 1- 4.
[84] Opello Jr. and Rosow, *The Nation-State and Global Order,* pp. 37-38.

from Rome. The clergy came to be respected for its learning as well as feared for its enforcement of canon law, under which, among other things it could accuse people of heresy (i.e., adherence to religious teaching contrary to Church dogma) and execute them.

Few people outside the clergy and the nobility were literate in Latin, the *lingua franca* of religion and government that inevitably enabled the ecclesiastics to penetrate, and take charge of, the administration of the kingdoms and other feudal entities. The use of Latin gave the clergy enormous power because the Church communicated legal and moral ideas.[85]

The unity that existed during the medieval times came not through identification with the political association of the state but through a system of religious rituals and ceremonies institutionalised by the Church throughout Western Europe that served not only the religious function of reinforcing and strengthening faith, but the socio-political function of establishing identity in Christendom, that universal community to which all Christian believers belonged.[86]

Of course, many areas in Europe were not thoroughly Christianized until the 12th and the 13th centuries. The establishment of Catholic dogma was a struggle, a political act that often involved persuasion and the use of military force in the form of Crusades instigated by popes and undertaken by Christian kings to win to the faith different peoples from different places.

The universal idea of Christendom that acted as a bond of union of different peoples and places both retarded the emergence of an understanding of the territorialized political community and made available a powerful alternative community identity across the otherwise politically fragmented lives of medieval peoples.[87] In this alternatively imagined Christian community, the political was subordinated to the religious, as was reason to faith.

The subordination of the political to the religious resulted in the limitation of the power of the kings, who were obliged to pledge their ultimate allegiance to the Pope. Kings did not see themselves as the sovereign power of the state. They continued to express their claims to power in terms of their being the representatives of a universal Christendom in Europe. Of course, this allowed them to claim rightful authority in areas outside their territorial domain.

However, the rise of Christianity raised the problem of conflicting Church-state loyalty. Situations were bound to arise in which the jurisdictional lines between Church and state were hazy. Indeed, it sometimes appeared to the conscientious Christian that the secular authority had invaded sacred territory. When this happened, the Christian, if he were concerned about an eternal life of salvation, had to obey the authority (the Church) which was of consequence.

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[85] *Ibid.,* p.38.
[86] *Ibid.*
[87] Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought,* Boston: Little, Brown, 1960, chap. 4.

4. The Development of the Modern State

4.1. The First Stage of the Secularisation of the State: The Investiture Controversy

When the Holy Roman Empire, one of the medieval European authorities that emerged around 800 AD, developed as a strong force, it was the first real challenge to Papal power, and a dispute of jurisdiction between *imperium* and *sacerdotium* or the secular and religious powers emerged which came to be known as the investiture controversy.

While on the surface it was over a matter of official procedures, regarding the appointments of offices, underneath it was in a legal sense a powerful struggle over the proper boundaries of authority, of what the one or other, the king or pope, might lawfully do within the limits of his office. [88] In this sense, and in this sense only, was the investiture controversy the most significant conflict between secular and religious powers in medieval Europe.

The investiture controversy began as a dispute in the 11th century between the Holy Roman Empire and the Gregorian Papacy concerning who would control the appointments of church officials (investiture). Prior to the controversy, the appointment of church officials, while theoretically a task of the Church, was in practice performed by secular authorities, as a way of maintaining a balance of power between secular authorities and the Church.

This was in line with the theory of the two swords expounded as early as 494 by Pope Gelasius I (492-7). According to the Gelasian theory of the two swords that was universally accepted in the 11th century, and which summed up the teachings of the Early Christian Fathers on the relationship between Church and state, human society is divinely ordained to be governed by two authorities, the spiritual and the temporal, the one wielded by priests and the other by secular rulers, in accordance with divine law and natural law respectively. No man, under the Christian dispensation, can possess both *sacerdotium* and *imperium.*[89]

By *sacerdotium* is meant both the institution of the church and also its higher, or longer term moral responsibility. By *imperium*, or *regnum* (whether one is referring to an empire or a kingdom), is meant both the institution of the civil authority and its particular functions, which were to keep order within society and protect it generally from external forces that were bent perhaps on its destruction. That the two powers should be balanced within the state conveyed the sense of how Christian theorists conceived the nature of good government.[90]

Within this circle of ideas, there was properly speaking neither church nor state in the modern meaning of both terms. The emperor and pope were not representatives of the secular order, and of the religious order, respectively. Rather, as Boeckenfoerde notes, both stood within a single mystical body of the Christian state (as St Augustine wrote in the *City of God*), the king as church advocate and patron of Christianity, just as consecrated or blessed a person as the pope: in both the king and pope lived the *res publica Christiana* as a secular-religious unity.[91]

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[88] Sabine, *A History of Political Theory,* pp.216-217.

[89] *Ibid.,* p. 216.

[90] David Miller, ed., *The Blackwell Encyclopedia of Political Thought,* p. 68.

[91] Ernst-Wolfgang Boeckenfoerde, *Staat, Gesellschaft, Freiheit,* Frankfurt am Main: Suhrkamp, 1976, pp. 44-45.

However, collision between *sacerdotium* and *imperium* became inevitable, principally because a substantial amount of wealth and land was usually associated with the office of the bishop or abbot and bishops and abbots were themselves usually part of secular government, due to their literate administrative resources. In this situation, it became beneficial for feudal kings to appoint to (or sell) office someone who would be loyal. So, feudal kings appointed bishops and abbots who often cared very little for their spiritual duties and offices.

The feudal degradation of the spiritual role of the Church was challenged by the wave of reform which spread with the growth of the congregation of monasteries subject to the abbot of cluny. Cluniac monasteries formed an order centralized under the control of a single head subject to no external authority other than the Papacy. They were thus qualified to be the medium for spreading reform in the church so as to make it an autonomous spiritual power.

It was a foregone conclusion, therefore, that the increased consciousness for the independence of the Church should bring with it a demand for the purification of the Church for permanently raising the papacy from the degradation into which it had too often fallen, and for an autonomous control of the pope over ecclesiastical officers. It was precisely the more conscientious churchmen who felt most keenly the menace of the spiritual office occasioned by the entanglement of the clergy in the business of the administration of secular government.

The investiture controversy began in earnest with the accession to the papal throne of Gregory VII in 1073. Specifically, Gregory prohibited the lay investiture of bishops, that is, the part played by secular rulers in the appointment of the higher clergy. Gregory knew this would not be possible so long as the king maintained the ability to appoint the pope. Therefore, the very important first step was to liberate the papacy from control of the king.

An opportunity came in the 1050s when Henry IV became king at a tender age. Gregory with other churchmen loyal to his cause seized the opportunity to free the papacy while the king was still a child and was unable to react. In 1059 a church council in Rome declared secular leaders would play no part in the election of popes, and created the college of cardinals, made up entirely of church officials for the election of the pope. The college of cardinals remains to this day the method used to elect popes. Once the church had gained control of the election of the pope, Gregory was now ready to attack the practice of lay investiture on a broader front.

In 1075, Gregory declared in the *Dictatus Papae* that as the Roman church was founded by God alone, only the pope was the sovereign head of the whole church, and that the pope alone could appoint or depose churchmen or move them from see to see. His legate was to take precedence of bishops and all other officers of the church; he alone could call a general council and give effect to its decrees. Papal decrees, on the other hand, could not be annulled, and a case once brought before the papal court was not subject to the verdict of anyone else.

In short, Gregory's theory of government was monarchical, not in the sense of the feudal monarchy, but more nearly in the sense of the imperial Roman tradition; under God and the divine law the pope was absolute. The Pope had now become effectively the head of the Church and no longer felt himself to be dependent on the emperor for its good government.

This radical departure from the Early Medieval balance of power ended the practice of the lay investiture of bishops and reduced the influence of the bishops in secular government. What the king (and bishops) really desired was the continuation of a state of affairs which, in fact if not in theory, had given the king a predominant voice in papal affairs. The king's case was weak in theory but strong in respect of historical precedents, and as he was forced into a

defensive position, he was obliged to appeal against the practically novel claim of Church autonomy, to the generally admitted theory of two independent spheres of authority.

By the time Gregory VII made the ruling prohibiting the lay investiture of bishops, Henry IV was no longer a child, and he immediately challenged the ruling in his letter to Gregory of March 1076 with an attempt to secure the deposition of the pope and call for the election of a new pope. Gregory in turn responded to the letter by excommunicating and deposing the king.

In excommunicating the king, Gregory still basically operated within the bounds of the old political-religious unified order.[92] The position taken by Gregory, in opposition to Henry IV was a natural, if extreme, development of the church's admitted jurisdiction over questions of morals. Gregory defended his action on the grounds of the right and duty of a spiritual authority to exercise moral discipline over every member of the Christian community. He claimed the same right of discipline over a king that as pope he had over every Christian.[93]

By implication, the coordinate authority of a secular ruler over spiritual and moral matters disappeared. The king, indeed the ruling office, was banished from the new *ecclesia*, lost his spiritual place and was dismissed into the secular order. The king was no longer the consecrated person, but a layman like every other believer. He was subject, in regard to the fulfilment of his Christian duties, like everyone else, to the verdict of the pope's spiritual authority on which his legitimacy would depend, while the spiritual authority of the pope was not itself in any conceivable sense at all subject to the verdict of the worldly authority.[94]

The revolution that took place here went beyond the secularisation of the king. The political order was dismissed at the same time with him from the sacred and sacramental sphere, it was secularised and as such set free on its own course, to its own development, as a worldly enterprise. What was thought of as devaluation in order to resist the king's claims to power in the sphere of the *ecclesia* turned out in the indissoluble dialectic of the historical process to be emancipation: the investiture conflict constituted politics in its own sphere; politics was no longer capable of a spiritual but a worldly, that is, a natural rights justification.[95]

The break with the old order comes to be self-evidently expressed in the action of Gregory VII in excommunicating Henry IV, removing him from the Church which was in line with the old political-religious unified order. In effect, however, this amounted to the claim that the right to excommunicate carried with it the right to depose the king, of course for adequate cause, and thus absolve subjects from their allegiance to the king.

The German aristocracy was happy to hear of their king's deposition. They would use the cover of religion as an excuse for a continuation of the rebellion started at the first battle of Langensalza in 1075 and for the seizure of royal powers. The aristocracy would claim local lordship over peasants and property, build castles which had previously been outlawed, and build localized fiefdoms to break away from the empire.

In order to create within the old religious-political unified order, through papal absolution, the preconditions for the exercise of his office again, Henry IV had no choice but to back down, needing time to mobilize his forces to suppress the rebellion in his kingdom. In 1077, he

[92] Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit,* pp.45-46.
[93] George Sabine, *A History of Political Theory,* pp. 222-223
[94] Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit,* p. 46.
[95] *Ibid.*

travelled to Canossa in northern Italy to meet the pope and apologize in person, submit himself to the pope in admission of his misdeeds and reconcile with the Church.

As Gregory VII revoked the excommunication of the repentant king, Henry IV, Böckenförde states, he limited himself to the religious act, reconciliation of the king with the Church and the neutralization of the political consequences of the revocation of the excommunication, and therefore the reinstatement in royal office. As pope, he no longer concerned himself with taking over the secular functions of government, it was the king's business.[96] He was more concerned with the independence of the Church in spiritual matters. Herein was the separation of the spiritual from the worldly matters, the religious from the political order evident.

The secularisation of politics was in its first stage only able to realise spiritually more by regaining its autonomy than it directly realised historically and politically. In this first stage, secularisation effected only the release of the political order from the sphere of the sacred and holy the direct orientation towards the spiritual goal of salvation and eternal peace in the next life and not the release from its religious foundation.

After the investiture conflict and being set free on the way to worldly politics, state rulers and kingdoms were still Christian rulers and governments, the Christian religion was still without doubt the foundation for a minimum amount of existential common ground of homogeneity between rulers and the ruled that gave the state its legitimacy. Even the movement towards the development of the state, as well as the delivery of politics oriented towards the formation of and struggle for power in the 15th and 16th centuries occurred first of all in this context.

However, while state rulers and kingdoms remained Christian rulers and governments, a movement towards a natural rights justification of politics began unfolding as early as the writings of Thomas Aquinas (1225-1274). For Aquinas, politics was to be governed by principles of natural law independently of direct religious supervision. He revived Aristotle's ideas about the ability of human reason to discover for itself moral laws that governed humans.

Following from this, Natural Law, that was only indirectly linked to God's law in having developed from "participation in the Eternal Law by rational creatures",[97] reflected humankind's nature as a rational being with the power of insight by virtue of which it is able to discover the moral rules of natural law governing human conduct in order to achieve the good life. These moral rules of natural law are evident from the inclination of humans to do good. When legally enacted for the regulation of human conduct, they constitute Human law.

In order to be just, argues Thomas of Aquinas, Human Law must accord with and never contravene the Natural Law. A just law must accord with reason that has as its first and principal object the ordering of the common good, rather than the advantage of an individual or group. For this reason, law has behind it a general authority rather than an individual will.

In order to give legitimacy to law, it must be derived from the whole community or some one person selected by it who represents it. Thus, law is the product of the whole people acting for their joint good, either by legislation or by the less tangible means of creating custom, or it has the sanction of a public personage to whom the care of the community has been delegated.

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[96] *Ibid.*

[97] St. Thomas Aquinas, *Summan Theologica,* in *St. Thomas Aquinas on Politics and Ethics,* trans. and ed., New York: W. W. Norton, 1988, p 46.

The most important position adopted by St. Thomas is that a law which fails to conform to natural law is no law at all. St. Thomas seems to have said that laws which conflict with the requirements of natural law lose their power to bind morally. In other words, a government which abuses its authority by enacting laws which are unjust (against the common good) forfeits its right to be obeyed, for it lacks moral authority or right to rule.

St. Thomas does not suggest that one is always justified in disobeying government which abuses its authority by enacting unjust laws. He was obviously fearful that resistance to authority might become a standard of political right and bring about disunity. Hence, St. Thomas only allows for disobedience in exceptional circumstances when it is a matter of avoiding 'scandal' (that is, a corrupting example to others) or civil disorder.

The Thomistic view of the authority of the ruler to govern as derived (indirectly- via natural law) from God who exercises it through the participation of the people, or a superior public personage representing them, in the making of its own laws, and as existing for the moral purpose of the common good by which his/her authority is limited in order to check its arbitrary use or abuse of authority, became more explicitly political in later Christian thinkers.

Their concern was with the absolute and abusive authority of both the spiritual and secular rulers. They sought to limit the absolute and abusive authority of the spiritual and secular rulers by making the people the ultimate source of authority. The people have the inherent power to make its own laws which is effected through a representative body that stands and speaks for the people. This saw the revival of Roman republican ideals of a distinct political realm separated from the status or standing of the prince or the Pope.

4.2   Renaissance: Revival of Roman Republicanism

This new spirit of politics emerged most forcefully in the city states of Renaissance Italy. From the 13th through to the 16th century, powerful Italian states such as Florence, Venice, Pisa, Milan, and Siena struggled to establish their independence from both the Catholic Church, which claimed the right to control them directly, and the Holy Roman Emperor.

Among the republican theorists of Renaissance Italy, the main reason for this basic commitment was that all power is liable to be corrupt. All individuals or groups, once granted sovereignty over a community, will tend to promote their own interests at the expense of the community as a whole. Thus, the only way to ensure that the laws promote the common good must be to leave the whole body of citizens in charge of their own public affairs.[98]

This basic insight was followed up within the republican tradition in two separate ways. It was first used to justify an assertion of civic autonomy and independence, and so to defend the *libertas* of the Italian cities against external interference. This demand was initially directed against the Holy Roman Empire and its claims of feudal sovereignty or lordship over the *Regnum Italicum* or Italian kingdom. But the same demand for *libertas* was also directed against all potential rivals as sources of coercive jurisdiction within the cities themselves.[99]

It was claimed, on the one hand, against local feudatories, who continued to be viewed as the most dangerous enemies of free government. And it was even more vehemently directed

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[98] Quentin Skinner, "The State," p. 9.
[99] *Ibid.*

against the jurisdictional pretensions of the Church. The most radical response against the jurisdictional pretensions of the Church, that was embodied, for example in Marsilios's *Defensor pacis* of 1324, took the form of insisting that all coercive power is secular by definition, and thus that the church has no right to exercise civic jurisdictions at all.[100]

Like Dante Alighieri, Marsilio of Padua described the pope as " a mere administrator of sacraments who could have no power and make no laws in temporal fields".[101] The reason, as Giovanni da Viterbo expresses it, is that the ends of temporal and ecclesiastical authority are completely distinct. The implication being that, if the church tries to insist on any jurisdiction in temporal matters, it will simply be "putting its sickle into another man's harvest".[102]

The other way in which the basic insight of the republican tradition was developed was in the form of a positive claim that the precise type of government under which a city could hope to remain "in a free state" will be a *res publica* in the strictest sense. The community as a whole must retain the ultimate sovereign authority, assigning its rulers or chief magistrates a status no higher than that of elected officials. Such magistrates must in turn be treated not as rulers in the full sense, but merely as agents of *ministri* of justice, charged with the duty of ensuring that the laws established by the community for the common good are properly enforced.[103]

The underlying assumption that liberty can be guaranteed only within a republic can already be found in many Florentine writers. Dante, for instance, speaks in the *Inferno* of the move from seigneurial (monarchical) to republican rule as a move from tyranny to a *stato franco*, a state or condition of civic liberty. However, the equation between living in a republic and living "in a free state" was worked out with the greatest assurance by the leading republican theorists of Venice and Florence in the course of the high Renaissance.[104]

Among Florentine theorists, it was of course Machiavelli in his *Discorsi* or *Discourses on the First Ten Books of Titus Livy* who provided the most famous version of the same argument. As he explains at the start of book II:

> *It is easy to understand whence the love of living under a free constitution springs up in peoples. For experience shows that no cities have ever increased in dominion or riches except when they have been established in liberty.*

The reason, he goes on

> *is easy to perceive, for it is not the pursuit of individual advantage but of the common good that makes cities great, and there is no doubt that it is only under republican regimes that this ideal of the common good is followed out.*[105]

From the point of view of the present argument, it can be said that it is within the republican tradition of thought that we encounter, for the first time, a vindication of the idea that there is a distinct form of "civil" or "political" authority which is wholly autonomous, which exists to regulate the public affairs of an independent community, and which tolerates no rivals as a

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[100]Quentin Skinner, *The Foundations of Modern Political Thought: The Renaissance,* Vol. 1. Cambridge: Cambridge University Press, 1978, pp. 16-22 ; J. H. Hinsley, *Sovereignty,* 2nd ed. Cambridge: Cambridge University Press, 1986, pp. 82-88.
[101] Hinsley, *Sovereignty,* p. 83.
[102] Quentin Skinner, "The State," p. 10.
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*

source of coercive power within its own *civitas* or *res publica*. It is here in short, that we first encounter the familiar understanding of the state as a monopolist of legitimate force.[106]

This view of "civil government" was of course taken up in France and England at an early stage in their constitutional development. National monarchies were emerging in France and England in the 15th century: England with the installation of Henry VII, the first Tudor King; France with the end of the Hundred Years War; Spain with the marriage of Ferdinand and Isabella. In the German and Italian domains that remained divided into a multitude of princely states, unification was held up until the 19th century.[107]

The political task of the new monarchs in France and England was to centralize administration and law and subdue the medieval representative institutions of the clergy, the nobility and the bourgeoisie that obstructed it. For this they needed standing armies and revenue from taxes with which to support them. New weapons, notably the cannon, helped to nullify the castles of the nobility.[108]

The collection of revenue, as well as the growth of the general right to tax, led to the commercialisation of economic life and the loss of control by the nobility over taxation and with it the power to influence the king, as medieval kings came to take into their possession the instruments of rule that had up until then been dispersed among the estates.[109] They began to construct an administrative apparatus for the formulation and execution of centralized, territory-wide rule. This structure became more public, official, distinctive, and visible. Society came to be seen more as composed of private individuals and not corporate groups.[110]

Large territorial political units emerged, and politico-military power became concentrated in the institutions and offices of the king and his court. As a result, public officials eventually replaced individuals who held political power as a private possession, and the centralized medieval monarchy, the precursor of the modern territorial state, came into being.[111]

As power and authority came to be concentrated more in the institutions and offices of the king and his court, they were increasingly depersonalised which involved, first the development of uniform impersonal systems of law, such as *common law* in England and Roman *code law* on the continent.[112] The second element of the increasing depersonalisation was the development of a new language of politics and rule revolving around the idea of *state sovereignty.*

Medieval kings claimed a different kind of sovereignty from that of kings in feudal "states". For, as authority, the legitimate right to exercise power, came to be vested in the state itself, and in the person of the king for as long as the king represented the imagined unity of the state, the king claimed to be not simply *primus inter pares* ("first among equals") but a separate, overarching *sovereign* – that is, one whose power was free from control by all others.[113]

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[106] *Ibid.*

[107] Anthony Quinton, *Political Philosophy,* p. 309.

[108] *Ibid.*

[109] Walter C. Opello, Jr. and Stephen J. Rosow, *The Nation-State and Global order,* p. 54.

[110] Gianfranco Poggi, *The Development of the Modern State,* pp. 77-79.

[111] Strayer, *Feudalism,* p. 67.

[112] Walter Opello, Jr. and Stephen J. Rosow, *The Nation-State and Global Order,* pp. 54-55.

[113] Ernst H. Kantorowicz, *The King's Two Bodies: A study in Medieval Political Theology,* Princeton: Princeton University Press, 1957.

In this new language of politics, the king became more and more the symbolic representation of the apparatus that managed public affairs. In other words, the state became identified less with the authoritative decisions of private persons, in this case the king, and more as an ongoing apparatus of processes, offices, and institutions under the supervision of the king.[114]

When Machiavelli wrote his most famous book, the *Prince*, most of Italy was divided among five states: Naples, Milan, Venice, Florence and the Papal states. He shared with Marsilio a common hatred for the unwarranted interference of the Pope in secular matters that he held to be responsible for the disunity of Italy and the inability of any other ruler to unite the land, leaving it a prey to the French, the Spaniards and the Germans. In Machiavelli's view:

> *a country can never be united and happy except it obeys wholly one government, whether a republic or a monarchy, as is the case in France and Spain; and the sole cause why Italy is not in the same condition, and is not governed by either one republic or one sovereign, is the Church.*[115]

Apart from a common hatred for the unwarranted interference of the pope in secular matters as a cause for the disunity of Italy which Machiavelli shared with Marsilio, observes Sabine, the two men had similar ideas about the political utility which religion ought to have as its secular consequences. However, Machiavelli's secularism was more thoroughgoing than that of Marsilio in that, whereas Marsilio defended the autonomy of reason by making Christian morals otherworldly, Machiavelli condemns them because they are otherworldly. He believed Christian virtues were servile in their effects on character, and contrasted Christianity unfavourably with the more virile religions of antiquity.

> *Our religion places the supreme happiness in humility, lowliness, and a contempt for worldly objects, while the other, on the contrary, places the supreme good in grandeur of soul, strength of body, and all such other qualities as render men formidable... These principles seem to me to have made men feeble, and can control them to become an easy prey to evil-minded men, who can control them more securely, seeing that the great body of men, for the sake of gaining paradise, are more disposed to endure injuries than to avenge them.*

Machiavelli does not deny the important role of religion in the state in making citizens good and obedient. Nevertheless, when confronted with a choice between a strong and successful state and the Christian virtues of private goodness, the ruler must not actually believe in the religion of his subjects or practice their virtues.

Machiavelli's indifference to Christian morals has sometimes been described as an example of scientific detachment. Machiavelli was not detached; he was merely interested in a single end of acquiring and maintaining state power, and indifferent to all others. Political and military measures were almost the sole objects of Machiavelli's interest and he detached these from religious and moral considerations, except as the latter were politically expedient.

The purpose of politics was to acquire and maintain state power itself, and the standard by which he judged it was its success in doing this. He therefore never hesitated to pass sweeping judgments on rulers who allowed their states to grow weak. His judgment was formed empirically by the observation of rulers he had known or by studying historical examples.

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[114] Walter Opello, Jr. and Stephen J. Rosow, *The Nation-State and Global Order,* p. 56.
[115] Nicollo Machiavelli, *The Prince and Discourses* ed., Max Lerner, New York: Random House, 1950, p.12

He used history, exactly as he used his own observation of rulers he had personally known, to draw maxims or rules for successful political behaviour in order to write something 'useful to the enquirer'. Machiavelli's method is illustrated in the third chapter of the *Prince*, where 'the general rule' (*regola generale*) that 'he who enables someone to become powerful ruins himself' is drawn from Machiavelli's practical experience of Louis XII's campaign in Italy that made Popes Alexander VI and Julius II strong at his own expense.

The originality of Machiavelli's method lies in his use of the growing Renaissance's emphasis on man's behavioural patterns instead of Christian moral precepts as a basis for politics. His method is based on a pragmatic and utilitarian approach to politics, trying to be useful (*utile*) by getting at the real truth of the matter (*verita effetuale*) instead of dealing merely with imaginary situations. The Renaissance impelled Machiavelli to re-examine things other than from the clerical point of view, that is from a purely secular basis.

Machiavelli is regarded as the founder of the true political philosophy.[116] He makes an emphatic break with the tradition of political philosophy associated with the names of Socrates, Plato, Aristotle, Augustine and others. The entire tradition had failed both in its quest for truth and in its inability to lead men toward peace. The classics failed, because they based their political doctrines on considerations of man's highest aspirations, the life of virtue and the society dedicated to the promotion of virtue.[117] They conceived of human beings not as they are but as they ought or wished them to be, they rendered themselves ineffective; as Bacon said, they made imaginary laws for imaginary commonwealths.

The actualisation of the best regime, Machiavelli contended, depends on *Fortuna,* that is, on luck, chance or something which is essentially beyond human control. *Fortuna,* Machiavelli said in a famous passage in the *Prince*, " is a woman and it is necessary, if you wish to master her, to conquer her by force."[118] Machiavelli's realistic assessment of politics revives the Roman idea of *virtù*, that is the individual's (male's) own abilities to master the circumstances he finds in the world. Politics, he declared, demanded that the ruler knows how men live.

Machiavelli was not concerned with how men do live merely in order to describe it; his intention is rather, on the basis of how men do live, to teach princes how they ought to rule and even how they ought to live. A ruler should know that if he is to live happily and his rule is to be strong and effective men's nature is such that a wise ruler cannot and should not do in every matter what is good or else he will be ruined by so many who are not good.

Underlying Machiavelli's realistic view of politics was the assumption that human nature is essentially selfish, and that the effective motives on which a statesman must rely are egoistic, such as the desire for security in the masses and the desire for power in rulers. Government is really founded upon the weaknesses of the individual who is unable to protect himself against the aggression of other individuals unless supported by the power of the state.

Human nature, moreover, is profoundly aggressive and acquisitive: men aim to keep what they have and to acquire more, Machiavelli argues. Neither in power nor in possessions is there any normal limit to human desires, while both power and possessions are always in fact limited by natural scarcity. Accordingly, men are always in a condition of strife and competition which threatens to lead to anarchy unless restrained by the force behind law.

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[116] Leo Strauss and Joseph Cropsey, *History of Political Philosophy,* Chicago: Rand McNally and co. 1972, pp. 272-273.

[117] *Ibid.*pp. 370-1.

[118] Niccolo Machiavelli, *The Prince and the Discourses,* ed., Max Lerner, New York: Random House, 1950, p.94.

The power of the ruler is therefore built upon the very imminence of anarchy and the fact that security is possible only when government is strong. Machiavelli constantly takes this conception of government for granted, though he nowhere develops it into a general psychological theory of behaviour. He frequently remarks, however, that humans are in general bad and that the wise ruler will construct his policies on this assumption.

In particular, Machiavelli insists that successful governments must aim at the security of property and of life and everything else; since these are the most universal desires in human nature. When completed by a systematic psychology to explain and justify it, this phase of Machiavelli became the political philosophy of Thomas Hobbes.

However, Machiavelli is not so much concerned with badness or egoism as a general human motive, as with its prevalence in Italy as a symptom of social decadence. Italy stood to him as an instance of a society, with no such partial mitigation, as the monarchy brought in France and Spain.

> *In fact it is in vain to look for anything good from these countries which we see nowadays so corrupt, as is the case above all others with Italy, France and Spain also have their share of corruption, and if we do not see so many disorders and troubles in those countries as is the case daily in Italy, it is no longer so much owing to the goodness of their people…as to the fact that they have each a king who keeps them united.[119]*

The problem in Italy, then, was to found a state in a corrupt society. By corruption, Machiavelli meant in general the decay of private virtue and civic probity and devotion that renders popular government impossible. It included all sorts of disorder and violence, great inequalities of wealth and power, the destruction of peace and justice, the growth of ambition, disunity, lawlessness, dishonesty and contempt for religion. Machiavelli was convinced that, in such circumstances, no effective government was possible except absolute monarchy.

A successful state needs to have a single man at the top, and the laws and government that he creates determine the national character of his people. Moral and civic virtue grows out of law and when a society has become corrupt, it cannot reform itself. It can only be reformed when a law-giver takes control of it and restores it to the healthy principles set up by its founder.

> *But we must assume, as a general rule, that it never or rarely happens that a republic or a monarchy is well constituted, or its old institutions entirely retained, unless it is done by only one individual; it is even necessary that he whose mind has conceived such a constitution should be alone in carrying it into effect.[120]*

Machiavelli was not thinking only, or even mainly, of political organization, but of the whole moral and social constitution of a people, which he conceived to grow out of the law and from the wisdom and foresight of the law-giver. There is practically no limit to what a ruler can do, provided he understands the rules of the art. The lawgiver is the architect not only of the state but of society as well, with all its moral, religious and economic institutions.

From this point of view, it is easier to understand the double standard of conduct for the statesman and the private citizen which forms the main connotation of Machiavellism. The

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[119] *Ibid.,* p. 321.
[120] *Ibid.,* p. 323.

ruler as creator of the state is not only outside the law, but if law enacts morals, he is outside morality as well. There is no standard to judge his acts except the success of his political expedients for enlarging and perpetuating the power of his state.

The frankness with which Machiavelli accepted this conclusion and included it in his advice to rulers is the chief reason for the evil reputation of the Prince. He openly sanctioned the use of cruelty, perfidy, murder, or any other means provided only they are used with sufficient intelligence and secrecy to reach their ends.

> *It is well that, when the act accuses him, the result should excuse him; and when the result is good, as in the case of Romulus[his murder of his brother], it will always absolve him from blame. For he is to be reprehended who commits violence for the purpose of destroying, and not he who employs it for beneficent purpose.*[121]

Machiavelli's prince, the prefect embodiment of shrewdness and self-control, who makes capital alike of his virtues and his vices, was little more than an idealized picture of the Italian tyrant of the 16th century. He is a true, if exaggerated, picture of the kind of man that the age of the despots threw into the forefront of political life. Though the most extreme examples occurred in Italy, Ferdinand of Spain, Louis XI of France, and Henry VIII of England were of the same type.

There is no doubt that Machiavelli had a temperamental admiration for the resourceful, if unscrupulous, type of ruler and a deep distrust of half-way measures in politics which he believed to be due to weakness more often that to scruple. His admiration for this type sometimes betrayed him into serious superficialities of judgment, as when he held up the unspeakable Cesare Borgia as the model of a wise prince and asserted that his political failure was due to nothing but unavoidable accident.

Machiavelli never erected his belief in the omnipotent lawgiver into a general theory of political absolutism, as Hobbes did later. His judgment was swayed by two admirations for the resourceful despot and for the free, self-governing people which were not consistent. He patched the two together, rather precariously, as the theories respectively of founding a state and of preserving it after it is founded.

Therefore, he recommended despotism only in two somewhat special cases, the making of a state and the reforming of a corrupt state. Once founded, a state can be made permanent only if people are admitted to some share in government and if the prince conducts the ordinary business of the state in accordance with law and with due regard for the property and women of his subjects, since these are matters on which men are most easily stirred to resistance.

The preservation of the state, as distinct from its founding, depends upon the excellence of its law, for this is the source of all the civic virtues of its citizens. Even in a monarchy the prime condition of a stable government is that it should be regulated by law. As a result, Machiavelli no longer equates the idea of governmental authority with the powers of particular rulers but as embodied in a structure of laws and institutions which rulers may be said to have a duty to maintain.

Machiavelli favoured a gentle rule wherever possible and the use of severity only in moderation. He said explicitly that government is more stable where it is shared by the many

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[121] *Ibid.,* p. 324.

and he preferred election to heredity as a mode of choosing rulers. He spoke for a general freedom to propose measures for the public good and for liberty of discussion in order that both sides of every question may be heard before a decision is reached. He believed that the people must be independent and strong.

Closely related to his favourable judgment of popular government where possible, and of monarchy where necessary, is his exceedingly low opinion of aristocracy and the nobility. More than any other thinker of his time he perceived that the interest of the nobility are antagonistic both to those of the monarchy and of the middle class, and that orderly government required their suppression or elimination.

Side by side with Machiavelli's dislike of the nobility stands his hatred of mercenary soldiers. Here again he had in view of one of the most serious causes of lawlessness in Italy, mercenary troops who were ready to fight for whosoever would offer the largest pay, who were faithful to no one, and who were often more dangerous to their employer than to his enemies.

Such professional soldiers had almost wholly displaced the older citizen-soldiers of the free cities, and while they were able to terrorize Italy, they had proved their incompetence against better organized and more loyal troops from France. Machiavelli had a clear perception of the advantage which France gained from nationalizing her army and consequently he was never tired of urging that the training and equipment of a citizen-army is the first need of a state.

The art of war is therefore the primary concern of a ruler, the condition of success in all his ventures. Before everything else he must aim to possess a strong force of his own citizens, well equipped and well disciplined, and attached to his interests by ties of loyalty to the state. With such a force the ruler can maintain his power and extend limits of the state; without it he becomes a prey to civil strife within and to the ambition of neighbouring princes.

It took several centuries for the principle of state sovereignty that unified political rule within a specific territory to develop. The authority and growing power claimed by centralizing monarchs were contested throughout the period of the renaissance and beyond, in some cases successfully, by the Catholic church, as well as the nobility of most European kingdoms.

Moreover, kings did not yet clearly see themselves as representatives of the sovereign power of the state. Most kings continued to frame their claims to power in terms of their being representatives of a universal Christendom in Europe and claim the authority to bring the coercive power of the state to bear against heretics inside and outside their jurisdiction. This set the stage for a prolonged period of religious persecution and confessional war against the Protestant reform movement across Europe. From the pacification of warring confessional groups followed the second and final stage of the secularisation process that gave primacy and supremacy to politics over religion which was reduced to an affair of the private citizen.

4.3.   The Second Stage of Secularisation : The Christian Reformation and the
            Development of State Sovereignty.

An important catalyst for the transformation of medieval monarchies into an idea of sovereignty that unified political rule within a specified territory that linked the local to the national and the rest of the world, in ways that broke with the traditions of medieval Christendom, was the Reformation and religious violence it bred between Catholics and

Protestants from the great slaughter of Protestants in Paris 1572 to the Thirty Years War (1618-1648).[122] With the Church in disarray, freedom was given to the state to begin to develop. Princes began to tolerate less and less manipulation from the church. The monarchy began to detach itself from the Church for its legitimacy and looked towards its own power.

The Reformation was a movement of revolt against the Catholic Church by those who considered it corrupt, more concerned with maintaining its power and privileges than with guiding the spiritual salvation of Christendom. At first, reformists were members of the Catholic clergy, notable among whom was the German monk Martin Luther (1482-1546).[123] But soon they hardened themselves into separate churches as Lutherans, Presbyterians and Calvinists and spread throughout Europe, especially among the bourgeoisie and the nobility.

Reformers, known as Protestants argued that salvation depended on individual faith alone. Protestant religious practice emphasized the private, personal relationship between the individual person and God; this relationship, they argued, obviated the need for the Catholic Church's liturgy, sacraments, and official hierarchy of priests, bishops and the pope. Indeed, Protestants argued that the Catholic Church's statues and images of its saints amounted to false gods; some even viewed the Catholic hierarchy, including the Pope, as the Antichrist.[124]

After the religious split became reality, the European Christendom was faced with the question of how possible it was for different religious confessions to live together with each other in a common political order. By virtue of the meaning that the Christian religion had for the political order as the foundation for a minimum amount of existential common ground of homogeneity between rulers and the ruled that gave the state its legitimacy, the conflict between the Catholics and Protestants was not only religious, but at the same time political.

For both Catholics and Protestants, the conflict was about which one of them professed the true faith or pure Gospel; as a fight about truth, the conflict allowed for no compromise. After the determining conditions of spiritual and worldly violence that theologians and canonists on both sides of the confessional divide fostered, it was considered the responsibility of the worldly political order to openly suppress error with its own means and punish heretics.

Heresy was therefore determined by the church but punished by temporal rulers as a civil crime.[125] The inquisition, for instance, was the judicial institution established by the Catholic Church that gave the papacy the *de jure* power to seek out and try people guilty of heresy while secular rulers were given *de facto* power to do the coercive work of punishing offenders.

Both Catholics and Protestants alike were in agreement that not only rebellious heretics that at the same time fanned political unrest were to be punished; it was the responsibility of the secular order to also punish non-rebellious heretics that did not wreck havoc by fomenting political unrest. For, they were both to be considered blasphemous. Indeed, observes Boeckenfoerde, this understanding of faith as a legal-like relationship and the continuous working tradition of the *polis* religion precluded a culture of civil tolerance.[126]

From the foregoing consideration, it can be safely surmised that it was thus unavoidable that the question of religion became a matter of politics. In the 16th and 17th century, Europe

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[122] Walter C. Opello, Jr. and Stephen J. Rosow, *The Nation-state and Global Order,* pp. 69-70.
[123] *Ibid.*
[124] *Ibid.*
[125] David Miller, *The Blackwell Encyclopedia of Political Thought,* p. 332.
[126] Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit,* p. 49.

experienced a wave of the horrifying Wars of Religion between Catholics and Protestants; political and religious interests, exertion for the true faith and a striving for the extension of and claims for political power continuously crossed and combined with each other.

This religious-political conflict took place specifically in three different places in Europe with different outcomes: in Spain under Philip II who dedicated his monarchy to overthrowing Protestant states of other countries, in the Holy Roman Empire in the conflict between the King and the feudal estates, in France in the conflict between Catholics and Huguenots (Protestants) and the nobility over the ruling of the country. From these Wars of Religion followed the second stage of secularisation of the pure worldly and political foundation and legitimation of the state; with the coming up of the second stage of secularisation, the separation of religion and politics was in principle at the same time also settled.[127]

It may remain to be seen how far this development was a result of the intention of those involved at the time, but this development arose from the logic of the historical situation and the conditions of human agency already given in it. The distinction between the spiritual and worldly, first used by popes to justify church supremacy, now developed its strength in the direction of the primacy and supremacy of politics. The demands of the spiritual authority on worldly power (to suppress error with its own means and punish heretics) that ensued in the wake of the confessional split, contained the threat of permanent political conflict.

However, because politics placed itself above the demands of the conflicting religious confessions, it emancipated itself from them and actually allowed for a pacified political order, peace and security for the people and for everyone to be restored. It is within this context that the development of the position of power of the King in France, the "cuius regio eius religio" (a subject's religion should be that of his ruler) in the Holy Roman Empire, the already applying idea of sovereignty that unified political rule within a specified territory at the turn of the 16/17th century and the political thinking of Thomas Hobbes should be understood.

The first major wars of religion were the series of wars fought between Catholics and Huguenots (Protestants) from the middle of the 16th century to the development of the position of the king of France as neutral authority standing above the warring religious confessions and finally to the Edict of Nantes in 1598. In addition to religious elements, they also involved a struggle for influence over the control of the ruling of the country by Francis II who took over from his Father Henry II as King of France at the tender age of fifteen.

Understanding that the monarchy was in a weak position, the noble family of Guise and the Catholic League, on the one hand, and the noble family of Bourbons, who were mostly Catholic, but for political reasons supported the Protestant cause, on the other hand, struggled for control of the rule of France. The most powerful Catholic family of Guise would eventually gain control of the young monarch and, for all practical purposes, the French state.

When Francis II died, barely one year after taking over from his father, his younger brother, Charles IX assumed the throne. The accession of Charles IX, who was barely ten years old, clearly called for the appointment of a regent (a regent is the ruler of a kingdom when the king is incapable of exercising that rule), as the position was openly coveted by the Catholic family of Guise.[128] In 1560, Catherine de Medici succeeded in thwarting this ambition by accepting the regency of her young son.

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[127] *Ibid.,* p. 50.

[128] Quentin Skinner, *The Foundations of Modern Political Thought: The Reformation*, Vol. 2, Cambridge: Cambridge University Press, 1978, p. 243.

However, Catherine still found her government under enormous pressure from the Catholic family of Guise to impose its policy of religious uniformity by force, in particular the use of weapons to suppress the Huguenots (Protestants). But she understood right off that the Catholic family of Guise would be a threat to her if she allowed such a policy. For, it would be equivalent to overcoming their rivals amongst the Huguenot nobility, and would thus be equivalent to making themselves completely dominant in the Kingdom's affairs.[129]

As Catherine de Medici quickly perceived, her best hope of maintaining her own authority was to steer the throne carefully between the powerful and conflicting interests that surrounded it. Although she was a sincere Roman Catholic, she was prepared to bring about an agreed measure of religious toleration for the Huguenots, hoping in this way to avoid the domination of the most powerful Catholic family of Guise. This accordingly became her policy throughout the 1560s and later that of her son Charles IX, a fact which does much to explain the initial cautious approach adopted by the Huguenots.

During the early stages of the religious wars, the Huguenots adopted a strategy of avoiding as far as possible any direct confrontation with the government of Catherine de Medici. This relatively passive strategy was partly forced on the Huguenots by their lack of any very powerful basis of popular support.[130] Moreover, such support, as they did succeed in winning, tended to be concentrated in the more remote corners of the land. On the other hand, the Guises, who had formed the Catholic League, were aided by Philip II of Spain who was dedicated to overthrowing Protestant states and were therefore in a very strong position.

While the foregoing considerations virtually forced the Huguenots to proceed at the outset with as much caution as possible, it was also rational for them to hope that they might be able to emerge from the growing factional conflicts with the Catholics with a relief from persecution and a measure of official toleration for their faith. The most obvious reason for this optimism was that Catherine de Medici made it clear throughout the early phases of the civil wars that she was emphatically in favour of a policy of compromise.[131]

Another reason why it was rational for the Huguenots to pin their hopes on winning an official measure of toleration in the 1560s was that an influential group of moderate Catholics had by that time come to the conclusion that any attempt to impose a policy of religious uniformity by force would constitute a serious tactical even if not a moral mistake. This became the characteristic platform of the so-called party of *politiques* ("politicians"), who argued that uniformity was no longer worth preserving, however valuable it might be in itself, if the cost of enforcing it seemed liable to be the destruction of the commonwealth.[132]

The *politiques'* case was mainly presented by those who had no belief in religious toleration as a positive moral value, but merely believed in the unfortunate necessity of conceding it as the only alternative to endemic civil strife. As already mentioned, this became the policy of the government itself, and as the crisis between Catholics and Protestants deepened, this position was brilliantly and very influentially expounded in a series of speeches by Michel de l' Hôpital, the moderate chancellor nominated by Catherine in May 1560.

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[129] *Ibid.*
[130] *Ibid*., p. 241.
[131] *Ibid*., p. 242
[132] *Ibid.* p. 249.

In spite of the unquestioned value of his earlier advocacy for a return to a unified faith in the hope of trying to bring about civil peace in the state, l' Hôpital quickly came to realize, however, that the price of trying to impose the time honoured demand for 'one faith, one law, one king' (*une foi, une loi, un* roi) was becoming ruinous. This appears most clearly in his opening address to the representatives of *Parlements* assembled at St. Germain in January 1562. He proceeds from two uncontentious claims: that religious uniformity is always desirable, but that 'those of the new religion have become so much bolder' of late that any attempt to enforce uniformity will now be liable to constitute a grave danger to civil peace.

L' Hôpital then moves on to introduce two new principles of far-reaching significance in the development of a specific thinking of the state, as we shall later see. He argues that while government may be said to have a duty to defend the established religion of the state, it has an even more compelling duty to 'maintain the people in peace and tranquillity' Where these two duties collide, he is now prepared to contemplate separating the fate of the kingdom from that of the Catholic faith, insisting that the fundamental question at issue 'is not about the maintenance of religion but about maintaining of the commonwealth.[133]

He then offers the reassurance that such a loss of unity need not have very catastrophic effects, since religious uniformity is not essential to the well-being of France. He cites with approval the claim that 'many can be citizens who will not be Christians', and insists that it must be possible for the kingdom as a whole 'to live in peace with those who have different opinions', if only because it has already been proved in the case of individual families that 'those who remain Catholic do not cease to love and live in amity with those who adopt the new faith'.

L' Hôpital's conclusion is thus that religious uniformity is simply inapplicable in the existing circumstances of the time. The enforcement of uniformity 'may be good in itself' but 'experience has shown it to be impossible'.[134] Any attempt to enforce uniformity by suppressing rival religions merely leads to the jeopardising of peace in the name of religious unity, whereas the only sane policy is thus to tolerate rival religious confessions. Consequently, l' Hôpital urged measures for the toleration of Huguenots to avert civil strife.

The government of Catherine de Medici was led to support religious toleration in the shape of the Edict of Toleration (1562), which allowed the Huguenots to worship publicly outside of towns and privately in towns. On March 1, however, the Guise family attacked a Huguenot service at Vassy and slaughtered everybody they could get their hands on. The Edict was revoked, under pressure from the Guise faction. This immediately prompted the Prince de Conde to mobilise on behalf of the Huguenots, and so sparked off the first religious wars.

The pattern of unending warring conflict about the renewal and extension of the religious liberties of the Huguenots by Catherine de Medici and their limitation by the Guise family was repeated in 1563 following the signing of the Edict of Ambiose, in 1568 following the signing of the Peace of Longjumeau. The government completely lost the power to steer a *politiques'* course after the violent renewal of fighting in 1568, at which point l' Hôpital was forced to concede defeat and withdraw from public life.

The summer of 1572 saw the final collapse of Huguenot hopes on the possibility of winning an official measure of religious toleration from government when Catherine suddenly abandoned any remaining chance of a *politiques* settlement by throwing in her lot with the

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[133] *Ibid.* p. 251.
[134] *Ibid.*

Guise family. Skinner discounts the traditional story that Catherine acted out of a growing hatred for the Huguenot spokesman Admiral Coligny's influence of the young king.[135]

Instead, he does not doubt that Catherine begun to fear the increasing military as well as political strength of the Huguenots, especially after they began to threaten her perpetual efforts to preserve peace abroad as well as to contain the factional struggles at home. The immediate threat in the summer of 1572 arose out of Coligny's demands for a campaign in support of the developing – and partly Calvinist – opposition to the rule of the Spanish in the Netherlands. This was the point at which Catherine decided to have Coligny eliminated.[136]

The first attempt to assassinate Coligny was made on August 22, 1572. It failed and Charles was persuaded by Catherine, the power behind her son's throne, that the Huguenots would take revenge against the monarchy. Therefore, Charles IV approved in a pre-emptive strike, a day before St. Bartholomew's Day, the murder of the entire Huguenot leadership. The outcome, the massacre on the eve of St. Bartholomew's day, involved the slaughter of some three thousand Protestants, including de Coligny, on the occasion of the marriage of Marguerite de Valois to Henry of Navarre when many Huguenots were in Paris for the event.

The St. Bartholomew Massacre was a turning point in both French history and the history of the European Christian church. Both Philip II of Spain, a fanatical Catholic himself, and Pope Gregory XIII declared themselves well-pleased with the outcome, which was naturally viewed with horror by their religious opponents throughout Europe. Throughout Europe, Protestant movements slowly transformed into militant movements. In France, the Huguenots were forced into a direct revolutionary confrontation with the monarchy.

When Charles IX died in 1574 and Henry III succeeded him, France had become a basket case. On the one hand, the noble family of Guise had formed a Catholic League, which was violent and fanatical. On the other hand, the Huguenots were filled with a passion for revenge. Like his mother, Henry tried to stay in the middle of the conflict. Unlike his mother, he had immense popular support for his middle course; the St. Bartholomew Massacre had deeply troubled moderate Catholics and the growing conflict upset moderate Huguenots.

By the middle of the 1570s, however, the very ferocity of renewed conflicts began to be treated by many political writers as the clearest possible sign that a policy of toleration was in fact the only sane course of action for the government to pursue. The outcome was the revival, with a renewed sense of urgency, of the suggestion that such a policy needed to be adopted as the only means of avoiding the total ruin of France.

This revival was of course partly the work of the Huguenots themselves, many of whom clearly feared, after the massacres of 1572, that unless they could somehow promote a policy of toleration once again, they might actually find themselves facing complete annihilation. Of course, this renewal of the *politiques* programme was more than a mere reflex on the part of the Huguenots, for the same arguments were soon developed once again by a number of moderate Catholic writers, the most important being Jean Bodin .

Bodin developed the argument for the renewal of the *politiques* programme in his *Six Books of a Commonwealth* in 1576.[137] He makes no pretence of dismissing the great and enduring value of religious uniformity. Like l' Hôpital, be begins by admitting that nothing does more

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[135] *Ibid*., p. 242.
[136] *Ibid.*
[137] *Ibid.,* p. 253.

to 'uphold and maintain the estates and commonwealths' than religious unity, since it serves to provide 'the principal foundation of the power and strength' of the state. He insists that since all 'disputations of religion' tend more than anything else to bring about 'the ruin and destruction of commonwealths', they ought rather to be 'by most strict laws forbidden', so that any religion which is 'by common consent once received and settled, is not again to be called into question and dispute'.

The foregoing sentiments are matched, however, by a reluctant yet absolutely clear perception that, since rival religions represent such a potent source of discord, they must always be tolerated where they cannot be suppressed. Bodin's conclusion here is best expressed figuratively when he says, 'the best advised princes' must 'imitate the wise pilots, who when they cannot attain unto the port by them desired, direct their course to such port as they may'.

Bodin's first reason for accepting this conclusion was that although the government may be said to have a duty to uphold the unity of religion, this cannot alter the fact that 'the health and welfare of the commonwealth' must remain 'the chief thing the law respects'. Where good order is found to be in conflict with religious uniformity, the maintenance of the good order must always be treated as a higher priority.

The other and even more emancipated argument he advances – very much in the spirit of l' Hôpital – is that the 'wars made for matters of religion' – which, as he observes have been taking place 'almost in all Europe within this fifty years' – are not in fact 'grounded upon matters directly touching his estate'. The implication is that all religious disputes ought in the end be seen as irrelevant to the essential business of government.

The duty of the prince is to ignore and avoid all such arguments as far as possible, separating the welfare of his kingdom entirely from the fate of any particular religion and thereby ensuring that he is never driven 'to make himself party, instead of holding the place of a sovereign judge'. In our view, Bodin saw in royal power the mainstay of peace and order and thus sought to raise the king, as centre of national unity, above all religious sects and political groups.

The view of the *politiques* that royal power had a duty to maintain the good order of the commonwealth led to the development of a Machiavellian-type absolutist thinking of the state that is relevant in a time of disorder. Against the scholastic natural rights tradition, the *politiques* presented a formal conception of peace, developed not from the quest for truth, but from opposition against civil war. They gave primacy to this conception of peace, that is the silence of weapons, the external peace and security of life over dispute about religions truth.

In the words of Boeckenfoerde, civil war brings not a win or subjugation of heresy but hate, misery and enmity; weapons were not a suitable means to overcome the confessional split. Formal peace, as against the horror and suffering of civil war is for the *politiques* an independent justifiable good in itself. It is only to be brought about through the unity of the land that is only possible through the observance of the order of the king as the highest law; the king is the neutral authority which stands over and above the warring parties and citizens. Therefore, only the king is in a position to bring about peace and to preserve it.[138]

The diversity of the confessions is for the *politiques* no longer a state but a church matter. The king has to ensure that his subjects do not seek to destroy themselves in bloody and insidious

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[138] Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit,* p. 51.

obstinacy. He cannot and should not himself decide the question of truth. The separation of politics from religion, the claim of autonomy asserts itself here without much ado, but emphatically. This general policy of settlement between politics and religion that left the question of truth to be decided by the subjects themselves and hence gave them freedom of conscience prevailed under Henry IV of Navarre, a Huguenot, who took over from his cousin Henry III, a catholic himself.

By the mid-1580s, Henry III tried to put himself at the head of the Catholic League, while remaining in favour of a moderated settlement with the Huguenots. This was considered anathema to the Catholic extremists who wanted the Huguenots completely suppressed. In May 1588, the League rose against the king and drove him from Paris into exile.

In exile, Henry III made an alliance with his Huguenot cousin, Henry of Navarre. However, before the two Henrys could attack Paris, Henry III was assassinated by a fanatic monk in July 1589. Since he had no children, Henry III named Henry of Navarre as the heir to the throne before he met his death. Henry of Navarre was a *politique*; he believed that the peace and security of France was far more important than imposing his religious views.

The situation on the ground in 1590 was that king Henry IV of France, as Navarre had become, held the south and west, and the Catholic League the north and east. He knew that he had to take Paris if he stood any chance of reuniting the Kingdom. Realising that there was no prospect of a Protestant king succeeding in fanatically Catholic Paris, Henry IV announced his conversion to the old faith and was crowned at Chartres in 1594.

As Henry IV of Navarre finally converted to the Catholic faith to realise his existing claim to the throne, Boeckenfoerde explains, this was no longer a win of the true religion, like it may have appeared from the outside but a win of politics.[139] In order finally to give peace to the country, to guarantee the rule of the king, a change of faith took place. The Catholic League fought on but enough moderate Catholics were won over to the throne by the conversion to make the party of the Catholic League ultimately one of extremists only.

The first thing that Henry IV of Navarre did after he externally pacified the country, following the signing the Peace of Vervins that saw the withdrawal of the Spanish from France, was to negotiate for the Edict of Nantes that granted to Huguenots the right to worship publicly, to occupy public office, to assemble, to gain admission to schools and universities, and to administer their own towns. Rather than being a genuine toleration of Protestants, the Edict was a permanent truce between the two religions, guaranteeing the existence of both.

As citizens of the kingdom, individuals were able to enjoy all civil rights, with the freedom of religion being the first right to be guaranteed, without the requirement by the state that citizens belong to the true religion. The first substantial separation of Church and state herewith became reality. For the first time, the Edict of Nantes was able to allow two religions in a state. The Edict can be said to mark the end of the first Civil Wars of Religion in France.

The other major war of religion was the *Thirty Years War* (1618-1648) which took place in Germany, that was part of the Holy Roman Empire, and extended from the North Sea to the Mediterranean. Germany then was not a unified state, but a loose collection of a huge number of autonomous province-states half of which were predominantly Protestant while the other half were predominantly Catholic. Religious differences between Catholics and Protestants stoked the fires of the political and economic rivalries between these separate states.

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[139] *Ibid.* pp. 52-53.

The fighting was bloody because the combatants thought they had God on their side and that the enemy was the instrument of Satan. It is estimated that about one-third of the population of German-speaking Europe died as a result of the fighting. Eventually, the desire to end bloodshed and economic devastation led to a new concern with peace in Europe.[140] An end to the bloodshed of the Holy Roman Empire came in sight with the *Peace of Augsburg* of 1555, followed by the signing of peace treaties in 1648 in the cities of Muenster and Osnabrueck , [141]which lie about fifty kilometres from each other in the present day state of North Rhine-Westphalia. Hence these treaties were known collectively as the *Peace of Westphalia.*[142]

The Peace of Westphalia was the agreement which not only ended religious violence for purely political motives, but also sanctioned the division of the Holy Roman Empire into territorially-bound states and gave absolute authority to the sovereign of each state. This was accomplished by granting rulers the right to decide the religion of their new states which in turn was transferred down to the people as a private affair. Thus, once again, the authority of the church was restricted with respect to the exercise of temporal functions, however this time by the emergence of the institution of the state that attained primacy and supremacy over it.

The principle of *cuius regio, euis religio,* that a subject's religion should be that of his ruler, which was implicit in the *Peace of Augsburg* of 1555, was not formulated until the end of the century and came to be more explicit in the *Peace of Westphalia*, set a precedent of non-interference in other states' internal affairs and was key in the evolution of the modern state as a legitimate actor in the international system of states. The peace treaties also further encouraged the development and use of *diplomacy*, that is the art and practice of conducting relations among states through embassies and ambassadors, that begun in the 16th century.[143]

Increasingly, the political *other* was conceived of as a state, with a specific geographic location, rather than a heretical religious group, a rival noble family, or a person of inferior rank. Gaining knowledge about and communicating with other states required different norms, rules, and formal institutions than did overcoming the estrangement from heretics or rival nobility. The new institutions of diplomacy, then, both presupposed the organization of territorial states and helped to further their entrenchment into a system of states.[144]

In this view of things, the Peace of Westphalia is considered the most important historical benchmark in the formation of the modern territorial state. Through it the principles of state sovereignty became normalized into a new political imaginary that, inside the state, sovereignty referred to legitimate, controlling authority, while outside, sovereignty referred to the reciprocal right of self-determination against dynastic, imperial or other claims, as well as freedom from external religious interference.[145]

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[140] Walter C. Opello, Jr. and Stephen J. Rosow, *The Nation- State and Global Order,* p. 70.
[141] David Miller, ed., *The Blackwell Encyclopedia of Political Thought*, p. 426.
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[143] Garret Mattingly, *Renaissance Diplomacy,* Boston: Houghton Mifflin, 1955
[144] Walter C. Opello, Jr. and Stephen J. Rosow, *The Nation-State and Global Order,* p. 70.
[145] *Ibid,* p. 71.

4.4.   The Territorial State Sovereignty Imagined: Social Contract Theory.

From the Peace of Westphalia, observe Opello and Rosow, arose the problem of how to imagine and represent a combined religious, moral, and political authority in a secular, earthly entity confined within territorial boundaries. It was imperative to find a solution since these territorial entities were created by conventions and agreements, which gave some measure of peace to the Europe of religious wars and which had to be grounded and secured.[146]

4.4.1. Thomas Hobbes' Absolute Monarchy.

The predominant solution to this crisis of the representation of territorial authority was to imagine the state as a symbolic body, a *body politic*. This representation of authority, which was to have a lasting effect, was developed by the English philosopher *Thomas Hobbes* (1558-1679) in the *Leviathan*. For Hobbes, the reason for having the state, that great Leviathan called a commonwealth, was the interest of individual subjects in securing their own peace, as well as protection for their own lives, property, and families.

Thomas Hobbes, deeply worried by the English Civil War of 1642-7 and the defeat and execution of Charles I that he attributed to the unlimited exercise of private judgment in matters of religion endorsed and practiced by anti-episcopal Protestants[147], leads the readers of his *Leviathan*, to imagine a 'state of nature', a situation where no absolute sovereign state exists, in order to justify his political conclusion for an absolute sovereign state.

Hobbes hypothesized that with no common power to keep them in awe, human beings would live in a natural state characterized by a state of war 'where every man is enemy to every man'. He defines the state of war not as the state of constant conflict, but as a constant threat of conflict that is synonymous with anarchy, so that no one can relax and let down their guard. Nothing could be worse than life without the protection of the state, Hobbes argued, and therefore an absolute sovereign state was essential so that society does no lapse into anarchy.

Hobbes answer to the question on why a society where no absolute sovereign state exists would be a state of anarchy depends almost entirely upon his psychological theory about the nature of man. Following Machiavelli's realism, Hobbes aimed to found a science of society and politics not on the basis of man's highest aspirations, but on the basis of men's lower but most powerful motives that were more likely to be realized: not reason, but passions.[148] He set out to achieve his aim through the method of geometry by proceeding from the simplest propositions to the more complex structure in a step-by-step procedure.

Hobbes believed, as a materialist influenced by the scientific movement of the time, that the first principles of all things are body, or matter, and motion, or change of place. The most important aspect of Hobbes's account of matter was his adoption of Galileo's principle of the conservation of motion. Prior to Galileo, philosophers and scientists had been puzzled by the

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[146] *Ibid,* p. 72
[147] Anthony Quinton, "Political Philosophy," p. 317.
[148] Leo Strauss and Joseph Cropsey, *History of Political Philosophy,* p. 397.

question of what kept things in motion. Galileo's revolutionary answer was to say this was the wrong question. What needed to be explained was why things change direction and stop.[149]

In Hobbes's time this view was still a *novum*, and, he pointed out, defied the common sense thought that, just as we tire and seek rest after moving, objects will naturally do this too. But the truth, he claims, is that 'when a thing is in motion, it will eternally be in motion, unless something else stays it'.[150] This, he thought, was true for humans, too. So, Hobbes used the principle of the conservation of motion to develop a materialist, mechanist view of humans.

Consistent with this view, Hobbes takes human beings as mechanical systems of material particles whose psychological states are governed by the same physical laws of motion as other material bodies. The broad outlines of this account are laid out in the introduction to the *Leviathan*: 'What is the *heart* but a *spring;* and the *nerves* but so many *strings;* and the *joints*, but so many *wheels*, giving motion to the whole body…?'[151] Thus human beings are animated through motion.

In accordance with Hobbes's geometrical way of proceeding, one would begin with the physical laws of motion, from them deduce the passions, the causes of the behaviour of individual men, and from the passions deduce the laws of social and political life. He understands human behaviour in terms of a mechanistic psychology of the passions or responses to sensations, which are a form of motion. Sensations are caused by the pressure of objects from outside on the sense organs through which it is transmitted to the central nervous system. Sensations always aid or retard the 'vital motion' or life of the human organism.

Human beings invariably respond positively towards sensations that aid their vital motion and negatively towards sensations that retard this. As the vital motion is heightened or retarded, two primitive types of passions appear, *desire* and *aversion,* the first being a response towards that which is favourable to vital motion and the second being an avoidance of that which is unfavourable to vital motion. Hobbes calls the object of any man's desire good and the object of his aversion evil. The chief object of man's desire is to preserve his own life in motion and the chief object of his aversion is the discontinuation of his own life in motion.

Hobbes uses the theory of the conservation of motion to portray human beings as always searching for something and never at rest. 'There is no such thing as tranquillity of mind while we live here, because life itself is but a motion, and can never be without desire'[152]. Human beings, Hobbes argues, seek continual success in preserving their lives in motion. The desire for continual success in the preservation of life in motion is inseparable from the desire for power, the search for the 'present means to obtain some future apparent good'[153].

The search for the present means of preserving life in motion is therefore equivalent to the endless desire of power of every sort, whether riches, or position, or reputation or honour. Human beings seek not only to procure the means of some future apparent good, but also to be insured of a contented life for themselves. 'So that,' Hobbes says, 'in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power,

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[149] Jonathan Wolff, *An Introduction to Political Philosophy,* Oxford: Oxford University Press, 1996, p. 9.

[150] Thomas Hobbes, *Leviathan,* ed. Richard Tuck Cambridge: Cambridge University Press, 1991, p. 87.

[151] *Ibid.,* p.81.

[152] *Ibid.,* pp. 129-30

[153] *Ibid.,*p. 150.

that ceases only in death'[154]. Human beings desire the same ends, and they have generally the same capacity to achieve them in the state of nature.

While some human beings may be stronger or more intelligent than others, Hobbes assumes, they possess roughly the same level of strength and skill, and so any human being has the capacity to kill any other. 'The weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others'[155]. Since individuals are equally fragile or vulnerable to each other and equally seek to continue their own motion, Hobbes argued, each person has an equal natural right

> to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which in his own judgment, and reason, he shall conceive to be the aptest means thereunto... It follows that in such a condition every man has a right to everything, including another's body.[156]

As Macpherson[157] observes, Hobbes must be accounted a natural rights man, and must indeed be ranked as the originator of modern natural right. For he made the decisive break with the Thomistic-scholastic hierarchical natural law tradition, in which natural rights had been deduced from natural law that prescribes ethical rules originating in divine order and binding upon earthly communities.

He made the break, Macpherson argues, by deducing natural right from the innate compulsion or desire to preserve one's life or motion, and he made this deduction of right from fact by his postulate of *equal* need of continued motion. It is because men are self-moving systems of matter in motion, each of which by the necessity of nature equally seeks to continue its own motion, and is equally fragile, that they must be allowed to have equal rights.

It is from the equal right to life itself that Hobbes deduces the right to the means of preservation: 'It is a …right of nature: that every man may preserve his own life and limbs, with all the power he has. And because where a man has a right to the end…it is consequent that it is…right for a man to use all means and do whatsoever action is necessary for the preservation of his body.'[158] In such a situation every man has a right to everything.

Since everyone has a natural right to do anything, to take anything, 'to possess, use, and enjoy'[159] anything, to invade any other man, it is clear that Hobbes's conception of natural right is different from most ideas of natural rights which by the nature of things entail an obligation of other men to respect them. Hobbes makes this point, employing momentarily the more usual concept of right[160]: 'But that right of all men to all things, is in effect no better than if no man had a right to anything. For there is little use and benefit of the right a man has, when another as strong, or stronger than himself, has the right to the same.'[161]

Due to equality of strength and cunning, there arises equality of hope among all human beings who desire the same kind of thing. To this Hobbes adds the reasonable assumption that in the

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[154] *Ibid.,* p. 160.

[155] *Ibid.,*p. 183.

[156] *Ibid.,*p. 189.

[157] C. B. Macpherson, "Natural Rights in Hobbes and Locke," in *Political Theory and the Rights of Man Rights of Man,* ed. D. D. Raphael, London: Macmillan, p. 3.

[158] Thomas Hobbes, *Elements of Law Natural and Politic,* ed. Tonnies, 1889, I, Ch. 14, pp. 6-7.

[159] *Ibid.,* p. 10.

[160] Macpherson, "Natural Rights in Hobbes and Locke," p. 3.

[161] Thomas Hobbes, *Elements of Law,* p. 10.

state of nature there is a scarcity of goods, so that people who desire the same kind of thing will often desire to possess the same thing. Therefore, if any two men desire the same kind of thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end endeavour to destroy or subdue one another.[162]

Finally, Hobbes points out that no one in the state of nature can make himself invulnerable against the possibility of attack. Whatever one possesses, others may desire, and so one must constantly be on one's guard. So long as there is no common power to regulate their behaviour, a condition of 'war of every man against every man' will break out in the attempt of each one to satisfy their desires at the expense of others.

Such a condition is inconsistent with any kind of civilization : there is no place for industry, navigation, cultivation of the soil, building, or art. Men live in perpetual fear and danger of violent death. In a famous sentence, Hobbes sums up the horrors of such an existence, telling us that the life of man in the state of nature 'is solitary, poor, nasty, brutish and short'.[163]

Equally, there is neither right nor wrong, justice nor injustice. 'Where there is no common power, there is no law: where no law no injustice'[164]. Force and fraud are, in war, the two cardinal virtues. In the state of nature there is no property, no dominion, no distinction between *mine* and *thine* distinct, since the rule of life is 'only to be every man's, that he can get; and for so long as he can keep it'[165].

The human being is not by nature social. Contrary to the Aristotelian-scholastic claim, and in support of Machiavelli, nature dissociates, and renders humans apt to invade, and destroy one another. Hobbes goes on to assert that experience confirms the destructive and egoistic nature of the human being. When taking a journey, he arms himself and seeks to go well accompanied. When going to sleep, he locks his doors. Even when in his house, he locks his drawers. He would not behave so if human beings were good.

Hobbes's analysis of the state of nature indicates that the anti-social forces are as natural as, and when unmitigated by convention, even more powerful than, the forces promoting civil life. Human life in the state of nature is governed by the fear of death and desire for commodities of life that propel men to take for themselves what others desire and so brings them into conflict in their hope to satisfy what they desire at the expense of others. Reason, working along with these passions of fear, desire, and hope suggests rules for peaceful living and cooperation with others securing protection for people's lives, property and families.

Hobbes calls the rules for peaceful living and cooperation with others the laws of nature. A natural law, said Hobbes 'is a precept or general rule, found out by reason,' that is not a moral law but a theorem of conclusion of reason, telling the human being what to do and what not to do to survive. The first law of nature is therefore that every man ought to 'seek peace and follow it'[166]. Now this law that urges man to seek peace is a pre-condition for his survival. Human beings have a better chance to survive if they first help create conditions of peace .

The second law of nature derived from and implementing the first and fundamental law of nature states that the only way for human beings to achieve peace is for them to tacitly agree

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[162] Thomas Hobbes, *Leviathan,* p. 184.
[163] *Ibid.,*p. 186.
[164] *Ibid.,*p. 101.
[165] *Ibid.,*p. 145.
[166] Hobbes, *Leviathan,* p. 190.

with others to give up their natural claim to all things, save for the inalienable and inviolable claim to life, to a sovereign, whose form and particular identity they thus also determine. This presumes a social contract in which it is as if every man should say to every other man:

> *I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that you give up your right to him and authorize all his actions in like manner.*[167]

That one should 'keep covenants made' is a further law of nature. Given the unsocial inclination of human beings in the state of nature, there is no trust that one or both parties will perform their covenants, for it may be in their interest not to perform, Hobbes reasons. 'Covenants without the sword, are but breath, and of no strength to secure a man at all'; to be effective they must be backed by the threat of sanctions for non-compliance. The fear of punishment compels all contractors to make good their promise to perform their covenants; once again, fear is the passion to be relied upon.

The parties to the contract are individuals who promise each other to hand over their right to govern themselves to the sovereign; it is not a contract between the sovereign and the citizens. Political power, Skinner explains, is originally instituted by the people, but never in the form of a trust.[168] For the people to perform that particular act, Hobbes stresses in *Leviathan,* it is essential for them to recognize that they are 'renouncing and transferring' their own original sovereignty, with the implication that it is totally abandoned or granted away'[169] to someone else and by virtue of which this some else assumes absolute sovereign power.

Civil government, Hobbes insists, cannot therefore be seen as the powers of citizens under another guise. It must be seen as a distinct form of power, for reasons that Hobbes enunciates with complete assurance in *De Cive* almost a decade before giving them classic expression in Leviathan. 'Though a government,' he declares, 'be constituted by the contracts of particular men with particulars, yet its right depends not on that obligation only'.[170]

By constituting such a government, 'that right which every man had before to use his faculties to his own advantage are now wholly transferred on some certain man or council for the common benefit'.[171] But whatever form the sovereign would take, it is clear that Hobbes saw the transfer of the right to rule from the people to the sovereign as both absolute and irrevocable. It is such an absolute and irrevocable transfer of natural rights that produces the political obligation of subjects on which the political right of the sovereign to rule depends.

Hobbes was particularly anxious to demonstrate with logical rigor that sovereign power is indivisible. Having shown that, in the state of nature anarchy is the logical consequence of independent individual judgments, he concluded that the only way to overcome such anarchy is to make a single body out of the several bodies of the citizens. The only way to transform multiple wills into a single will is to agree that the sovereign's single will and judgment represent the will and judgment of all the citizens. In effect, this is what the contract says when men agree to hand over their right to govern themselves.

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[167] *Ibid.,* p. 190
[168] Skinner, "The State," p.15.
[169] Hobbes, *Leviathan,* 192.
[170] Thomas Hobbes, *De Cive : The English Version,* ed. H. Warrender, Oxford: Clarendorf, 1983, p. 105.
[171] *Ibid.*

The sovereign now acts not only on behalf of the citizens but as if he embodied the will of the citizens, thereby affirming an identity between the wills of the sovereign and citizens. Resistance against the sovereign by a citizen is therefore illogical, first because it would amount to resistance to himself, and second, because to resist is to revert to independent judgment, which is to go back full circle to the state of nature or anarchy. The power of the sovereign must therefore be absolute in order to secure the conditions of order, peace and law.

This contract unites the multitude into one people and marks 'the generation of that great Leviathan, or rather (to speak more reverently) of that mortal God, to which we owe under the immortal God, our peace and defence. For by this authority given him by every particular man in the commonwealth, he has the use of so much power and strength conferred on him, that by terror thereof, he is enable to form the wills of them all to peace and home and mutual aid against their enemies abroad.'[172]

Hobbes was the first to define the commonwealth, which in Raleigh's view had come to used 'by an usurped nickname' to refer to 'the government of the whole multitude',[173] as one person. As Sabine points out, any distinction between the body politic and the state is a mere confusion. It follows that any distinction between law and morals is a confusion. Very properly does Hobbes call his sovereign a 'mortal God' and unites in his hands both the sword and the crozier, symbols of law and morality,[174] replacing the metaphor of the Two Swords.

The sovereign alone makes law and determines the rules of private property, for in a state of nature there is no property, and therefore property is created by the sovereign. The sovereign also determines the rules of good and evil, of just and unjust actions; he has the power of the sword, the power to punish those that will not obey the law. By virtue of the power of the sword, the sovereign also commands the armed forces, decides on war and peace. He is the only judge of what conduces to peace and therefore of what doctrines may be taught to the extent where he even enlists religion to his side by taking care of it himself.

With Hobbes, we accordingly arrive at the view that if there is to be any prospect of civil peace, the fullest powers of sovereignty must be vested neither in the people nor in their rulers, but always in the figure of an 'artificial man'.[175] It was as a result of his insistence to establish an impersonal form of sovereignty whose power remains distinct not merely from the people who originally instituted it, but also from the rulers that the concept of the state as we have inherited it was first articulated with complete self-consciousness.

4.4.2.   John Locke's Constitutional Limited Monarchy

Another English philosopher John Locke (1632-1704) disagreed with Hobbes's location of absolute sovereign power in the state or the monarchical form of government. Locke, as a contractarian opponent of the early-modern absolutism of Hobbes, assumed that the institutions of the state or apparatus of government   are nothing more than a means of upholding the sovereignty of the people in an administratively more convenient form.

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[172] Thomas Hobbes, *Leviathan,* p. 227.
[173] Quoted in Skinner, "The State," p. 16.
[174] George Sabine, *A History of Political Theory,* pp. 434-5
[175] Hobbes, *Leviathan,* p. 82.

People never give up the supreme power to preserve themselves and the society, but merely depute or delegate the institutions of the state or apparatus of government to safeguard it more effectively on their own behalf. The supreme power to preserve themselves and the society remains always with the people themselves. People exercise the supreme power actively only in society without the institutions of the state or apparatus of government.

While, as we saw, Hobbes identified the state of nature, a situation where no state exists and no one possesses political power, with a state of war, Locke is keen to emphasize that this is not the case. Locke supposed that it would generally be possible to live an acceptable life even in the absence of the institutions of the state or apparatus of government. How did Locke manage to draw this conclusion ? Or, how, according to Locke, does Hobbes fall into error ?

Locke begins his second *Treatise of Civil Government*, as did Hobbes, by supposing a state of nature, a situation where no state exists and no one possesses political power. 'To understand political power right, Locke says, and derive it from its original, we must consider what state men are naturally in'.[176] First, it is 'a state of perfect freedom; second, a state of equality; and third, bound by the Law of Nature. On the face of it, this sounds more like Hobbes view, but each of these three elements is given quite a different interpretation by Locke.

Hobbes principle of equality was a claim about mental and physical capabilities of all people. For Locke, it is a moral claim about rights: no person has a natural right to subordinate any other. This assertion was explicitly aimed against Robert Filmer, who accepted the feudal view of the divine right of kings against the notion of popular or parliamentary control of the crown. This is the view that originally God bestowed the kingly power upon Adam, from whom it descended to his heirs, and ultimately reached the various monarchs.

In his first *Treatise of Civil Government*, Locke annihilates Filmer's positive doctrine at great length and with comfortable ease. What reason have we to suppose that God gave Adam the right to rule, or that any king ruling now inherits his position from Adam ?[177] Although Hobbes did not mean this by his assumption of equality, he would accept Locke's position here. But a wide gap develops immediately between the two.

For Hobbes the equal physical and mental capacity and freedom of every man to everything under conditions of scarcity leads to a war of all against all in the state of nature. Not so for Locke. Though the state of nature ' be a state of liberty, yet it is not a state of licence…man has not [the] liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it.'[178]

The nearest thing to a definition of the state of nature to be found in Locke is the following: 'men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of nature'.[179] This is not a description of savages, as Russell observes, but of an imagined community of virtuous anarchists who need no police or law-courts because they always obey 'reason', which is the same as 'natural law'.[180] The saving feature of Locke's state of nature is the existence of a law of nature:

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[176] Title page of the *Two Treatises*.

[177] Wolff, *An Introduction to Political Philosophy* p. 19.

[178] John Locke, *Two Treatises of Government,* ed., Peter Laslett, Cambridge: Cambridge University Press, 1960 § 6

[179] *Ibid.,* § 19.

[180] Bertrand Russell, *A History of Western Philosophy,* London: Unwin Paperbacks, 1979, p. 602.

> *The state of nature has a law of nature to govern it, which obliges everyone:*
> *and reason, which is that law teaches all Mankind, who will but consult it,*
> *that being all equal and independent, no one ought to harm another in his*
> *life, health, liberty and possessions.*[181]

Whereas for Hobbes natural rights are logically prior, and natural law is derived from them, Locke derives his natural rights from natural law, that establishes the rights and corresponding obligations. We now critically analyse Locke's natural rights to life, liberty and property.

Locke calls the natural right to life 'the right man has to subsist and enjoy the conveniences of life.'[182] Here, as in the *Second Treatise,* Locke asserts a natural right to preservation of one's life, and hence to the means of subsistence (and even 'conveniences').[183] And this right to life and the means of life is deduced from the need or 'strong desire' every man has 'of preserving his life and being'. 'The first and strongest desire…being that of self-preservation…'[184]

There is a difference in the manner that Locke deduces the right to life from the 'strong desire' of self-preservation from the way Hobbes does it. Hobbes deduces the right directly from the fact of desire, whereas Locke deduces the right from the intention of the Creator, who planted the desire of self-preservation in men.[185] So, the reason the right to life imposes a moral obligation is that while we have no natural superiors on earth, we have one in heaven.

In other words, we are all creatures of God, his property, put on earth as his servants, 'made to last during his, not one another's Pleasure'. Therefore 'Everyone…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'.[186] The law of nature, for Locke, is simply that everyone has an obligation to preserve mankind. So, Locke argues, everyone has a clear obligation not to harm others in the state of nature.

What the obligation not to harm others supposes is the second natural right to freedom from the arbitrary wills of others ('arbitrary' being whatever is not required or permitted by the law of nature). It is a right not to be interfered with, except when one has transgressed natural law: a right of 'freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending on the will of any other man'.[187] This is first introduced simply as a freedom, but later called a right.

Locke did not think that human beings would automatically be motivated to follow the law of nature. Indeed he comes very close to sounding like Hobbes: 'For the law of nature would, as all other laws that concern men in this world, be in vain, if there were nobody that in the state of nature had a power to execute the law and thereby preserve the innocent and restrain offenders'[188]. In other words, the law of nature, like all laws, needs a law-enforcer.

Locke cannot accept that the law of nature could be in vain: it is, after all, in Locke's view the law of God, who presumably does nothing in vain. So, there must be a way of enforcing the law: somebody who has the power to enforce it. But we are all equal in the state of nature, so

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[181] Locke, *Two Treatises of Government,* § 6.
[182] *Ibid.,* § 97.
[183] *Ibid.,* § 6.
[184] *Ibid.,* § 88.
[185] *Ibid.,* § 86.
[186] *Ibid.,* § 6.
[187] *Ibid.,* § 4.
[188] *Ibid.,* § 7.

if anyone has such power then everyone must have it. Therefore, from the right to freedom follows the natural right of each person, to punish those who transgress the law of nature. Each of us has the right to punish those who harm another's life, liberty, or property.

The right to punish is the right to make anyone who has overstepped the law of nature pay for their transgression. If the law of nature can be enforced, we have good reason to hope that life in the state of nature will be relatively peaceful. Offenders can be punished to make reparation, and to restrain and deter them, and others from similar acts in the future: 'Each transgression may be punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like'[189].

It is important that this natural right to punish is not restricted solely to the individual who suffers the wrong. If that were so, then obviously those who commit murders would go unpunished. Locke therefore argues that those who break the law are a threat to us all, as they will tend to undermine our peace and security, and so every person in the state of nature is given what Locke calls the 'executive power of the law of nature'. It is reasonable and just

> one may destroy a man who makes war upon him, or has discovered an enmity
> to his being, for the same reason that he may kill a wolf or a lion.[190]

In support of the view that we all have a natural right to punish offenders, Locke claims that, without it, it is hard to see how the sovereign of any state can have the right to punish an alien who has not consented to the laws. If the foreigner has not consented to the sovereign's laws, then he has not accepted that he is liable to punishment for breaching them. Therefore, such a person cannot justly be punished, unless there is some sort of natural right to punish. Locke sanctions the sovereign's right to punish an alien by the executive power of the law of nature.

If the law of nature is enforceable, then a number of other rights can be secured, even in the state of nature. For Locke, the most important of these is a right to private property. A property in a thing is a right to exclude others from it, to use, enjoy, consume and exchange it. The chapter on property of the *Second Treatise* shows that the individual's right to property is prior to civil society and government, and not dependent on the consent of others to it.

The right to property is deduced from (a) the right of self-preservation,[191] and (b) the property in, or right to, one's own person – 'the labour of his body, and the work of his hands, we may say, are properly his'[192]. The right to property is limited, by this derivation, to 'as much as leaves enough for others', since all human beings have an equal right to subsistence. The abundance of natural provisions in the original condition establishes a man's right to some portion of the common holding, to the exclusion of others, by 'mixing his labour' with it.

Though the original condition was an abundance of natural provisions, it was an abundance of worthless provisions and not enough of human labour to produce a surplus of goods that humans would need for their comfortable subsistence[193]. Hence the general penury or poverty of the natural state. Another major cause of the penury of the original condition was that 'the greatest part of things really useful to the life of man …are generally things of short duration,

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[189] *Ibid.,* § 12.
[190] *Ibid.,* § 16.
[191] *Ibid.,* § 25.
[192] *Ibid.,* § 27.
[193] *Ibid.,* § 41.

such as, if they are not consumed by use, will decay and perish of themselves…'[194] This natural fact of spoiling was perhaps the major limitation of property in the state of nature.

The third factor Locke saw contributing to the penury of the original condition was the lack of cultivation of the land: 'land that is left wholly to nature…is called, as indeed it is, waste'[195] ; the extent of this natural waste can be lessened, therefore, by the spread of agriculture that could produce a surplus to benefit more people. Agriculture then was, for Locke, a major step toward alleviating the penury of man's original condition, but it was limited in its effectiveness by the fact of spoiling. Hence the need for some invention that would make it reasonable for a man to grow more than his family could consume and thereby benefit others.

That invention was money, which according to Locke, came into existence 'by tacit consent' that men would exchange it for perishable goods.[196] This gave people a reason to cultivate more land to produce a surplus for sale and horde up enormous amounts of money without the risk that it will spoil. Locke's natural man is bourgeois man: his rational man is a man with a propensity to capital accumulation. He is even an infinite appropriator of property[197].

By the tacit consent to the use of money, Locke turned the limited right to property (as much as its leaves enough for others, since all have an equal right to subsistence) into an unlimited natural right to the appropriation of most land by few men, in amounts exceeding the requirements of their own comfortable subsistence, leaving others with little land on which to labour for themselves. The extended property right is not as pure a natural right as the other rights, for others do not require any consent.[198] And it is less pure in another respect.

In a second respect, Locke established the unlimited right to appropriation of land by means of the utilitarian argument to productivity. It is the greater productivity of labour on appropriated land that justifies its appropriation beyond the amount which would leave as much and as good for others. Because of the greater productivity, those who are left without any land can get a better subsistence than they would have had if no land were appropriated[199].

However, inasmuch as consent to the use of money completes the reversal of the original economic condition of penury through increased production that can support an increased population, the unlimited natural right to the appropriation of most land by few humans leads to an inequality in the possession of land as it gives more land to humans of more industry than others of less industry[200]. In turn, this leads to pressure on land which becomes scarce.

Now, Locke does not say that such scarcity introduces the Hobbesian state of war, but he recognizes that once land is in short supply, labour can no longer give title to property or be the measure of value, and spoiling ceases to limit acquisition. The possessions of the 'industrious and rational' – those men upon whose powers of increase the well being of all depends – come to be subject to the 'fancy or covetousness of the quarrelsome and contentious'[201] who may attempt to take their property by stealth or secretly.

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[194] *Ibid.,* § 46.
[195] *Ibid.,* § 42.
[196] *Ibid.,* § 47-50.
[197] C. B. Macpherson, *Political Theory of Possessive Individualism,* Oxford: Clarendon Press, 1962, p. 235.
[198] C. B. Macpherson, *Natural Rights in Hobbes and Locke,* pp. 8-9.
[199] John Locke, *Two Treatises of Government,* p. 41.
[200] *Ibid.*, § 48.
[201] *Ibid.,* § 34.

When this happens, the injured party has the right to punish the transgressor. There would be no reason for humans to leave the state of nature and to form societies, except that inconveniences of the state of nature once land is in short supply and under dispute multiply and multiply in applying punishment to those who transgress the law of nature. So, 'property', which Locke uses in a wider sense to include 'life, liberty and estate'[202], is not secure.

In the state of nature, property is not secure, because there are lacking three things necessary to its preservation: 'an established, settled, known law'[203]; a 'judge with authority to determine all differences according to the established law'[204]; and the 'power to back and support the sentence when right, and to give it due execution'[205]. Thus, Locke anticipates inconveniences in the administration of justice in a state of nature without the three things.

Individuals will disagree about whether or not an offence has taken place in interpreting the law of nature. They will disagree about its proper punishment and compensation. Since every person is a judge in their own case, this leads him to make biased judgments and mete out on offenders punishment that exceeds the original harm. Or one may simply lack the power to protect his/her rights. So, the attempt to administer justice becomes a source of dispute.[206]

In order to overcome the impairments of the state of nature, men require a legislature to lay down consistent and uniform laws, a judiciary which will administer the law impartially, and an executive who can enforce the law when it is broken. Society originates in the attempt to develop such institutions for the purpose of remedying the defects of life in a state of nature.

All humans are in the natural state until by their own consents they decide to leave the state of nature and enter into a contract and create a political society. The decision to form one political society is the original contract. The contract is created by the unanimous consent of those who enter entered into society; those who wish may remain in the state of nature.

The contract members make to form a political society is an agreement to transfer the rights each had in the natural state 'into the hands of the community'[207]. In the state of nature, every man has two rights: the right to exercise the legislative power 'to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of nature' and the right to exercise the executive 'power to punish the crimes committed against the law'[208].

The right to exercise the executive 'power to punish the crimes committed against the law' every person 'wholly gives up, and engages his natural force…to assist the executive power of the society, as the law thereof shall require'[209]; they agree in a common intention to put themselves under whatever specific form of government the majority may choose.

But Locke says that the right to exercise the legislative power, which includes judging what is necessary for preservation, is not wholly transferred to government; he says it is given up 'so far forth as the preservation of himself and the rest of that society shall require'[210]. Each one does not give up the right to exercise the legislative power to preserve himself and society.

[202] *Ibid,* § 87.
[203] *Ibid.,* § 124.
[204] *Ibid.,* § 125.
[205] *Ibid.,* § 126.
[206] *Ibid.,* § 19-20.
[207] *Ibid.,* § 87.
[208] *Ibid.,* § 128.
[209] *Ibid.,* § 130.
[210] *Ibid.,* § 129.

The contract by which the rights of everyone in the natural state to exercise legislative and executive powers are transformed into the powers of the political community is not between the people and government. The contract is made between equally free persons.

Government is created through a trust arrangement by which equally free persons entering into a contract depute or delegate powers to government as a fiduciary agent to do for them things they find inconvenient to do themselves, just as we appoint a secretary to handle our affairs if we are too busy. These powers are limited by the purpose for which the contract was made: the preservation of life, liberty and estate. Locke thus defines political power to be:

> A *right of making laws with penalties and, consequently, all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws and in the defence of the commonwealth from foreign injury, and all this only for the public good.*[211]

Absolute arbitrary power, or governing without settled standing laws, cannot be consistent with the ends of society and government, which humans would not quit the freedom of the state of nature for, and tie themselves up under, were it not to preserve their lives, liberties and fortunes, and by stated rules or right and property to secure their peace and quiet.

In order to protect people from absolute arbitrary power, the kind of government which is to be formed through the trust arrangement must be based on laws which are arrived at after long deliberation by properly chosen representatives of the people, and which are promulgated so that all citizens may become acquainted with them. There is need for a law-making body.

The best kind of government, Locke states, is that in which 'legislative power is placed in collective bodies of men who, duly assembled, have by themselves, or jointly with others a power to make laws.'[212] Locke, of course, expressed his desirability for placing legislative power in the hands of a representative assembly instead of placing it in the hands of one man.

Locke also calls for the need for impartial judges. Finally, a government which is to be formed through the trust arrangement must also have the power to execute judgments. Thus, an executive branch of government must be set up. The executive possesses authority subordinate to that wielded by the legislative and is, in fact, an agent of the legislative. The foregoing two powers, Locke states, must not be placed in the same hands.

An absolute monarchy is out of question. For it could never act as a fiduciary agent of the people. Unquestioned submission to a monarch is worse than being in a state of nature. Men would be foolish 'to avoid what mischief can be done by polecats or foxes,' and be content 'to be devoured by lions.' If a ruler is absolute, he would not have to seek impartiality, he could ignore natural rights; and he could make exceptions to his own laws when he pleased. There would be no appeal, theoretical or substantial, for his wronged subjects.

Therefore, to be subject to the arbitrary authority of an uncontrolled ruler without the right or strength to defend oneself is a condition far worse than the state of nature; it cannot be supposed to be that to which men consented freely, for 'no rational creature can be supposed

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[211] *Ibid.,* § 3.
[212] *Ibid.,* §134.

to change his condition with an intention to be worse'[213]. Absolute monarchy, Locke says, 'is indeed inconsistent with civil society, and so can be no form of civil government at all.'[214]

Hobbes's great error is not his premise that the fear of death or the desire for self-preservation is the first principle of human action but his conclusion that the only remedy for the state of nature is for men to make themselves subject to the unlimited power of the might leviathan, a conclusion which contradicts the premise. Locke's conclusion – limited government based on the consent of the governed – is more true to that premise than Hobbes's own conclusion.

Contrary to Hobbes, Locke recommended that the legislative and executive powers be wielded by different branches of government, giving as his reason for the doctrine of the separation of the two powers the common one that both powers in the same hands 'may be too great a temptation to human frailty, apt to grasp at power,' for it may enable persons charged with making laws to exempt themselves from their execution.[215]

Locke was talking about Parliaments and kings, which he called the executive and legislative powers respectively. Instead of absolute monarchy he said there should be a separation of power. It is not, however, a separation in which the legislative and executive bodies or branches of government are equal. Rather, it is a separation of power into different branches of government, each one of which would function as a check upon the other.

Of the powers, legislative and executive, Locke proposed that the former is supreme, 'for what can give laws to another must needs be superior to him'[216]. The executive has no authority independent of legislative control. Locke did not, however, hold that the executive should be limited to a mechanical and literal carrying out of legislative wishes.

In an interesting chapter on 'prerogative', Locke argued that it is proper for the executive to exercise discretion where the public good is at stake, and to act in advance of law and sometimes even contrary to it[217]. This doctrine of executive prerogative seems to contradict not only legislative supremacy but the rule of law.

Locke, however, believed that 'the people shall be judge'[218] whether the exercise of such prerogative tends toward their good. If necessary, they can limit executive prerogative through laws passed by the legislature. Since prerogative exists only for the people's good, and indeed is nothing but what people allow and acquiesce in, such limitations are not encroachments on a power belonging inherently to the executive.

Such an attitude toward government heightens the importance of the idea that the power given to government by the people is a trust to be employed for their good. The legislature and the executive are merely the agent and executor of the supreme power of the people for the more effective promotion of their own good, 'the peace, safety and public good of the people'.

This is how it comes about, as Locke concludes, that the community perpetually retains a supreme power over its kings or legislative body, and when power deputed to government by the people as a trust to be employed for their good is used contrary to that trust it is forfeited.

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[213] *Ibid.,* § 131.
[214] *Ibid.,* § 90.
[215] *Ibid.,* § 143.
[216] *Ibid.,* § 150.
[217] *Ibid.,* § 160.
[218] *Ibid.,* § 240.

Transgression of its limits in a manner that does not protect the natural rights of the people dissolves a government and the obligation of the people to obey it.

Political power reverts to the community acting through its majority, which must act to remove the government, by force if necessary, and establish a new government. The right of the members of society to choose and remove government assumes that sovereignty rests with the people. This sovereignty of the people or community over government is expressed in the election of representative legislative bodies and ultimately in the right of removal.

The power of the people over government, however, is still not quite as complete in Locke as it came to be in later and more democratic theories. Though he called the power of government a trust and a delegation from the majority that acts for the community, Sabine observes, he retained the older view that the grant of the community divests the people of power so long as the government is faithful to its duties.[219]

The people's legislative power is in effect limited to a single act (though Locke admits that a democracy is conceivable), namely, that of setting up a supreme legislature. Even if the community resumes its power for good cause, it cannot do so 'till the government be dissolved'. The French philosopher Jean Jacques Rousseau considered this to be an unwarranted limitation on the perpetual power of the people to govern itself as it saw fit.[220]

4.4.3. Rousseau's Popular Sovereignty

Rousseau (1712-1778) rejects the view that the sovereignty of the people can be represented by a legislative body or the executive, which, like all other partial associations will develop a pseudo-general will of their own, directed towards their special interests. This implies people will be subordinated to the will of an interest group more inclined towards its own interests, and that they cannot, therefore, be expected to voluntarily obey the state or government.

In other words, where the sovereignty of the people is represented, the people will not be free to govern themselves according to the general will, directed towards their general interests. Sovereignty, argued Rousseau, belongs only to the people as a whole body, while government is only an agent having delegated powers to carry out particular applications of the law people make which can be withdrawn or modified as the will of the people dictates.

The only free government is a direct democracy in which each person gives himself up entirely together with his natural liberty and property to the political community and in return receives the moral and civic liberty to participate actively and directly with others in making laws or policies and the legal title to that which rightly belongs to him, and these are guaranteed and protected by the greater power of the whole community. In this situation, each person while uniting himself with all, may still obey himself (by voluntarily obeying the laws of the state he helped put in place), and thus remain as free as possible.

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[219] Sabine, *A History of Political Theory,* p. 493.
[220] *Ibid.*

Rousseau presented an attractive picture of the life of man in the natural state without the institutions of the state or government. In the second *Discourse on Inequality* (1754), he held that 'man is naturally good, and only by institutions is he made bad'. Like Hobbes and Locke he assumed that human beings are primarily motivated by the desire for self-preservation. Yet he also believed that human beings are motivated by the innate feeling of pity or compassion.

Hobbes and Locke's intuition was different to see this central aspect of human motivation and so overestimated the likelihood of conflict in the state of nature, not realising that compassion acts as a powerful restraint on the desire for self-preservation that might lead to attack and war. By so doing, both Hobbes and Locke, who inquired into the foundations of society, could not describe man's natural state the way Rousseau did, despite their attempt to do so.

Hobbes and Locke, who inquired into the foundations of society projected the qualities of man-in-society onto natural man. That is, 'every one of them, in short, constantly dwelling on wants, avidity, oppression, desires, and pride, has transferred to the state of nature ideas which were acquired in society' and assumed that without the state there would be war.[221]

In order to accurately describe man's natural state, Rousseau suggested that all the qualities connected with man's life in society be removed. This forced him into an investigation of primitive man. Rousseau acknowledged in line with the thinking of the time that primitive man is not a human being in a true sense; he is an animal-like creature who knows neither right nor wrong, consequently he cannot be good or bad, virtuous or vicious. He is pre-moral, but nonetheless innocent.

When we understand how Rousseau's natural man behaves, the state of nature would be far from a state of war, and even in some respects preferable to a more civilized condition. Rousseau's natural man is not the aggressive brute that Hobbes made him out to be. Rather he is a 'noble savage' whose natural desire for self-preservation is effectively counterbalanced by the innate feeling of pity or compassion, 'an innate repugnance at seeing a fellow creature suffer'[222] that prevents him from harming others and from being harmed by them.

Rousseau's claim that natural man is motivated by pity or compassion is very different from that of Locke that natural man in the state of nature has a moral obligation to follow a moral law of divine origin. Unlike Locke, Rousseau claims that natural man generally tries to avoid harming others, not because reason tells him that it is morally bad, but because he has an aversion to harm, even when it is not his own. He is not primarily rational but moved to action by his feelings. So he takes steps to avoid the suffering of others, whenever he is able to.

Natural man is a solitary being, rarely coming into contact with others. He has no family. Rousseau speculates that children would leave their mothers as soon as they could survive on their own, and that among natural men there would be no permanent union. Compassion is just not a strong sentiment to create a family bond.[223] Part of Rousseau's explanation of the solitary life of natural man is that nature has equipped the savage to live alone.

Natural man's passions are of the simplest kind. He desires only food, sexual satisfaction, and sleep, and fears only hunger and pain.[224] He has few desires, and relative to those desires,

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[221] Jean-Jacques Rousseau, *Discourse on the Origin of Inequality,* eds. G.D. H. Cole, J. H. Brumfit, and John C. Hall, London: Everyman, 1973, p. 50.

[222] *Ibid.,* p. 76.

[223] Wolff, *An Introduction to Political Philosophy.,* p. 29.

[224] Jean-Jacques Rousseau, *Discourse on the Origin of Inequality,* p. 171.

goods are likely to be obtained by hunting and gathering rather than by taking them from others. Being in direct contact with physical nature, he is untouched by modern man's relations with his fellows that are likely to bring him into conflict with them.

Indeed, natural man wholly lacks language, unless in the form of instinctive cries, and without language any social life is impossible. Without language, the opportunities for forming and expressing opinions seem restricted. Equally, he has no desire for power that Hobbes, as we saw, defined as 'the present means to satisfy future desires'. But Rousseau argues, the natural man has little foresight, and hardly ever anticipates future desires, let alone seeking the means to satisfy them.[225] Consequently, all of Hobbes's drives to war – desires for gain, safety, and reputation – are either defused of absent in Rousseau's state of nature.

Limited and instinctive though the life of natural man may be, it is at least a happy one in that it is independent of others and so neither harming nor harmed by them. Leading a simple isolated life in the midst of nature, natural man could rely on the basic impulse of self-preservation, any aggressiveness that arose from the rare frustration of his desire, being held in check by the natural feeling of compassion by which he avoided harming others. In this sense, compassion contributed towards the preservation of peace and the whole species.

Still, despite its relatively peaceful character, Rousseau's state of nature hardly seems a welcoming prospect. Rousseau's 'noble savage' may not be the brute that Hobbes made him out to be, but nevertheless, as portrayed, seems barely distinguishable from other wild animals. Natural man, unlike the brute, has free will and perfectibility: he can choose, accept and reject and can improve his faculties and pass these on to the whole species. But both distinguishing characteristics are pure potentiality that cannot be developed in a vacuum.

Perfectibility or the capacity for self-improvement is the source of all human progress and all human misfortune. The first moment of consciousness is the beginning of natural man's decline, for reflection leads him to the fatal knowledge of his superiority and the potentiality that lies within. Natural man's first path to progress begins through the first exercise of the capacity of self-improvement: the development of tools in the struggle for existence.

This struggle for existence is brought about, Rousseau speculates, by an increase in population. Wolff finds it interesting that Rousseau sees innovation, and not Hobbesian competition, as the primary response to scarcity. And it is, in actual fact, innovation to make work easier –tool-making - that first awakens man's pride and intelligence.[226]

The capacity for choice and self-improvement require a community for it to be realised at all. The commonality of interests brings about the need for cooperation, as for example, in overcoming natural hazards. Thus the advantages of living in communities, and making a common dwelling, become apparent, and the habit of living in these new conditions 'gave rise to the finest feelings known to humanity, conjugal love and paternal affection'.[227]

Co-operation and tool-making conquer scarcity well enough to give the opportunity to create goods which go beyond bare survival needs. Thus natural man now starts to create luxury goods unknown to former generations. However, 'this was the first yoke he inadvertently imposed on himself, and the first source of the evils he prepared for his descendants'.[228] For,

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[225] *Ibid.,* p. 62.
[226] Wolff, *An Introduction to Political Philosophy,* p. 31.
[227] Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, ed., Cole et. al. p. 88.
[228] *Ibid.*

man now develops 'corrupted needs'. He becomes dependent on what were at first considered luxuries. Having them gives one little or no pleasure, but losing them is devastating.

As communities develop, so do languages, the comparison of talents, competition and inequality. This gives rise on the one side to vanity and contempt and on the other to shame and envy. For the first time an injury is treated as a sign of contempt rather than simply as damage, and those so injured begin to seek their revenge. As the state of nature begins to transform itself, causes of dissension and strife break out, a fatal combination to the innocence and happiness of natural man in the natural state that is still a relatively stable stage in human development, what Rousseau calls 'the real youth of the world'.[229]

Instability only begins to set in with the long and difficult development of agriculture and metallurgy. The development of iron tools and agriculture is the source of private property. The foundation of private property marks the new-born state of civil society according to Rousseau:

> *The first man who, having enclosed a piece of land, bethought himself of saying, 'this is mine', and found people simple enough to believe him, was the real founder of civil society.*[230]

With the foundation of private property forethought arises. Men seek to increase their possessions and to secure them. Private property leads to mutual dependence, jealousy, inequality, and the slavery of the poor. The destruction of inequality brings about instability.

> *Usurpations by the rich, robbery by the poor, and the unbridled passions of both, suppressed the cries of natural compassion and the still feeble voice of justice, and filled man with avarice, ambition and vice.*[231]

Thus the new-born state of civil society gives rise to a horrible state of war between the rich and the poor that Hobbes considered to be the state of nature. The rich are aware that they owe what they have to force and usurpation; they also know that they can easily lose their possessions in the same manner, and they look for a way to protect themselves .

At this point, ' the rich man, thus urged by necessity, conceive at length the profoundest plan that ever entered the mind of man to employ in their favour the forces of those who attack them.'[232] The rich persuade the poor to join in a contract with them to create a power which will protect each person in what he has, and thus restore peace. The poor succumb gladly to the plan.

The poor consent to the plan in the hope of securing their lives. But it is a swindle. The plan is greatly advantageous to the rich, for they, after all, are the ones with property to secure. The rich give an appearance of legitimacy to the control of their property and are able to enjoy it peacefully. The inequality is made lawful and the subjection of the poor by the rich comes to be maintained by public force.

In Rousseau's main political writings, especially *The Social Contract* and the *Discourse on Political Economy* Rousseau asks, what he had explained in his second *Discourse*, as we have

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[229] *Ibid.,* p. 91.
[230] *Ibid.,* p. 203.
[231] *Ibid.*
[232] *Ibid.,* p. 98.

already shown, how the change from the original assumption of the freedom of man in the natural state to the political subordination of man in civil society came about and how political subordination can be made legitimate:

> *Man is born free, and everywhere he is in chains. Many a man believes himself to be the master of others who is, no less than they, a slave. How did this change take place? I do not know. What can make it legitimate ? To this question I hope to be able to furnish an answer.*[233]

Rousseau acknowledges in the *Social Contract* that political subordination exists and that the real question is to discover how it can be made legitimate. By his own admission, force cannot be a basis of legitimacy. Might is not right, for it rests upon the principle of strength, not morality. If might is right, argues Rousseau, then as 'soon as we can disobey with impunity, disobedience becomes legitimate.' The strongest is never strong to be always master,' stated Rousseau, 'unless he transforms strength into right and obedience into duty'.[234]

Nor do people sell themselves into slavery under a despot in order to gain civil peace. If security were all that mattered, we could solve our problems by going to jail. 'One can live peacefully enough in a dungeon, but such peace will hardly, of itself, ensure one's happiness.'[235] Political legitimacy, therefore, can be based neither on force nor on a contract in which freedom is exchanged for security merely for its own sake.

In order to discover the true foundation of legitimacy, argues Rousseau, it is necessary to begin with the first community and thus discover the purpose for which that step was taken. Rousseau's assumption for argument's sake is that human beings in the natural state were not in a position to realise the capacity for freedom and self-improvement. Hence the need for the establishment of a human community through which this natural freedom could be realised.

But with the foundation of civil society following the institution of property and the resultant inequality, human beings were compelled to rely upon their individual strength to protect their natural freedom. Freedom was highly desirable, but that of the poor came to be abused where the rich only sought to protect their property by using force to subordinate the poor to them. Both freedom and security are desirable, and the problem is to secure them through an association which combines both freedom and security without neglecting any one of them.

> *The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.*[236]

Rousseau's fundamental problem was to explain how a naturally free person can legitimately be subject to the authority of a political community that protects his security. Rousseau says a naturally free person can legitimately be subject to the authority of a political community that protects his security when he obeys only the laws which he himself makes, and not otherwise.

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[233] Jean Jacques Rousseau, *The Social Contract,* Ernest Barker ed., *Social Contract : Essays by Locke, Hume, and Rousseau* (Rousseau's *Social Contract* trans. Gerard Hopkins) N.J: Oxford University Press, 1984, I, 1
[234] *Ibid.,* I, 3.
[235] *Ibid.,* I, 4.
[236] *Ibid.,* I, 6.

Rousseau establishes this new political community by means of his second contract, but it is a different form of contract from those envisioned by Hobbes and Locke. In Hobbes's contract, all rights are surrendered to an authority whose duty is to provide security. Rousseau rejects this concept of contract, for it protects individual security at the expense of his freedom.

In Locke's contract, people agree to form a contract and then entrust their security to a government which is representative of and responsible to them and is charged with protecting the rights which individuals carry with them into political community. As we shall see, Rousseau rejects the notion that legislative power can be delegated without a surrender of freedom. Moreover, in Rousseau's contract, there can be no reserving of any rights on an individual basis as Locke's theory of natural rights clearly demands.

Rousseau's contract consists in the surrender of everyone, together with all his rights, to the whole community'. The result is that the people as a whole community become sovereign. To quote Rousseau, 'Since each gives himself up to all, he gives himself up to no one; and as there is acquired over every associate the same right that is given up himself, there is gained the equivalent of what is lost, with greater power to preserve what is left.'[237]

The surrender is to be without reserve. Rousseau argues that, 'if certain rights were reserved to the individual, as there would be no common superior to decide between them and the public, each being on one point his own judge, would ask to be so on all; the state of nature would thus continue, and the association would necessarily become inoperative or tyrannical.'

Nothing of value is lost, but a great deal is gained through the contract. What man loses is the natural freedom to get everything he can and the right to keep that which his strength permits; it is not true freedom at all. In return he gains the civil liberty to participate actively and directly with others in making laws or policies and legal title to that which rightly belongs to him, and these are guaranteed and protected by the greater power of the whole community.

Each person, under the terms of the contract, gives all his rights to everyone, as they give their rights to him. This means that, in effect, no one loses anything (in relation to others) and everyone gains security by the increased power of the community. At any rate, a new political community that is able to provide security without loss of freedom is established by contract.

What now exists, Rousseau says, is a 'public person,' which, in its 'passive role,' is known as the state and, in its active role as the sovereign. The people, or individual components of this body, also have a dual role. When they exercise their sovereignty through their collective and legislative capacity they are citizens; when they obey the state they are subjects.

It is possible for a person in the exercise of his collective and legislative capacity to seek his selfish interest and ignore the general interest, that is, he may 'enjoy his rights as a citizen without, at the same time, fulfilling his duties as a subject.' To avoid such a particularistic pursuit of interests, which may destroy the community, Rousseau finds it necessary for the body politic to operate on the basis of what he calls the 'general will.'

Talking about the general will in his *Discourse on Political Economy*, Rousseau says:

> *The body politic…is also a moral being possessed of a will; and this general will,*
> *which tends always to the preservation and welfare of the whole of every part, and it*

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[237] *Ibid.*

>*is the source of the laws, constitutes for all members of the state in their relation to one another and to it, the rule of what is just and unjust...*[238]

The general will emanates from the whole community and is directed towards the community as a whole. Moreover, it is invariably good for every member of the community. Rousseau is saying that in the diversity of particular interests of a community there is a common interest which must be discovered. This common interest must form the basis for all laws and policies.

Rousseau makes a distinction between the general will and the 'will of all.' According to him, it is possible for people to express political opinions or make laws not based upon the general will. This would be the case if the opinions rendered or the policy adopted were designed to benefit only a part of the community, whether that part comprises a minority or a majority. The 'will of all' is this expression of the sum of particular wills that are self-centred and do not think of the good or interest of others.[239]

What we must do, Rousseau says, to ascertain the general will from the sum of particular wills is that we must 'take away from their wills the pluses and minuses - which cancel one another, the sum of the differences is left, and that is the general will.'[240] If we take away from the sum of particular wills, Rousseau explains, the various particular interests which conflict with each other, what remains is the general will.

However, this procedure is only reliable when the people, in isolation, exercise their individual wills as citizens. If they state their opinion as members of 'intriguing groups and partial associations', the result will be the 'will of all,' not the general will.

>*If, then, the general will is to be truly expressed, it is essential that there be no subsidiary groups within the state, and that each citizen voice his own opinion and nothing but his opinion.*[241]

In practice, such a system would involve the prohibition of churches (except a state church), political parties, trade unions, and all other organizations of men with similar economic interests. The result is obviously the corporate or totalitarian state in which the individual citizen is powerless. Rousseau seems to realise that it may be difficult to prohibit all associations, and adds, as an afterthought, that, if there must be subordinate associations, then the more there are the better, in order that they may neutralize each other.[242]

Rousseau's proposal that 'pluses and minuses' should offset one another and that the balance determines the general will is another way of stating that the people express their views through voting. The majority vote voices the general will. The good citizen will always obey the decision of a well-informed and public spirited majority as that of the general will.

>*When, therefore, a view which is at odds with my own wins the day, it proves only that I was deceived, and that what I took to be the general will was no such thing.*[243]

[238] Jean-Jacques Rousseau, *A Discourse on Political Economy,* Cole ed., et. al.pp.336-7
[239] V.D. Mahajan, *Political Theory*, New Delhi: S. Chand and Company Ltd., p. 240-1.
[240] Jean-Jacques Rousseau, *Social Contract,* Barker ed., *op.cit.,* II, 3.
[241] *Ibid.*
[242] Russell, *op. cit.,*p. 673.
[243] Jean-Jacques Rousseau, *Social Contract,* II, 3.

It is generally assumed that in a political community which operates on the basis of majority rule, the minority shall give way to the majority's will or risk the disruption of the community. Thus, it is a difficult and perennial problem in a free state to determine in any specific case just how far the rights of the minority need be respected as against the will of the majority.

The minority may simply be misled by its selfish interest and be honestly but wrongly convinced that it coincides with the common interest. But, its true interest is always the same as the common interest. The minority may, therefore, be forced to follow its true interest. It may be forced to free itself from its selfish interest in order for it to follow its true interest.

> *Whoever shall refuse to obey the general will must be constrained by the whole body of his fellow citizens to do so; which is no more than to say that it may be necessary to compel a man to be free...*[244]

The true meaning of Rousseau's theory of the general will is that a properly constituted and functioning majority can never go wrong, that what it decides is beneficial to everyone, and that a force is moral which compels individuals to do those things that are good for them and which they could do voluntarily if they were not influenced by selfish interest.

There is no place for the doctrine of individual rights in Rousseau's proposition of the general will. The sovereignty of the general will requires obedience from all the people, but, like any sovereign, the general will is itself subject to no laws. Being concerned for the welfare of society as a whole, 'the sovereign power need give no guarantee to its subjects.'

Rousseau designed the legislative and executive institutional arrangements to initiate and implement the general will, respectively. Two forces, Rousseau declares, are required to produce action – will, and the strength to execute it. It is the legislative which provides the general will, and in a legitimate political community it consists of all the people.

The people as a whole body must create a constitution and establish a body of laws. It must found government and devise methods of electing magistrates. It must meet regularly, often, and in a manner prescribed by law. This requirement raises the practical problem of how a legislative comprising the whole body of citizens can meet and deliberate more effectively.

The sovereignty of the entire people cannot be divided into population segments and the general will be taken in each. This is impossible, for sovereignty is, according to Rousseau, indivisible; to divide it is to destroy it. Unless all participate, Rousseau argues, some are subordinated to others. Equality disappears and the legitimacy of political community is lost.

Rousseau does not see a representative system solving the problem either. In his view of things, sovereignty cannot be delegated or represented in any legislature. 'The moment there is a master, there is no longer sovereignty'. Rousseau rejects the solution offered by admirers of the English system. 'The English,' he says, 'are free only once when they are electing their representatives; the rest of the time they are slaves'.

Rousseau suggests two solutions to the problem, one of which greatly disqualifies the other. First, if it is impossible to maintain the size of the state at a point which will permit all citizens to gather and deliberate at a central location, it will be necessary to move the seat of government from one place to another in order that the general will may be ascertained in

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[244] *Ibid.,* I, 7.

each. Rousseau recognizes that this would be enormously difficult, but he insists that it is worth the effort. After all, 'where right and liberty is everything, inconvenience matters little.'

Upon further consideration, Rousseau changes his mind. The second, and only solution, is the adoption of the city-state form as found in ancient Greece and existed at the time in Geneva.

> *Having examined the whole question thoroughly, I do not see how,*
> *henceforth, it will be possible for the sovereign to maintain among*
> *us the exercise of its rights unless the city be a very small one.*[245]

The only free government is, therefore, a direct democracy in which laws are made by an assembly of the people in which all have the right to vote. But he knows that factions in the assembly can easily prevent the general will from being expressed and that supplemental institutions, tailored to local needs and conditions, must be added to ensure the right outcome.

The supplemental institutions Rousseau proposes include the requirement of more than a simple majority for passing laws, the proper management of sub-political groups (clans, interest groups), the artful apportionment of votes among the different segments of the population, and above all the creation of a virtuous, or patriotic citizenry.

The agency that carries out decisions of the general will is the executive. In Rousseau's plan, the executive is the government. The entire people cannot concern themselves with administrative tasks. Moreover, the people do not have sufficient virtue to combine and adequately employ both legislative and executive authority. 'Were there a people of gods, their government would be democratic. So perfect government is not for men.'

An elective democracy, by which Rousseau means a system in which executive officials are elected by the people, is generally the best form of government. A hereditary aristocracy, or executive power exercised by the nobility, is the worst. A monarchy provides vigour in the execution of laws and could be the most desirable government, but given the character of most kings and the fact that heredity rarely produces a monarch of quality, this is unlikely.

What is evident from the foregoing is that Rousseau's discussion of democracy, aristocracy, and monarchy in government applies only to the executive, and that any form of executive may be compatible with a legitimate political community. The same is not the case with respect to the legislative. Legitimacy here is inseparable from democracy. Legislative power must always be exercised by the whole body of sovereign citizens, or the entire purpose for which men undertook the establishment of political association is subverted.

Legislative effort should de directed towards securing the liberty and equality of citizens, and moral equality is impossible where there is no freedom, or where citizens are politically subordinated to the wealthy. Liberty and equality is only possible where each person totally surrenders his natural freedom to everything he can get and the right to keep that which his strength permits to a political community and in return receives the moral freedom to actively and directly participate with others in making laws or policies and the legal title to that which rightly belongs to him which are guaranteed by the greater power of the whole community.

Rousseau's idea of popular sovereignty made him to be one of the most influential and explicit proponents of democracy. Indeed, the *Social Contract* became the bible of most of

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[245] *Ibid*., III, 15.

the leaders of the French revolution.[246] In their contest with the old oppressions of the monarchy and the church, the leaders of the French revolution relied heavily on the proposition that the third Estate, the bourgeoisie, that represented the peasants and workers, were the rightful rulers of France. In later revolutions, similar claims were made.

The result was to attack the position of the established state authority of the personal rule of the absolute monarch by appealing to an alternative and presumably more popular source of sovereignty from which was born the French Revolution. The French Revolution can best be characterised as a period of upheaval between 1787-1799 that overturned the old order of the nobility and church in France on behalf of "the people" and "the nation".

The revolutionary movement, based on liberal, democratic principles, established a constitution in 1791 and proclaimed the *Declaration of the Rights of Man and of the Citizen*. After a phase of reform, it entered a period known as the Reign of Terror. The Revolution ended in 1799 with the overthrow of the First Republic by Napoleon Bonaparte.

5.   The Completion of the Development of the State:
   The Liberal Theory of the State.

5.1.   The Social and Political Idea of Order of the French Revolution.

The immediate cause of the French Revolution was the large national debt France incurred in its recent war with Britain in North America, that King Louis XVI inherited. In 1787, the king, deeply in debt, called an emergency assembly of people of rank to approve the imposition of higher taxes on the higher estates. He could not persuade the privileged classes to agree to pay higher taxes. When he sought to impose higher taxes, the nobility and the clergy refused the king's request and challenged his authority by demanding a say in the governance of the realm in exchange for the relinquishment of their immunity from taxation.[247]

Previously, the arrangements inherited from the feudal polity of estates had given the three Estates – the propertied clergy, landed nobility and bourgeoisie – the political privileges and burdens of shaping and executing policy.[248] For instance, the king needed the consent of the estates to obtain access to their financial resources, especially for war. The absolute kings in the highly stratified European society excluded all groups from the political privileges and burdens of shaping and executing policy.

Thus, from the point of view of absolute rulers, society – or civil society - appeared chiefly as a realm of great processes of great political significance, but which on that very account had to be authoritatively disciplined, monitored, administered and policed from above.[249] This

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[246] Russell, *op.cit.*, p. 674.
[247] Opello, Jr. and Rosow, *op.cit.*, p. 104.
[248] Gianfranco Poggi, *The State: Its Nature, Development and Prospects,* Cambridge: Basil Blackwell, 1990, p. 55.
[249] *Ibid.*

was a *societas civilis cum imperio* as it was called at the time.[250] The political implication of the view of the old civil society as it existed before the French revolution amounted to something like a benevolent, enlightened despotism.[251]

In response to the challenge from the social groups of the nobility and clergy against his benevolent, enlightened despotism and to the demand for a say in the governance of the realm, Louis XVI took the fateful step of calling together an advisory assembly of deputies from the three estates that had not met since 1614 – the Estates General.[252] During this assembly that opened in May 1789, the third estate, the bourgeoisie, which was already very heavily taxed, and the security of whose rights was in jeopardy under economic policies of mercantilism of the despotic regime that placed more restraints on property,[253] was encouraged by the challenge of the higher estates to the king's authority to make its own demands.

On June 17, 1789 the third estate proclaimed itself to the National Assembly, the only true representative of the French people.[254] It invited the peasants and workers, who suffered real privations and hardships at the hands of secular and clerical nobles, who continued to enjoy privileges and wealth not acquired through their labour and on merit, but at the expense of the third estate, to join it. Although Louis XVI dispersed the third estate, it reassembled and resisted further orders to disband. Peasants, workers, as well as liberal members of the nobility and clergy finally joined the ranks of the Assembly.[255] Reluctantly, the king sanctioned the meeting and stationed foreign regiments in Paris.

The result was open insurrection. Rioting and protests broke out in Paris and on July 14, 1789, the people stormed the Bastille, a prison that symbolized royal despotism. Rioting and civil unrest soon spread to the rest of France, caused, for the most part, by fear that the king and nobles would try forcibly to disband the Assembly and by the desire for revenge against hitherto invincible oppressors.[256] The army did little to oppose the insurrection. Louis XVI entered the Assembly and declared that he entrusted himself to the members.

In August 1789 the National Assembly embarked on the reconstruction of France. It began with a dismantling of the old feudal societal order. It abolished feudal privileges, ended serfdom and swept away all the special privileges traditionally enjoyed by the clergy and nobility.[257] It imposed an equitable tax on land and succeeded in confiscating church lands in order to meet the financial crisis. It then proceeded to draft a new constitution of France.

The preamble to the constitution known as *The Declaration of the Rights of Man and the Citizen,*[258] summarized the ideas of a new social and political order upon which the revolution was based and which determined the form of Europe and also the present-day world. In *The Declaration* and, additionally, in the constitution, emerged the ideas of order which are principally significant for the completion and extension of the construction of the modern state, as well as for the founding and development of modern society as a civil society.

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[250] Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa,* Frankfurt am Main: Suhrkamp Verlag, 1999, p.11.

[251] Gianfranco Poggi, *The State: Its Nature, Development and Prospects,* p. 53.

[252] Garrett Ward Sheldon, *Encyclopedia of Political Thought,* New York: Facts on File, Inc., 2001, p. 332.

[253] Gianfranco Poggi, *The State: Its Nature, Development and Prospects,* p.53.

[254] *Ibid*., p. 105.

[255] Gerald Runkle, *A History of Western Political Theory,* New York : The Ronald Press Company, 1968, pp. 334-5.

[256] *Ibid*.

[257] G. W. Sheldon, *Encyclopedia of Political Thought*, p. 332.

[258] Michael Rosen and Jonathan Wolff eds., *Political Thought,* Oxford: Oxford University Press, 1999, p. 398.

The Declaration and the constitution of 1789 set the whole social and political order on a new foundation. Against the historically traditional institutions which existed and developed for centuries, and against a religiously legitimated force of order, *The Declaration* and the constitution proclaimed principles of reason and of natural rational right as the basis for a new social and political order. The new social and political order should alone be built and shaped from the claim of reason. Which reason? Böckenförde hastens to ask.[259]

The reason that *The Declaration* and the constitution relies on is not in itself, as such, detached from interests and historical political determination; it is also no longer, as is the case with the thinkers of the middle ages and early modern times, a distinct reason oriented towards a universal order of goals seen as of a divine creation; it is rather, a free self-determining individualistic reason. First, on the basis of this setting of its life goals, it is generally a deducing and constructing reason: the begin and goal of all social and political order is the single, free , equal personality on its own, the individual.

The fall back on nature and also, as far as that goes, the natural rights argument is not in this case given up. But in place of the socially bound, in historical life-forms shaped concrete nature emerges the elementary abstract nature detached from all historical particularisation and concretisation. This is the social bond thought in advance and leads back to the last indivisible figure, the individual, pure nature. The social and political institutions must now be measured on the claim and postulates of this rational nature and shaped according to them. Even when taken over and continued, they acquire through this a new content and meaning.

The Declaration is the precipitate of rational thinking, the constitution of 1791 explains this in further detail. The positive change from the old societal feudal order to a new order brings about *The declaration*, the 'first basic law of the new society', as Lorenzo von Stein said.[260] This first basic law contains rational principles of societal order and principles of state order.

5.2.   The Social and Political Construction of Order of
        the Declaration and Constitution.

The principles of the new societal order appear in inalienable human rights: equal rights; the general freedom (that is, the freedom of the person, of thought, speech and the press and of work and ownership acquired through labour and not as a result of one's social status, as was the case with the nobility and clergy under the old societal feudal order). They – and they alone – are the firm ground, the normative basis of all social order.

What is meant and intended is not only the abolition of all violence between individuals or segments of the population, but also of all limitations of rights and occupation to status and the integration of the individual to the corporate-status of the estate. It is about the completion of emancipation : on the one hand, of the detachment from the given orders of rule and life, from the binding force of birth and status of the family; and, on the other hand, of the release of the individual to full self-referential development on the basis of legal equality.[261]

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[259] Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa,* p. 13.
[260] Ernst- Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit,* p.56.
[261] Ernst- Wolfgang Böckenförde, *Staat, Nation, Europa,* p. 15.

What is guaranteed fundamentally is abstract, general freedom, and it is the freedom of the individual on his own, not the corporate freedom of social communities. It takes the place of the concrete freedoms of the old order. These existed within social and political relationships of the ruled, almost shaped the legal status within them, but they thereby presupposed them as such. Freedom exist now according to the idea, not in law, and through law, by which social relationships in which the human being stands inextinguishable are justly organized. It is rather the precedent and prerequisite: law appears as the limitation of freedom.[262]

Looked at in the foregoing manner, freedom is the potential unlimited extension; the fellow human being and the network of social relationships in which the individual lives come into play not as a condition for one's own freedom and self-development, but as the limit of one's own extension, as Karl Marx correctly remarked[263]. 'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law' (Art. 4).

As a means of order against this freedom so as to be able to regulate the common life in society, *The Declaration* refers to the law. It is the general and only means of order. 'Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law' (Art. 5).

The characteristics of law are that it is general, it is the same for all; it lays down no privileges, equality of right is immanent in the law; it is in its content, just as in its origin, general: it proceeds from the right of every citizen to participate personally, or through his representative in its foundation (Art. 6). While all provisions in questions are only generally or potentially laid down, the principle of freedom is maintained: the citizen who himself or through his representatives obeys the laws, decides not for others, but at the same time for himself as this thought is expressed in Rousseau's political writings and later in Kant's metaphysic of morals.

The underlying idea of order clearly emerges here: over the free and equal and the society that they build, there arises a unitary power of order, the state, that has its definitive outward form in law. The state appears as a unitary, central power of order and rule over individuals that are released by the other as stately rule. The state detaches itself, on the one hand, from the person of the monarch, becomes an abstract organisation; *The Declaration* refers to the state as a political association (Art.2). On the other hand, it is based on individuals and their social contract, it is a social body , as it is expressed in the preamble of *The Declaration.*

The state builds itself over individuals as their political organisation. It obtains its legitimation and its purpose not as godly support in order to resist, like Martin Luther, the unjust and the evil, not as a naturally given, historically arisen institution (from the power of tradition), but from those who are subject to the power of the state and bear the state. From there is the goal and purpose of the state also determined: 'the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression' (Art.2).

The afore-stated goal and purpose of the state immediately finds approval today, but it means, at the same time, a rejection of every transpersonal and every community-oriented goal-setting of the state that captures the individual also as a member of a greater whole. Not only is the glory of the ruler or the power-related spreading out of the true religion, for which

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[262] *Ibid.*
[263] Karl Marx, *Die Frühschriften,* Ausg. Landshut, 1953, p. 192ff.

human beings were frequently used and sacrificed, ruled out as a state defined goal, but so is the communal ethical good life, the *eudaimonia* in the sense of Aristotle, or – presently – the order and responsibility for the preservation of the ecological basis in the world.

The state, seen in this way, acquires an instrumental character. Its sole responsibility is that of the preservation of emancipative rights of freedom of the individual. It becomes a state of civil society in which the individual is the starting and ending point of social life. Its principle is the elevation of individuals to the fullest freedom, to the fullest personal development. The political organisation of the state seeks this principle as a result. But it necessarily props itself on an additional element which is not compatible with the individualistic basic approach.

The French Revolution fused the idea of the nation to the political organisation of the state. Article 3 of the *Universal Declaration of the Rights of Man* declares that all sovereignty resides with the people and that nobody may exercise sovereignty, that means the highest and extensive power , which does not proceed from the nation or from the people constituting it.

What this means, first of all, is a rejection of rule by nature, as well as of such originating from one's own right or divine power. All political power must ultimately rest with the people; the holding of political power by certain persons only serves a specific function, it justifies no own, more than ever, irrevocable right that allows its bearer to step out as person from civil equality. In this respect, the identity of the ruled and ruler remains in force.

The people become the bearer of sovereignty, not as a sum of individuals, or an embodiment of those affected by stately measures, but a totality and a unit, really a nation. One's national identity or nationhood, therefore, comes from being a member of a certain people, which was defined as homogenously distinct in language, culture, race, and history from other peoples. Thus, nation comes to have its contemporary meaning: "a uniquely sovereign people readily distinguishable from other uniquely defined sovereign peoples who are bound together by a sense of solidarity, common culture, language, religion, and geographical location."[264]

While the people become a nation, the people taken together as a unit constitutes itself as a self-conscious political body. In this way, the shift of sovereignty from monarchy to nation, its anchor in the will of those who are subject to it, at the same time, a raise in the claims and extent of sovereignty is here allowed to take place: political rule and its bearer no longer appear as an opposite number, but as the outflow of equitable self-rule.[265]

The exercise of sovereignty takes place through the delegation to different powers. They are clearly defined in their responsibilities and must operate as checks and balances upon one another, thus directly countering the tendency, characteristic of absolutism, to concentrate all power in the ruler.[266] They are bearers of power of decision-making, no longer from themselves, the force of a social, religious or traditionally justified position of power, but first the force of authorisation through the constitution and in the extent of this authorisation.

In addition to this comes the principle of representation. Through the will of the unity and the collectivity, the collectively binding and obliging, not the individual personal will, and in the decision-making powers, representation should be shown to advantage and be authoritative. Therefore, it requires as holder of these powers – legislative and executive – not instructed, an agent carrying out a particular will, but representatives. Elected from the citizens or – like the

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[264] Norman Davies, *Europe: A History*, Oxford and New York: Oxford University Press, 1996, pp. 7-8.
[265] Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa,* pp. 18-19.
[266] Gianfranco Poggi, *The State: Its Nature, Development and Prospects,* p. 54-55.

king - appointed through the constitution, they should represent the nation itself, act as the people and for the people in the sense of the general will.[267]

Locke's English model of representation and separation of powers are the ways in which the state, proceeding from the principle of popular sovereignty and bound back on this, in the sense of political freedom and the realisation of the general will, should be organised. This follows, on the one hand, in a centrally controlled and hierarchically organised administration that translates the general will in the country within and equally shows this to advantage. It follows, on the other hand, in the self-administration of the communities or municipalities.[268]

The French draft constitution, approved by King Louis XVI in 1790, established local units of self-government for purposes of decentralizing authority. It created a limited monarchy. The constitution was designed to take advantage of the virtues of the separation of powers. Thus, in addition to a limited monarchy, the constitution created a unicameral legislature that could make laws, which could be blocked by the king for a period of four years, though. Moreover, the legislature was elected by voters who met property requirements.[269] In effect, the constitution conferred the electorate on the middle and upper classes. The constitution was thus a bourgeois document that reflected the ideas of moderate leaders of the revolution.

The failure to give the poor a voice in government had serious implications for the revolution. Hoping for relief from economic misery, and angry that they had been denied the franchise, the poor became increasingly radical. A wide civil society network of Jacobins, the most extreme of the political clubs debating the shape of the revolution, accelerated the process, spreading their radical sentiments throughout the nation in political writings, in theatre, music, opera and scientific circles.[270] The Jacobins espoused a republic and universal suffrage.

The Jacobins placed the claim of equality for all citizens – an implicit element of liberal claims of individual rights, which moderate liberals more responsive to the concerns of private property-owning bourgeoisie avoided – above all else, even the protection of private property.[271] They appealed to the national sentiment that the French state was a common enterprise that deserved to be run by the French people themselves and thus urged them to escape from the old oppressions of the monarch, the church, or even from foreign rule.[272]

Much of the Jacobin debate centred around the future of the King, an issue fanned by Louis's aborted escape from Paris in June 1791 and growing fears that he was conspiring with foreign states against the French people. Louis's acceptance of the final draft of the constitution did nothing to strengthen his position. The revolutionaries, believing that the king and the aristocracy were colluding with foreigners, imprisoned the royals.[273]

In August 1792, the Paris commune was set up. Its purpose was to suspend the power of the king, call a national convention and revise the constitution. Radical leaders *Georges Jacques Danton* and *Comte de Mirabeau* instituted the First Terror. They aimed to stamp out the king's remaining supporters by organising a wide net of arrests, seizures and executions. The National Convention was elected in September 1792 to write a republican constitution.

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[267] Ernst- Wolfgang Böckenförde, *Staat, Nation, Europa,* p. 19.

[268] *Ibid.*

[269] Gerald Runkle, *op.cit.,*p. 335.

[270] G. W. Sheldon, *Encyclopedia of Political Thought,*p. 332.

[271] Opello, Jr. and Rosow, *The Nation-State and Global Order,* p. 105.

[272] Robert I. Rotberg, "African Nationalism: Concept or Confusion," in *Nationality and Nationalism*, vol. III, eds., Athena S. Leoussi and Steven Grosby, p. 214.

[273] G. W. Sheldon, *Encyclopedia of Political Thought,* p. 332.

Consequently, the monarchy was abolished. Louis was tried for treason and executed in January 1793.[274]

Although France was declared a republic in 1792, the stiff resistance of the nobility and the clergy prevented liberals from gaining full control of the French state. Moreover, France was invaded by several European kings, who saw the survival of the new French republic as a direct challenge to their monarchies. In order to deal with these threats, the republic ordered universal conscription in August 1793. At the same time, all of France's economic resources were placed under the authority of the new republican government, called the Directory.[275]

These two actions were truly radical: for the first time, an army of citizen-soldiers loyal to the nation was raised and supported by mobilizing the vast resources of an entire national economy. To compensate for its weakness at home, the republican regime waged war against its absolutist, monarchical enemies abroad.[276] The French met defeat, however, and suffered further hardship as a result of crippling trade blockade imposed by the British.[277]

Mounting international pressure led to renewed internal strife. The extremist position in France became stronger, and moderates were expelled from the National Convention. Under the direction of *Danton*, *Robespierre* and *Marat*, who allied themselves with the middle class, the convention introduced radical reforms: state limits on prices; national assistance for the poor; heavy taxes on the rich; and universal compulsory education. The Convention drafted a new constitution, ratified by national plebiscite, announcing universal suffrage.

Organized regional resistance grew to the radical programme and, in response, the National Convention issued a proclamation in October 1793 legitimating any means it deemed fit to continue the revolution. Power was centralized in the committee of Public Safety, which worked with the Committee of General Security and the Revolutionary Tribunal to subdue or execute enemies of the people. Thousands died and the country was plunged into civil war.

Robespierre was overthrown and executed on July 27, 1794. Power shifted to the moderates, who expelled the directors of the Terror. The National convention undertook to create a new constitution. In August 1795 the National Convention, now wary of the abuses of one-chamber assemblies, approved a new constitution that placed executive power in a five-member Directory and legislative power in a Council of Ancients and a Council of Five Hundred. It added a statement of duties to the declaration of rights in the constitution in 1791.[278]

But the Directory faced crippling problems: the burdens of the European wars; a financial crisis; counter-revolutionary unrest from both radicals and royalists who yearned for a return to strong centralized rule. An insurrection by royalists and reactionaries encouraged *Napoleon Bonaparte* (1769 – 1821), the republic's most successful general, to seize dictatorial power in 1799.[279] The Directory was abolished and Napoleon declared the revolution had ended.

Napoleon's own empire, however, would convey the revolution's ideals throughout Europe. He sought to unify France around the revolution's ideals of *liberte, egalite, fraternite* (liberty,

[274] *Ibid.,* p. 333.

[275] Opello, Jr. and Rosow, *The Nation-State and Global Order,* p. 105.

[276] *Ibid.*

[277] G. W. Sheldon, *Encyclopedia of Political Thought,* p. 333.

[278] *Ibid.,* p. 333- 4.

[279] Walter C. Opello, Jr. and Stephen J. Rosow, *The Nation-State and Global Order*, p. 105.

equality and brotherhood) and to restore order. Between 1799 and 1804, he reorganized the state's central administration, provided France with a constitution and a uniform legal system called the *Code Napoleon*, and expanded territorial administration. He placed *prefects* under the absolute control of the central government in charge of the 83 *departements* into which France had been divided by the previous revolutionary government.[280]

Therefore, though French liberals were able to overthrow the monarchy, they had a difficult time gaining control of the state and were not immediately successful. Even after successfully gaining control, the resultant liberal republican state retained many aspects of the previous absolutist state, especially its centralized, unitary character. As such, the French revolution brought the development of the political state, like it arose in the wars of religion, and was thought of by Hobbes, to its completion, Böckenförde asserts.[281]

The French revolution signalled a turning point in modern history and became the model for all future revolutions. It was the first revolution built on the principle of total reconstruction, not only overhauling social and political institutions but also overseeing the smallest details of social and personal life. Its achievement was the establishment of the democratic principle that the constitution is the will of the people and, as Thomas Paine had, said, any government violating the constitution exercises "power without right" and thus is a despotism.[282]

The French revolutionaries' vision of democracy was new. It was not based on the English model of the separation of and balance of powers, nor on representative government, but on the general will. From this revolutionary theory, and the experience of diverse people in European wars, emerged the idea that the nation is sovereign over the law.

The success of the French Revolution announced the incompatibility of hereditary right and privilege with citizenship. After the revolution true democracy could mean nothing less than the equal admission of all members in a state to full political participation. The concept of being French was beginning to be associated with the right of participation in the government of the polity rather than with being a subject of the French king. There was widespread national consciousness that the state was a common enterprise that required to be run by all.

Nationalism provided an escape from the old oppressions of Church, monarch, or even from foreign rule, since a nation – which was far more than the sum of its individual citizens – by its very existence promised a better future to peoples possessing common cultural traits who lived within its defined territorial boundaries. The idea of a nation gained currency in the 19th century as a new building force of homogeneity or political cohesion.

5.3.   The Idea of Order of the Nation

Originally, the word nation (from the Latin *natio*, meaning birth or place of origin) was a derogatory term that referred to groups of foreigners from the same place whose status was below that of Roman citizens. During the Middle Ages, the word came to refer to a student

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[280] *Ibid.*

[281] Böckenförde, *Staat, Nation, Europa,* pp. 12-13.
   Böckenförde, *Staat, Gesellschaft, Freiheit,* p.55.
[282] G. W. Sheldon, *Encyclopedia of Political Thought,* p. 334.

elite from the same geographical region attending Europe's medieval universities who took sides as a group against students from different regions in scholastic debates.

It was during the 16th century, in the aftermath of the French Revolution, that the word nation began to be applied to a unique people who had liberated themselves from the tyranny of absolute monarchy and the Church, and was readily distinguishable from other people by the objective criteria of a common language, culture, race, origin and history.[283]

The unity of the nation based on a common culture replaced the unity of religion and established a new, though politically and externally directed homogeneity in which one still lived largely from the tradition of Christian morality. According to the 'Sleeping Beauty' views of nationalism of the time, national identity was a dormant natural human emotion that needed to be awakened by its desire for freedom, self-government and a state of its own.[284] Thus, the homogeneity of the nation found its expression in the idea of a nation-state.

During the 18th century, creating a common national community to which all subjects of the state belonged - that is, a nation bound together by a common language, culture, origin and history – enabled states to raise huge armies without threatening the state. Thus the process of state formation in Europe in the 18th century created nations where none had previously existed in order to mobilize resources and survive in a world of competitive states.[285] This was more the case with the need for formal political domination of colonies that were meant to provide a cheap source of labour and raw materials for the industries in Europe.

However, the idea of a nation later lost its binding force not only in many European states. Even in the young states of Asia and Africa, Boeckenfoerde observes, the binding force of the idea of a nation was to be of a temporary duration. To start with, the modern nation-state that prevailed during the 19th century in Western Europe, was legitimated on the basis of the idea of the dominant or majority ethno-national group being able to represent the population throughout the territory of the state : 'each nation, one state. Each state, one national being.'[286]

The principle of nationality began to challenge the established boundaries of states, creating a serious political problem for imperial regimes. Hurst Hannum notes that, as 'democracy and social contract theory became central to European concepts of government, multiethnic states became more difficult to sustain. States-in-waiting utilized ethnic or linguistic homogeneity to justify their separation from the imperial regimes to which they were subject, as well as to legitimise peripheral territorial expansion'.[287]

Demand increased for states to be bounded according to national principles and, by World War I, the concept had actually become a war aim under the doctrine enunciated as 'self-determination' by Democratic US President Woodrow Wilson. Based on Wilson's rhetoric of nationalist legitimacy, the League of Nations founded after World war I for disarmament and war prevention sanctioned massive border changes, population transfers, and realignments.[288]

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[283] George Brunner, *Nationality Problems and Minority Conflicts in Eastern Europe,* Gürtesloh: Bertelsmann Foundation Publishers, 1996, p. 18.

[284] Hans Kohn, *The Idea of Nationalism: A Study of Its Origins and Background*, New York: Macmillan, 1944; Anthony D. Smith, *The Ethnic Origins of Nationalism*, Oxford: Basil Blackwell, 1986.

[285] Opello Jr. and Rosow, *The Nation-State and Global Order,* p. 183.

[286] J.C. Bluntschli, *Allgemeine Staatslehre,* 6th ed., Stuttgart 1885, p. 107.

[287] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights,* Philadelphia: University of Pennsylvania Press, 1990, pp. 453-4.

[288] Linda S. Bishai, "Sovereignty and Minority Rights: Interrelations and Implications" in *Global Governance*

But as nationalism clarified the boundaries of the nation-state, the principle of sovereignty derived from the theory of individual freedom and consent revealed its sheltered tendency to deny freedom to identifiable outsiders. "When nationalist ideology becomes aggressive, the result is the exclusion, rejection and even diabolization of the nationalism of others" [289]who may be a minority ethno-national group within the population of the territory of the state.

Nationalism can be used by authoritarian regimes to promote illiberal goals of chauvinism, xenophobia, militarism and unjust conquest against alleged enemies of the nation.[290] In Europe, the nationalism of the authoritarian Nazi regime revealed the sheltered chauvinistic tendency to deny freedom to identifiable outsiders. It is this nationalism that was the primary cause of the World War II and spawned enough "crimes of war" to shock the collective conscience into articulating the 1948 *Universal Declaration of Human Rights*.

World War II produced a dramatic shift in the legitimacy of nationalism as a basis of statehood.[291] Liberal states adopted the myth of ethno-cultural neutrality. They began to treat culture in the same way as religion, as something which people should be free to pursue in the private life, but which is not the concern of the state (so long as people respect the rights of others). Just as liberalism precludes the establishment of official religion, so too there cannot be official cultures which have preferred status over other possible cultural allegiances.[292]

In reality, however, liberal-democratic states are far from being ethno-culturally neutral. The policies of United States, which is the allegedly proto-typical 'neutral' state, that make the English language a legal requirement for education and government, citizenship for immigrants (under the age of 50), the drawing of internal boundaries, are a case in point. The United states is not unique in this respect. Virtually all liberal democracies have, at one point or another, attempted to diffuse a single societal culture, throughout all of their territories.

No one would have predicted in 1750, for instance, that virtually everyone within the current boundaries of France or Italy would share a common language and sense of nationhood. Other typical 'nation-states' include England, Germany, and Portugal. These governments have deliberately promoted integration into a territorially concentrated culture, based on a shared language used in various institutions, in both private and public life (schools, media, law, economy, government). By so doing, they have encouraged citizens to view their life-chances as tied up with their participation in common institutions that operate in the same language.[293]

Of course, there are other countries like Switzerland, Belgium, Spain and Canada, and not so long from now the former Yugoslavia and Soviet Union, where minorities have successfully resisted attempts to integrate them into the dominant or majority societal culture for fear of being assimilated into the dominant or majority culture, and governments have had to back down on their nation-building policies by recognising the rights of these groups to continue to exist as separate cultures outside the mainstream culture.

[ ] 4 (1998) p. 164.

[289] Gerard Chaliand, ed., *Minority Peoples in the Age of Nation-States,* trans. T. Berrett London: Pluto Press, 1989, p.2.

[290] Will Kymlicka, "Nation-Building & Minority Rights: Comparing Africa & the West," in *Ethnicity and Democracy in Africa,* eds., Bruce Berman, Dickson Eyoh and Will Kymlicka, Oxford: James Curry Ltd., 2004, p. 56.

[291] Linda Bishai, "Sovereignty and Minority Rights," p. 164.

[292] Kymlicka, " Nation-Building & Minority Rights," p. 54.

[293] *Ibid.,* pp. 54-55.

But the quest to become a nation-state has been a powerful one in most Western democracies. As Canovan reasons, nationhood is 'the battery' which makes Western states run: the existence of a common national identity motivates citizens to act for common political goals. Modern states need to be able to mobilize citizens in pursuit of a wide range of goals. The battery of nationalism can be used to promote liberal goals (such as social justice, democratisation, equality of opportunity and economic development) and illiberal goals.[294]

Since nationalism was recast as the villain of World War II, it was no longer a legitimate basis for state sovereignty. Paradoxically, Wilson's doctrine of self-determination retained its status as a worthy political goal. However, the nature of self-determination shifted from the right of an ethnic minority to secede to the right of a people under foreign or alien domination to politically constitute itself into an independent territorial state. States were to be legitimated by being seen to represent their populations without reference to (ethno) national groups.[295]

The nation was no longer viewed as natural and primordial, in the words of Anderson, but as created and invented.[296] The nation was now viewed as consciously invented in order to create the cultural, sociological, and psychological conditions necessary to sustain the sovereign territorial state. Creating a sense of nationhood required the breakdown of the individual's attachment to local languages and cultures in order to create a common national culture that inculcates in the state's subject population a common national frame of reference across space (i.e., territory) and time (i.e., a single national history). Therefore, creating a national identity after World War II became closely connected to the formation of territorial states.

In the shaping of the United Nations Charter, it was specified that the principle of self-determination "conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession."[297] The victors of the World War II believed that the maintenance of existing state borders was the means to a stable peace, the United Nations became the organisation of externally legitimate states.

Once admitted to the United Nations, the benefits of recognition for a state included the presumption of sovereignty as long as the state retained control over territory, cooperated with the reciprocal non-intervention norm, and fulfilled its treaty obligations. The United Nations rests on the foundation of the mutual recognition of sovereignty and reciprocity of states. Crucially, it is based on the formal assumption of states as equal sovereigns (derived from theories of political legitimacy)[298], as was formally established in the Peace of Westphalia.

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[294] Margaret Canovan, *Nationhood and Political Theory,* Cheltenham: Edward Elgar, 1996, p. 80.

[295] Bishai, " Sovereignty and Minority Rights," p. 164.

[296] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism,* London: Verso Press, 1983.

[297] Quoted in Rupert Emerson, "The Problem of Identity, Selfhood, and Image in the New Nations: The Situation in Africa," in *Nationality and Nationalism*, eds., Athena S. Leossi and Steven Grosby, p. 228.

[298] Bishai, " Sovereignty and Minority Rights," p. 158.

6.   The Expansion of State Sovereignty

6.1.   The Colonial State.

Through colonialism European states transferred the idea of the state to their colonies, which laid the foundation of the present global system of sovereign territorial states.[299] In line with the principle of self-determination in the UN Charter, there is a strong correspondence between boundary lines of the present system of independent, sovereign states and the administrative and legal units of the European colonial Empires, most of which were arbitrary markers of the limits of exclusive spheres of political influence and economic influence.

A crucial force that transformed the world of colonial empires into the world of independent territorial states was nationalism, which arose in connection with popular sovereignty and liberalism and helped generate independence movements in the colonial empires.[300] Of course, pre-colonial Asia or Africa had very few nations in the accepted sense. The colonies themselves usually comprised many ethnic and political entities. None of these colonies were strictly speaking nations. They were demonstrably not of one people for one to talk about the rise of nationalism, as the self-assertion of the colonised is usually described.[301]

However, by partitioning, say the African continent into administrative entities and imposing on them their own legal, linguistic, and cultural concepts, alien European powers made the indigenous population more conscious than before that they were one people. Colonial domination gave them common experiences, a sense of common history, though brief, and, in the manner of India, a common language. They shared common grievances. They also lived within a single territory and were subject to the same laws and methods of administration.[302]

It was indigenous Africans indiscriminately who were subordinated to colonial rule, and their reactions to colonialism were in great part couched in terms of Africa as a whole. In its language, and in some measure in its outlook, African nationalism was African. It was Africans and their communities that suffered inequalities, discrimination, spatial distortions, limited investments and general backwardness. In brief, the essence of the confrontation was a racial one: Africans demanded an end to white superiority by which they were dominated.

Nationalism arose among Western-educated elites in the colonies. They learnt from the world-wide dissemination of philosophies proclaiming the equality of all human beings and the teaching that equal persons possess an inherent right to rule themselves, that to be ruled and never to rule was to be without dignity. Thus, the only way in which they could recover their dignity denied to them by their European rulers was by being able to rule themselves.[303]

The fact that nationalism was a demand for racial equality was its most conspicuous attribute. Nationalists demanded acceptance as equals in the human family. This had political dimensions, because colonialism in Africa had been marked by the domination of Africans by

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[299] Opello, Jr. and Rosow, *The Nation-State and Global Order*, p. 104.

[300] *Ibid.*

[301] Robert I. Rotberg, "African Nationalism: Concept or Confusion," p. 215.

[302] *Ibid.,*p. 216.

[303] E.A. Ruch and K.C. Anyanwu, *African Philosophy, An Introduction to the main Philosophical Trends in Contemporary,* Rome: Catholic Book Agency, 1984, pp. 294-5.

Europeans. So the demand for equality found expression in the demand for the emancipation of the whole of the African continent from European colonial rule.

The granting of the right to self-rule to former European colonies in Africa put an end to the drive to secure national unity that had been born, in the words of Immanuel Wallerstein, in the crucible of a revolutionary struggle against an alien colonial power.[304] Once the alien colonial power had been replaced, the new nationalist leaders had to look for another basis on which to build a broadly shared sense of national unity in the Post-colonial African states.

6.2.   The Post-Colonial State.

For the most part, independent African states did not aspire to their own nation-states. In conformity with the reinterpreted principle of self-determination in the United Nations Charter that was adopted by the Organisation of African Unity, they took their place in the colonially determined state-nations that constituted the existing political map of Africa.

From the point of view of the ethnic groups, few had the power or aspiration to form 'nation-states' in the Western sense, in which their language and culture would monopolize public space and public institutions. This was not a realistic possibility in Africa, since most states do not have a majority in this sense. They are composed of several ethno-cultural groups, none of which form more than twenty-five or thirty percent of the total population.[305]

And just as ethnic groups cannot aspire to their own nation-state, so too states cannot attempt to integrate citizens by diffusing a particular ethnic group's language and culture throughout the territory of the state. To be sure, most African states are interested in developing a common identity, and developing common public institutions and a common public sphere operating in a common language. But this has not typically involved diffusing the majority's language, history and identity (since there is no such majority).

In Africa, state nation-building has not been a matter of majority nation-building. Rather, it has typically involved diffusing the colonial language as the language of state institutions, and trying to develop pan-ethnic bases for state identification or patriotism which would appeal to most or all ethnic groups in the territory of the state. For instance, rather than basing national identity on the glorious history of the dominant group , African states have tried to imagine a common identity by appealing to a common future in which all groups share.[306]

Citing the example of Mauritius to demonstrate the path that African countries need to follow, Eriksen shows the state as being 'in the process of developing a common set of supra-ethnic, national myths and symbols which is invested with meaning and relevance by the bulk of the population', and has a 'high level of cultural integration, which makes a national public sphere possible', based on a Creole version of the Colonial French language.[307]

Kymlicka calls this 'nation-building', but it does not involve building the state around the language, culture and history of the dominant ethno-national group. As a result, nation-

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[304] Quoted in Emerson, "The problem of Identity, Selfhood, and Image in the New Nations," p. 233.
[305] Will Kymlicka, " Nation-Building & Minority Rights," p. 64.
[306] *Ibid.,* p. 65.
[307] Thomas H. Eriksen,"A Non-ethnic State for Africa ?", in *Ethnicity and Nationalism in Africa.*
    ed., Paris Yeros, Basingstoke: Macmillian, 1999, p. 49.

building of this pan-ethnic sort is, in theory, not as much of a threat to minorities. In Africa nation-building has not meant nation-destroying. Ethnic minorities have not been the target of majority nation-building campaigns as was the case in much of the West.

It would be paradoxical if it turned out to be Africa rather than the West which was the real home of 'civic' nationalism, whose official language and symbols really are neutral amongst the various cultures and identities of the ethnic groups living in the territory. In such a context, the dialectic of nation-building and minority rights would be different. Where nation-building does not privilege a hegemonic majority group, there may be less need for specific rights to protect minorities from injustice which arise as a result of majority nation-building.[308]

However, ethnic conflicts can still arise in this form of post-colonial pan-ethnic nation-building. But they are likely to take the form of struggles for a share of state power at the central level, rather that ethno-nationalist struggles for self-government and autonomy at a regional level. This indeed is a common feature in African politics.

The problem is that while the state may be more of less neutral (that is, its language, culture and symbols are not tied to any particular ethnic group), the avenues for accessing state power go through networks of patronage /clientelism and political parties that are predominantly defined along ethnic lines. And this raises the danger that some ethnic groups will have much better access routes to the state, while other ethnic groups are excluded.

Where this is the problem, ethnic groups are likely to mobilize as communal contenders, fighting for a share of state power, rather than as ethno-nationalists, fighting for autonomy. And indeed Gurr says that the distinctive feature of ethnic conflict in Africa is that it primarily involves 'communal contenders' rather than minority nationalism.[309]

In such a situation, political integration is most likely to be enhanced through measures adopted to accommodate religious groups in Belgium, the Netherlands, Austria and Northern Ireland. In these countries, Protestants and Catholics were in effect 'communal contenders', rather than ethno-nationalist. Through measures adopted to accommodate religious groups, each religious group was guaranteed proportional shares in political power and in access to public resources, a veto power over certain decisions, and guarantees of a share of power in government, so that neither group was excluded from state power.

For as long as ethnic conflicts in African take the form of conflict between communal contenders for a share of state power, Kymlicka suggests that measures adopted to accommodate all groups are the most appropriate, for they ensure that no ethno-national group is excluded from state power[310] and all ethno-national groups are thus able to support the public objectives of the state and thereby enhance its legitimacy.

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[308] Kymlicka, " Nation-Building & Minority Rights," p. 65.
[309] Ted Gurr, *Minorities at Risk,* Washington, DC: Institute of Peace Press, 1993,
[310] Kymlicka, *op. cit.,*p. 66-67.

7.   State Legitimacy

The question of what makes political power rightful or legitimate has exercised the minds of political thinkers since the origin of political speculation, especially so when political power has been substantially challenged or widely experienced as oppressive and unjust.

The concept of political legitimacy has been central to both political philosophy and to empirical social science despite their divergence in the twentieth century. The majority of social scientists writing about legitimacy during the second half of the twentieth century have been concerned with exploring the conditions and causes of the emergence of legitimacy in subjects' favourable beliefs, attitudes and perceptions that produce compliance with or support for a state[1], or in the stability or lawfulness of a regime that give it "the capacity to engender and maintain the belief that existing political institutions are the most appropriate."[2]

That a state is stable, lawful and refrains from the persecution or deliberate impoverishment of its subjects shows that it is good in some ways, but it does not obviously show that a state has the kind of special moral relationship with any particular subjects that gives it a right to rule.[3] Similarly, accounts of legitimacy simply in terms of the subject's beliefs or attitudes could also not show that a state has the rights to exclusively impose and coercively enforce binding duties on its subjects.[4] It is a mistake, then, to focus in an account of state legitimacy on the attitudes of subjects or on the capacity of a state to produce or sustain these attitudes.

Political philosophers present a different perspective, which is largely normative and moral. Their focus of attention is on the question of considerations of a significant moral relationship between the state and its subjects that gives the state the exclusive moral right to impose the duty on subjects to obey its law, to have its subjects comply with the duty, to use coercion to enforce this duty within the moral limits set to the exercise of political power by the state.

In view of these considerations, political philosophers have sought to demonstrate by *a priori* argument that the state is morally legitimate. Traditionally understood, only states have legitimacy for only states exercise political power. That is, only states claim a monopoly right to enact, apply and enforce laws on all those residing within their jurisdiction and only states claim that those subject to their authority have a general obligation to obey their orders.

Recently, the traditional understanding of legitimacy has been challenged. It has been claimed that both sub-state entities and international organizations can and do exercise political power. As Woods points out, the legitimacy of international institutions is being challenged by states who feel inadequately consulted or represented within organizations. The old hierarchy of states within multilateral forums, say the World Trade Organisation (WTO), is being challenged and their effectiveness and legitimacy questioned by smaller or weaker states.[5]

Thus, the question of legitimacy can be raised in the domain of sub-state entities and international organizations, just as the concept of legitimacy can be applied to other kinds of

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[1] Charles Taylor, "Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada," in *Communitarianism : A New Public Ethics,* ed. M. Daly Belmont, Calif.: Wadsworth, 1994, p. 58.

[2] Seymour M. Lipset, "Social Conflict, Legitimacy, and Democracy," in *Legitimacy and the State,* ed. W. Connolly, New York: New York University Press, 1984, p. 88.

[3] A. John Simmons, "Justification and Legitimacy," *Ethics* 109, July 1999, p. 748.

[4] *Ibid.,* p. 750.

[5] Ngaire Woods, "Good Governance in International Organizations," in *Global Governance* 5 1999, p.41.

power other than that involving the state, such as that of an employer hiring workers. But in our discussion, we shall apply the concept more to the exercise of power by the state.

7.1. The Idea of a State.

However, before making an attempt to understand why political philosophers have sought to demonstrate the legitimacy of state power, we first need to again briefly look at the idea of a state, by distinguishing it from what it is not. In order to do so, we first distinguish two kinds of social groups. The German sociologist and philosopher, Ferdinand Tönnies, distinguished between *Gemeinschaft* (community) and *Gesellschaft* (society or association).

Gemeinschaft is the earlier form of social group; it involves an attitude of natural friendship and is not deliberately organized; it is based on 'natural will'. *Gesellschaft* comes at a later stage of development; it involves an attitude of deliberate planning or calculation; it is based on 'rational will'. Though, *Gesellschaft* does not preclude the formation of friendships.[6]

Following the practice of sociologists using the word 'society' in a very broad sense for the whole subject-matter of sociology and treating 'association' as a technical term with a sharply defined meaning, Raphael defines an association as a group of persons organized for the pursuit of a specified common purpose or set of common purposes.[7]

An association is spoken of when the group, deliberately organized for a common purpose, is not for a short duration, but usually lasts for some length of time. The purpose of an association may be a continuing one, more than a group of tenants who try to get their rents reduced and disband once they succeed after a month's campaigning to achieve their purpose.

In contrast to an association, a community does not have a specified set of purposes and need not be deliberately organized. The Greek *polis* or city-state was more of a community than the modern state. Aristotle in his *Politics* (I.2) says that the *polis* comes into being for the sake of life, but that once it exists it has as its purpose the good life as a whole, the sum of all purposes humans think worth pursuing (of morality, religion, art, order and defence).

Unlike the Greek *polis* or city-state, the modern state is an association rather than a community. It is indeed the most highly organized of all forms of associations and, except for the totalitarian state that does not leave scope for private initiative, does not try to take upon itself the organization of all communal purposes, so that its purposes are in practice limited to the traditional negative function of the preservation of order and security against deliberate infringement of rights in respect of person or property (for instance, against assault or theft) and freedom, as well as the newer, positive function of the promotion of welfare and justice

The state is often called a nation, as when we refer to the nation's flag, hymn, pride or pledge allegiance to the 'nation', but we will reserve the term 'nation' for a different kind of entity. The nation is a community, a group with a common language, culture, origin and history giving rise to natural sentiments of loyalty and identification, and not limited to a specific set of purposes, as is the case with the idea of a modern state, except when a group urges that it secedes from an existing state and that it be organized as a separate state.

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[6] D. D. Raphael, *Problems of Political Philosophy,* Hampshire: The Macmillan Press Ltd, 1990, pp. 35.
[7] *Ibid.,* p. 36.

As we use the terms, therefore, nation and state are two quite different entities and do not always coincide. Some nations are divided into, or distributed among, more than one state; some states comprise more than one nation. It is possible for nation to be formed into a state just as it is possible for the population of a state to be or even become a nation, but the concept of a state is not the same as the concept of a nation.

Even when nation and state have the same territorial boundaries, membership of the two is not identical. An immigrant who becomes naturalized and so a citizen of the state, with all the rights and obligations of the natural-born citizen, will not, for sometime at least, feel himself to be a member of the nation and may not be accepted as such by others.

In general, nations and states in the modern world tend to coincide in membership, if only because nationalism gives rise to new states and the ties of statehood give rise to the feeling or sentiment of being a nation. Yet the difference in character between nation and state remains. The nation is a community; membership of the nation is a matter of sentiment, depending on common experience and history, while membership of the state is a matter of legal status.

The state should not be identified with those people who happen to be in government at any given time. A typical state lasts through a great many changes of government, and in principle any state could last for many decades. The state shares these properties with the institutions of government, suggesting that we might identify the state with the institutions of government of the legislature, the executive, judiciary, police, military and the bureaucracy.

So the main institutions of government include those which enact laws, administer the law, and adjudicate disputes about the law. Also included are institutions which maintain the internal order and security, the military which enforces the state borders, and the complex institutions operated by the civil service that administer the programmes of government. As a first approximation, then, we propose to identify the state with institutions of government.[8]

An institution can be conceived as a system of offices and roles. But, it will not do to think of the state in such an abstract and impersonal way. It is much more natural to think of the state as a system of offices and roles together with the people who occupy them at the times they perform their duties, as part of the state, at least during the times they occupy those offices and roles. That is, the state consists of the animated institutions of government against which we could make a claim for the protection of our person and property and pay allegiance to.

This understanding of the state rests implicitly on Hans Kelsen's idea of a state as a system of law, an idea David Copp[9] adopts, for the institutions of government are creatures of the law. They are defined legally, in the constitution and in the various statutes that have been enacted under the constitution. The idea of a legal system can be used to illuminate the idea of a state.

A state can thus be characterised by identifying a system of law and the territory in which the system is in force in the sense that residency in it is sufficient to put one under its jurisdiction. The state is the system of animated institutions that govern the territory and its residents, and that administer and enforce the legal system and carry out the programmes of government.

A state corresponds to the legal system that is in force in a territory. It governs the people in all of the territory in which its legal system is in force. It rules, or has its jurisdiction applied

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[8] See discussion in Quentin Skinner, "The State," in *Contemporary Political Philosophy, An Anthology* eds., Robert E. Goodin and Philip Pettit, Oxford: Blackwell, 1997, pp. 3-26, especially at pp. 8, 16.
[9] David Copp, "The Idea of a Legitimate State," in *Philosophy and Public Affairs* 28, no. 1, 1999, pp. 6-7.

universally to all the people who happen to be within its territorial bounds, though a state claims some, typically partial jurisdiction over persons outside their territories (for example, their citizens abroad or those who have committed crimes against their citizens).

The relevant bounds of jurisdiction of a state are in principle limited, roughly to the recognized territory of the state (with some extension to territorial waters, air space, and ships flying the state's flag in international waters). These bounds are defined by the general agreement of states in international law, designed to mitigate potential sources of conflict.[10]

States divide among themselves all usable territory – and that of the territory that remains in the usable universe that is claimed by no particular state (e.g., the high seas, Antarctica, the earth's moon, outer space), nearly all is regarded in international law as *res communis* (as held in common by all states and unavailable for acquisition). Virtually nothing usable is treated as *res nullius* (as "unsubjected" territory) and thus as unavailable for appropriation or settlement.[11]

The entire population of the world and its inhabitable territory have been divided into states or brought under the jurisdiction of existing states. If a person does not wish to live under the jurisdiction of a state in which s/he is born, and if s/he can afford to emigrate, s/he can escape the jurisdiction of his state but not the jurisdiction of any other state. All persons in the world today have become captive to the universal jurisdiction of one state or the other.

The universal jurisdiction of a state over all people in its territory means that everyone who resides in, or even temporarily visits, a certain territory, is willy-nilly subject to the laws of the state which controls it. No one can say that he chooses not to be subject to its laws. If anyone is in a state, s/he is necessarily bound by its laws, and if anyone disobeys any of them, s/he will be liable to punishment on the assumption that s/he is bound by them.[12]

The compulsion to obey the law which is exercised by the state is greater than that exercised by some other social groups, including associations like trade unions, for a state is able to give effect to the continued bonds of allegiance to it by coercively enforcing the duty to obey the law on residents within its territory in a manner other associations are not able to.[13]

The laws of a state require its subjects to act in certain ways, and the state typically enforces its law by attaching punishments or penalties to failures to comply. An example of this is criminal law, much of which requires actions of forbearance that would be morally required in any event. This is unlike the traffic law in which some actions that are legally required would not be morally required in the absence of the law. But in all these cases, there is the problem of explaining by what right the state imposes requirements and enforces them.[14]

Moreover, a state is territorial. A state may apply its law to anyone within its territory, including many who have no special attachment to it, such as illegal immigrants and their children, and temporary visitors. A state may attempt to control the use of land and resources within its territory, and a state defines the rules of property. Further, a state enforces its boundaries by controlling entry into or exit from its territory. The territoriality of the state

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[10] Raphael, "Problems of Political Philosophy," p. 44.
[11] Ian Brownlie, *Principles of Public International Law,* 5th ed., Oxford: Clarendon Press, 1998, p.105.
[12] Raphael, *Problems of Political Philosophy*, p. 45.
[13] *Ibid.,* p. 46.
[14] Copp, "The Idea of a Legitimate State," p. 4.

raises the problem of explaining by what right the state has jurisdiction in these ways in its territory.[15]

7.2.   The Problem of State Legitimacy.

The problem of legitimacy is, then, to demonstrate how a state can have the authority to do the kinds of things involved in governing. In part, it is the problem of explaining how a state can be morally entitled to impose its laws throughout its territory and to enforce its borders. In A. John Simmon's words, a legitimate state would have "the right to rule".[16]

The problem is to understand, first, precisely what this right amounts to, and second, under what conditions a state would have it. No one has brought out the problematic aspect of authority better than Robert Wolff in his *In Defense of Anarchy.*[17] Wolff's insight was to see that the problem with authority is not in the right to rule directly.

Contrary to conventional wisdom, people do not rule themselves, not even in a democracy. Nor is democratic power the most extensive power people have themselves. For democratic power still involves submission to the will of others. It would be anarchy for one to have the absolute right to decide ones own action while conceding an equal right to all.

Wolff's insight was to see that the problem with authority is in the duty to obey the state which it brings in its wake. If there is an authority which is legitimate, then its subjects are duty bound to obey it whether they agree with it or not. Such a duty is inconsistent with autonomy, with the responsibility of subjects to decide on the balance of reasons themselves. Hence Wolff's denial of the moral possibility of legitimate authority.[18] This is the challenge of philosophical anarchism and much of the debate about authority are seen as replies to this.

The most common route followed to avoid the anarchist challenge consists in the attempt of assimilating authority as the right to rule with authority in its other use of the permission to do something. In the case of political authority that something is the use of coercion in circumstances in which it is usually forbidden. [19]But, if a right to rule means no more than the authorization to use coercion, then it does not involve a duty of obedience. The anarchist's problem of political authority arises because it involves a duty of obedience.

Political philosophers have sought to demonstrate the legitimacy of the state, both to meet the challenge presented by philosophical anarchism and convince subordinates that obedience is not just a question of prudence or advantage but also a matter of duty. For, as Rousseau wrote,

> *The strongest is never strong enough to be master unless he transforms strength into right and obedience into duty.*[20]

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[15] *Ibid.,* pp. 4-5.

[16] A. John Simmons, *Moral Principles and Political Obligations,* Princeton: Princeton University Press, 1979, pp. 195-200.

[17] Robert Paul Wolff, *In Defense of Anarchy,* New York: Harper, 1970.

[18] *Ibid.,* p. 12-19.

[19] R. Ladenson, "In Defense of a Hobbesian Conception of Law," in *Authority,* ed., Joseph Raz, Oxford: Blackwell, 1990.

[20] Jean-Jacques Rousseau, *The Social Contract and Discourses,* London : Dent., 1963, p. 6.

We would grant that the state has power over its citizens when it imposes and typically enforces its law by attaching punishments or penalties to failures to abide, but we would hardly suppose that the state has authority, that is, that the state has a right to demand the obedience of its subjects to its law and subjects have a duty to obey the state and its law.

The more philosophically sound route followed by political philosophers to meet the challenge of the philosophical anarchist and convince subordinates that obedience is not just a question of prudence or advantage but also a matter of duty is one that points to a similarity between political authority and theoretical authority or the authority of the expert, whose judgment is a particularly reliable guide as to how things are independent of that judgment.

Indeed a close connection between theoretical authority and political authority is presupposed by the philosophical anarchist's challenge. What after all is disturbing in the case of authority is not the utilitarian consideration that one satisfies the wishes of rulers. The special problem with authority is that it requires one to let authoritative directives pre-empt one's own judgment. One should comply with them, whether or not one agrees with them because one believes that authoritative directives can guide one better than one can guide oneself.

In this sense, to have authority may mean to have the right to be obeyed, or it may mean to have the state's commands acknowledged as rightful by those at whom it is directed. When the state imposes and typically enforces its law on its subjects resident in its territory, its subjects may comply, because they believe it is something they ought to do. They are not, strictly speaking, obeying the command, but rather acknowledging the command as rightful.[21]

Of course, there are many reasons subjects acknowledge the power of the state. As Weber observed, it may be because of the prescriptive force of tradition: the fact that something has always been done in a certain way strikes most subjects as a perfectly adequate reason for doing it that way again. It may also be due to the extraordinary characteristics of those who hold state power: the fact that those who hold power may be great military leaders or forceful characters in times of crisis may inspire their subjects to acknowledge their authority. The official positions of those holding state power is a further reason for acknowledging power.

The fact that those subject to the state acknowledge the power of the state is clear. The fact that those subject to the state ought to acknowledge the power of the state is not so obvious. Hence the need to establish under what conditions and for what reason those subject to the state acknowledge the power of the state. Restated, there is need to demonstrate under what conditions the power of the state can be acknowledged to be rightful or legitimate.

The power of the state cannot be acknowledged to be rightful or legitimate by pointing to instances of human communities in which a state imposes and enforces its law on its subjects and subjects comply with the duty to obey the law. We must demonstrate by an *a priori* argument that there can be forms of human community in which state's power to impose its law and enforce it can be acknowledged to be rightful or legitimate.[22]

Indeed, demonstrating that the state is legitimate is not the same as showing that the state is justified. Justifying the state is a matter of rebutting the anarchist view that anything that is sufficiently coercive to count as a state also necessarily does or sanctions wrong (i.e., violates rights) and so could not be morally justified by showing that one or more specific kinds of

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[21] Wolff, *In Defense of Anarchism*, p. 6.
[22] *Ibid.,* pp. 7-9.

state (say, Nozick's minimalist state) are morally justified.[23] On the other hand, justifying its legitimacy involves showing that there are forms of human community in which the state's power to impose its law and enforce it does not violate applicable moral principles.

The recognition of the power of the state as rightful or legitimate by obeying its commands is not, however, as already pointed out, merely to the advantage of rulers in the consolidation of their rule and thereby meant to satisfy their wishes; the moral assumptions or principles which serve to define what counts as legitimate also typically set limits to what the powerful may do if they are to maintain their moral authority over those subordinate to them.

Therefore, a useful starting point in answering the question of what legitimacy consists in is to recognise that legitimacy, as a convenient expression for describing in general terms the criteria for the validity of power, its 'title' for issuing orders and demanding obedience from those who in turn hold themselves under obligation to obey, presupposes (i) legality, the existence of a legal system and of a power issuing orders according to rules, and provides (ii) the justification of legality, by conferring on power the chrism of authority. It is a further 'plus' sign added to the force which the state exercises in the name of the law.

The Latin root of the word 'authority' *augere* (to augment) clearly suggests the idea of conferment and possession of a special qualification, without which we speak only of 'might' and of 'power' in reference to the state.[24] When we recognise that the first dimension of legitimacy presupposes legality, we speak mostly of 'power' in reference to the state. Thus, it is only with the second dimension providing moral justification that we speak of authority.

In what follows then, we critically analyse legitimacy from the first dimension of legal rules as providing the primary ground, before analysing it from the second dimension of the moral justifiability of legal rules as providing the ultimate ground, for the legitimacy of state power, which is recognized as morally binding and worthy of the willing obedience of its citizens.

7.3.   Dimensions of Legitimacy

7.3.1. Legitimacy as derived from Legal Rules

The relationship between legality and legitimacy has long held to be one of the basic problems concerning the state. In the 16th and 17th centuries, the subtle distinctions drawn by medieval writers with regard to unjust or tyrannical power, especially the distinction between the two kinds of tyranny, *ex parte exercitii* and *ex defectu tituli* were still very much alive.

Power, according to the foregoing theory, which was fully developed by Bartolus and by Coluccio Salutati, could be unjust, that is tyrannical, on account of the use that was made of it, that is, of the way in which it was exercised. But it could also be unjust, and was held to be so even more definitely, due to a flaw in its origin, when the ruler had no proper title to govern.[25]

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[23] Simmons, "Justification and Legitimacy," p. 748, 752.
[24] D' Entreves, *The Notion of the State*: *An Introduction to Political Theory,* p. 141.

[25] *Ibid.,* pp. 141-142.

Therefore, in constructing legitimacy from the first dimension of legality, Beetham is able to speak of the state as legitimate insofar as it acquires power, and exercises it in accordance with established rules, whether these rules are customary and conventional or legal in form. Rules form a basic component of social life. It is only through their existence that we are able to predict the behaviour of others, and introduce any settled expectations into our lives.[26]

Social rules ensure predictability through their normative or prescriptive force; they impose obligations and create corresponding entitlements, which are publicly acknowledged and collectively enforced. It follows from the nature of social rules that we cannot separate the existence and acquisition of power from the normative expectations and entitlements by reference to which its possession is also justified, since both occur simultaneously; in acquiring power according to the rules a person also acquires the right to exercise it.[27]

Social rules may be customary and conventional in form, or be part of a legal order. The drawback to custom and convention, particularly with regard to important and potentially contested issues, is that they carry with them no means of adjudicating disputes about their precise reference and scope, and they rely on diffuse means of enforcement applied by society as a whole. The distinctive feature of the legal order, as H. L. A. Hart has shown, is the existence of rules prescribing the means whereby customary and conventional rules are to be recognized and adjudicated, and the presence of a specialized agency to enforce them.[28]

In most societies the basic rules determining access to the means of power come to be defined in legal form, even where they may have originated in convention, because of the disputes that arise among the powerful themselves over women, property and position. A characteristic feature of the modern world is the extent to which power is subject to precise legal regulation; and the flexibility of its procedures of legal enactment which enable the disadvantage of customary rules in the context of a rapidly changing environment to be overcome.[29]

It is not too difficult to detect behind this subjection of power to precise legal regulation in the modern world a deep commitment to legality as something worth preserving at all costs. In other words, the defence of legality is itself an indication of a choice, of the acceptance of a value considered to be inherent in the very existence of a legal system, one which, as such, is also seen to provide the ultimate justification of the power of the state.

Max Weber's comment on this is illustrative when he says that, 'today the most usual basis of legitimacy is the belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedures.' He observes that modern societies, and the state, are 'legal societies' where 'commands are given in the name of an impersonal norm rather than in the name of a personal authority; and in turn the giving of a command constitutes obedience to a norm rather than an arbitrary decision, a favour, or a privilege.'[30]

Legality in its positivist form requires the exclusion of arbitrary personal orders that go beyond the impersonal norms established according to some procedures and enacted as laws. These laws have come to replace 'the potentially capricious appeal to transcendent norms,' and are, in principle, 'what free men would establish by their own rationality.'[31]

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[26] David Beetham, *The Legitimation of Power,* Hampshire: The Macmillan Press, 1991, pp. 64-65.
[27] *Ibid.,* p. 65.
[28] H. L. A. Hart, *The Concept of Law,* Oxford: Oxford University Press, 1961, pp. 77-96.
[29] David Beetham, *The Legitimation of Power,* p. 66.
[30] Max Weber, *Economy and Society,* pp. 217-219.
[31] Steven B. Smith, *Hegel's Critique of Liberalism: Rights in Context*, Chicago Ill.: University of Chicago Press,

Hence, Weber concluded that 'rational legitimacy', which he identified with legality, was the only type of legitimacy to survive in the modern world. In it 'every single bearer of power of command is legitimated by the system of rational norms, and his power is legitimate so far as it corresponds with the norms. Obedience is thus given to the norms rather than to the person.'[32] Weber's comments certainly explain why the respect of legality plays such an important part today, not only in legal theory but in the modern conception of the state.

However, even in the contemporary world, acknowledges Beetham, the force of convention still persists, whether to qualify and subvert a status of formal legal equality, or to limit the power of the powerful in areas where the law is silent. Throughout history, in fact, the limitations on power which the subordinate have been able to secure, and which they understand as constituting rights for themselves have usually been conventional than legal.[33]

Such rights as those of peasants to a share of an agricultural product sufficient for subsistence, of industrial workers to control aspects of the work process, of women to a sphere of activity from which men are excluded, are typically the product of historical struggles between dominant and subordinate, and represent the crystallisation of a particular balance of forces. Like rights of way, they become confirmed by repeated use, and established as customary rules governing the relations between the subordinate and the dominant parties.

The breach of such rules by the dominant constitutes one of the most frequent sources of grievance on the part of the subordinate, though one which does not necessarily undermine the legitimacy of the power structure as a whole.[34] Where the powerful are able to secure legal validation for their action, the grievance becomes a dispute over which type of rule should have priority: whether the legal rule or the rule of custom or convention.

The much readier access of the powerful to the law, and the fact that it provides both the source and protection of their power, makes appeal to the law as the ground of legitimacy a particularly favoured strategy for dominant groups. Indeed, obedience to the law is insisted on as the first duty of the subordinate, and legal validity is made to appear not only as the necessary, but also the sufficient, condition of legitimacy: its ultimate, not primary source.[35]

However, the more the powerful appeal to the law as the self-sufficient justification of their power, the more they have to obey it themselves for their legitimacy to be sustained. The absolutist idea that those who make the law are themselves above it is historically exceptional. Much more usual is some version, however embryonic, of the 'rule of law' : the idea that the powerful and their agents, whatever influence they may exercise over the formulation of the law, are themselves subject to it, and have to conform to recognised procedures to change it.[36]

The notion of the constitutional system was born from the struggle against arbitrary rule and the need to restrict the action of the state within precise legal limits. The old idea of the rule of law was transformed into the institutional practice of the Lockean separation of powers between legislative, executive and judiciary. Special devices were gradually developed (such

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University of Chicago Press, 1989, pp. 146-7.

[32] Max Weber, *Economy and Society,* pp. 217- 219.

[33] David Beetham, *The Legitimation of Power,* p. 66.

[34] B. Moore, *Injustice,* London: Macmillan, 1978, pp. 18-31.

[35] David Beetham, *The Legitimation of Power,* p. 67.

[36] E. P. Thompson, *Whigs and Hunters,* London: Allen Lane, 1975, pp. 258-269

as 'administrative justice' on the Continent and 'judicial review' in the US) for the purpose of safeguarding legality against abuse by the executive power and by the legislative as well.[37]

Moreover, the rule of law came to mean that judges' decisions rest on interpreting existing law and relevant precedents, that judges must justify their verdicts by reference thereto and adhere to a consistent reading from case to case, or else find a reasonable basis for distinguishing them. Thus, the rule of law exists so long as government institutions and their associated judicial practices are conducted in a reasonable way in accordance with correct formal procedural rules of impartiality and consistency, adherence to the law and respect for precedent, all in the light of a coherent understanding of recognised constitutional norms.[38]

Although the institutional separation of powers and their associated legal and judicial practices could not of themselves guarantee to the subordinate any control over the content of law, they could at least secure the subordinate against the arbitrary exercise of state power (by depriving *arbitrium* of its ultimate ground – the right to get away with it), and provide the protection of the due process of the law when they fall foul of the powerful. The idea of the rule of law thus serves as a limitation on power[39] and a guarantee of rights of the subordinate.

The idea that legality is the foundation of the state was the inspiration of formulae such as Government under Law, *Stato di diritto*, *Rechtsstaat,* which are generally accepted today as the best descriptions of what the modern state is or purports to be, and of the reason why its commands are accepted as legitimate.[40] Legality seems indeed to have become, as Max Weber said, the modern version of the legitimacy of state power.

But if this is the case, the question then arises as to what kind of legitimacy legality offers. If our analysis thus far is correct, legality is inherent in the notion of power as force exercised according to, and in the name of, the law. There is no denying that this 'normalization' of force in itself represent a benefit or a value. In unravelling Hobbes's views we found that it was precisely that normalization or regularity in human relations which constituted for him the highest benefit or value of political association. We have to pay a high price for the preservation of peace and security by giving up our right or power to everything to the state.

However, no sooner is mention made of a value assured by the state through the normalization or monopolization of force, as Weber would have it, than the strictly formal approach is abandoned. The question is no longer one about the presence of power, but one about its purpose and scope: no longer one that can be answered in purely descriptive terms, but one that presupposes a choice and necessarily entails prescription.

We do not limit ourselves any more, as lawyers appear to do, to taking account of the fact that laws exist which ensure the regular exercise of force; but we commit ourselves to a particular view about the object, the content of law itself, about the end that norms pursue and that justifies their existence. This is the obstacle of all strictly legal theory of the state, the reason why the principle of legality cannot by itself alone fulfil the task fulfilled by that of legitimacy. For legality to provide legitimacy as well, it must of necessity refer not only to the

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[37] Alexander Passerin D'Entreves, *The Notion of the State,* p. 144.

[38] John Rawls, " The Domain of the Political and Overlapping Consensus," in *John Rawls: Collected Papers*, Cambridge: Harvard University Press, 1999, pp. 495-496.

[39] E. P. Thompson, *Whigs and Hunters,* pp. 258-69.

[40] Alexander Passerin D'Entreves, *The Notion of the State,* p. 144.

formal structure of power but to its intrinsic nature. In other words, what is required is clearly to indicate what kind of legality we have in mind when we praise the state for ensuring it.[41]

Undoubtedly an indication of this sort is traceable to the principle of the Rule of Law, at any rate, as it was usually understood in the Anglo-American tradition, and as it gradually influenced legal thought in other countries also. In the discussions held in Chicago in 1957 'it seemed to be generally agreed that the Rule of Law as understood in the West involved more than the mere compliance of the sovereign power in a state with the rules of the positive law of the state. There was, in fact, a large measure of agreement that the rule of law was some positive content capable of being expressed in terms of fundamental values'.[42]

Less than two years later the International Commission of Jurists, in the Congress it held in New Delhi, agreed to define the rule of law as 'the realization of the appropriate conditions for the development of human dignity'.[43] Clearly, the emphasis here is on the content of the law, on the purpose of legality. This is not merely a request for the formal correctness of the particular rules or the single decisions which compose a legal system.

There is a request for the conformity of these rules and decisions to the values that are posited as necessary for the existence of a free society.[44] We are provided with a criterion which enables us to evaluate the 'legal quality' of law, the substantive aspect of legality. Thus legitimacy and legality are identified only insofar as legality itself is an assertion of values.

But such views still found difficulty being accepted on the Continent of Europe. Initially the notion of *Rechtsstaat,* or government under law, sounded almost synonymous with the theory of constitutional government. It was intended to account for states founded on the principles of liberalism, if not of democracy. But later, particularly under the influence of the 'positive theory of law', the idea of *Rechtsstaat* completely altered its meaning and character.[45]

Once 'ethical neutrality' was accepted as the condition of scientific work, once all and every reference to value and content was declared to be irrelevant and even obnoxious to the understanding of the law, the one and only justification of any legal system was found to be 'efficacy', that is, its factual existence: and every state, in as far as it was a legal system, could by definition be considered to be a *Rechtsstaat*. The problem of legitimacy thus underwent a radical change. The 'principle of effectiveness' became 'the new rule of legitimacy'.[46]

The 'principle of legitimacy' means to Kelsen that the 'validity [of a given system of norms] is determined only by the order to which they belong'. When, as in the case of a successful revolution, 'the total legal order … has lost its efficacy', this merely indicates that a new legitimacy has set in: 'the principle of legitimacy is restricted by the principle of effectiveness'.[47] In the positivist view of things, an illegitimate legal system is a contradiction in terms. The existence of a legal system and its legitimacy are one and the same thing.

The positivist views ended by making force, not justice, the last resort of legal as well as political life. Hence, as Giovanni Sartori has pointed out, in our epoch 'legality' has emerged

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[41] *Ibid.*

[42] *Ibid.,* p. 145.

[43] *Ibid.*

[44] N. S. Marsh, 'The Rule of Law as a Supra-National Concept', in *Oxford Essays in Jurisprudence,* ed., A. G. Guest, London, 1961, pp. 240-5.

[45] Alexander Passerin D' Entreves, *The Notion of the State,* p. 146.

[46] *Ibid.*

[47] H. Kelsen, *General Theory of Law and State,* Cambridge, Mass., 1946, pp. 115-22.

as a 'trap word' often applied to any form of state organization with no value qualification of its legitimacy.[48] This is what enabled many tyrannical regimes of the 20th century to obscure their lack of intrinsically valid claims to rule in justifying the use of arbitrary power, or to portray their *de facto* lawlessness as the highest form of lawfulness by underscoring the sanctity of procedural rules as if they validate their commands as authentic legitimacy.[49]

The fact that state legality created for itself what Carl Schmitt called a political surplus value… 'a value that breeds surplus value' enabled totalitarian regimes to disregard legality and at the same time pretend to establish 'total' lawfulness.[50] As Hannah Arendt has pointed out, totalitarian 'defiance of all, even its own positive law implies that it believes it can do without any *consensus juris* whatever, and still not resign itself to the tyrannical state of lawlessness, arbitrariness, and fear. It can do without the *consensus juris,* because it promises to release the fulfilment of law from all action and will of man; and it promises justice on earth because it claims to make mankind itself the embodiment of the law.'[51]

In its positivist version, the concept of a legal authority that rejects appeal to higher law like religious commands or natural law is in serious contention with the democratic dogma that laws should be enacted only with the consent of the governed – theoretically the political community. Therefore, the legal positivist does not tell us a thing about how rules should be enacted or who has the right to hold office, nor does it prescribe precepts delimiting the scope of authority, that is, the range of commands based on established rules that can be issued.[52]

Of course, the foregoing criticisms may sound rather unfair. Positivist may be inclined to support their view of legal validity by repeating the view of Austin that 'the existence of law is one thing; its merit or demerit another.'[53] The question of the validity of law is to them a different question from that which needs to be asked of law being morally obligatory. However, many contemporary positivists would probably agree with Hart when he says that the 'official system', the state, must be submitted to some further 'scrutiny' before its power is recognized as morally binding and worthy of the obedience of citizens subject to it.[54]

What this scrutiny can mean is that the possession of power is not the final word about the state. The whole structure of normative propositions which constitute a legal system can very well be represented as a set on hypothetical imperatives, or rules concerning the use of force if and when the system so disposes. Power would in this case be merely force once removed. And laws could hardly be called obligatory indeed, since they would not provide a more adequate description of the reason why those who are subject to them should obey them.[55]

It seems to D'Entreves that for laws to be obligatory, that is, true ought-propositions or prescriptive propositions and not mere statements concerning the use of force by the state, a value-clause must be inserted somewhere in the system. The whole structure must be invested with some kind of legitimation of state power. It will be necessary to assume that the state is

[48] Giovanni Sartori, *The Theory of Democracy Revisted*, Chatham, N.J.: Chatham House, 1978, pp. 322-3.

[49] Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction*, Stanford, Cal.: Stanford University Press, 1978, p. 107.

[50] Carl Schmitt, "The Legal World Revolution," G. Ulmen trans., *Telos*, 72, Summer 1987, p. 74.

[51] Hannah Arendt, *The Origins of Totalitarianism*, New York: Harcourt, Brace and World, Inc., 1966, p. 462.

[52] Yossi Shain and Juan J. Linz, *Between States,* Cambridge: Cambridge University Press, 1995, p. 10.

[53] Alexander Passerin D' Entreves, *The Notion of the State,* p. 147.

[54] H. L. Hart, *The Concept of Law,* Oxford, 1961, pp. 203-7.

[55] Alexander Passerin D' Entreves, *The Notion of the State,* p. 148.

the holder not only of power but of legitimate power, or better still, of authority; that the 'aura of majesty' that surrounds the 'official system' can be somehow explained and justified.[56]

The search for a legitimate basis of state power is not an empty and futile search. Rather, it is the fundamental quest of political philosophy. A theory of the state which only takes account of its legal validity is necessarily incomplete. It is no use protesting that such notions as the moral justifiability of legal rules are emotionally loaded, that they are at bottom irrational and certainly incapable of definition with the precision and rigour of scientific language.

On its own, legality cannot provide a fully adequate or sufficient criterion of legitimacy. Despite its correct formal procedures we have already made mention of which conspire to seemingly set the law beyond question, circumstances will always occur which expose a more fundamental issue: why these particular laws, and what gives them legitimacy?

Such occasions arise, for example, when there is a conflict over the interpretation of existing law, which can only be resolved by appealing to some basic principle. Or social changes take place which provoke demands for reform of the law, thereby exposing its contingency. Or there occurs some infringement of the law by the powerful, which they seek to justify by reference to norms or an authoritative source that lies beyond existing rules.[57]

Such occasions expose a general truth, that appeal to the law can never provide more than a primary ground for legitimacy. That such an appeal is a necessary first step is ensured by the fact that established rules provide the recognised source of entitlements, and because a generalised respect for rules is the condition for any social order or settled expectations. That it is no more than a first step follows from the fact that rules cannot justify themselves simply by being rules, but require justification by reference to considerations [58] about the object, the content of law itself, about the end or purpose of power, its scope, and the means available to citizens to ensure that government enacting law is responsible and responsive to them.

These normative considerations typically set limits to the range of commands based on established rules that can be issued by the state if it is to maintain its moral authority over those subject to it residing in its territory. For though law does indeed have the threat of force or penalties behind it for those who do not comply with its requirements, the threat of force alone is insufficient to oblige citizens to willingly obey the law all the time.

To some extent, at any rate, there must be a willing or uncompelled obedience of citizens to the law because they recognise its authority and accept that they ought to obey. Therefore, we now address ourselves to the second dimension of legitimacy of the normative justifiability of legal rules that is necessary and sufficient to complement the first dimension of legality.

7.3.2.   Legitimacy as Normative Justifiability of Legal Rules

In order to distinguish a legitimate state from an illegitimate state, we must suppose that the laws of a legitimate state have some significant normative status. They must be more than simply enactments, more especially that appeal to the law as the ground of legitimacy is a

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[56] *Ibid.*
[57] Beetham, *The Legitimation of Power,* p. 69.
[58] *Ibid.*

favoured strategy for dominant groups, including tyrannical ones, who, lacking intrinsically valid claims to rule opt to take recourse to legality in justifing their use of arbitrary power.

It is simply implausible that we have an obligation to obey the law regardless of its moral content and nature. For this reason, a sensible view would propose that whether there is an obligation to obey the law depends on the moral quality of law that is enacted. For it is the moral quality of law derived from beliefs that the dominant share with the subordinate that should oblige the latter to willingly obey the law and give the state the right to rule.

Without this common moral order, the legal rules from which the powerful derive their power cannot be justifiable to the subordinate; the powerful can enjoy no moral authority for the exercise of their power, whatever its legal validity, and their requirements (rights against subordinates that they have an obligation to obey the law) cannot be normatively binding in the long term, though they may be successfully imposed on subordinates by force.[59]

If the point of legitimacy is its significance for the character of power relationships, and its effect on the behaviour/action of the subordinate, then it follows that the legal rules of power must be justifiable to them. The criteria for the justifiability of legal rules to subordinates can be classified into the following three moral principles that Matthias Kaufmann in *Rechtsphilosophie*[60] puts forward:

1. The principle according to which domination serves the protection of the subordinate.

2. The principle that makes any form of consent a condition that anything at all, especially obedience, can be demanded from the subordinate.

3. The principle which has as its goal the implementation of justice and other moral maxims in the political framework.

According to this classification, the first principle is an aspect of what Kaufmann calls *functional legitimacy*, the second principle an aspect of *affirmative legitimacy*, while the third is an aspect of *moral legitimacy*. We will follow the foregoing classification of legitimacy into functional, affirmative and moral legitimacy as providing normative principles or criteria to demonstrate when the origin and exercise of state power is legitimate.

7.3.2.1. Functional Legitimacy

The first form of legitimacy is traceable to the principle in Thomas Hobbes's political writings that the power of the state is legitimate to the extent that it can be shown to fulfil the rightful end, purpose or function of providing protection to those subject to the state. As Anscombe and Finnis[61] make clear, the authority of the state is justified in characteristically Aristotelian teleological terms of the end, purpose or function that the state has to fulfil.

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[59] *Ibid.*

[60] Matthias Kaufmann, *Rechtsphilosophie,* Freiburg/München: Verlag Karl Alber, 1996, p. 236.

[61] G.E.M. Anscombe, "On the Source of the Authority of the State", J.M. Finnis, "Authority" in *Authority*, ed., Joseph Raz, Oxford: Basil Blackwell Ltd., 1990.

In the natural state where no sovereign state exists, human beings are subject to the constant threat of conflict that is synonymous with anarchy. Given that human beings in the natural state have roughly the same strength and skill, says Hobbes, every human being has the right to use his own power for the preservation of his own life; and consequently, of doing anything which in his own judgment he shall conceive to be the aptest means to this. It follows thus that every human being has a right to everything, including another human being's body.

Since everyone has a natural right to everything, 'to possess, use, and enjoy' anything, to invade any other person, it is in effect no better than if no man had a right in respect of his physical person, property and freedom to pursue his life-plan or conception of the good life. In the natural state with no absolute sovereign state, there is no law, where no law there is no justice. There is no right and wrong. Force and fraud are the cardinal virtues in this state.

On account of the lack of security for people's lives, property and their freedom, the domination by a sovereign state is therefore justified and citizens have a corresponding obligation to obey the authoritative directives of the state, in Hobbes's view, because the domination of the state is able to meet the anthropologically deep-rooted need for internal security against deliberate infringement of rights in respect of physical person or property (e.g. against assault or theft), and against non-deliberate damage (e.g. due to negligence). The domination of the state also meets the need for security against external injury that covers both deliberate harm (as in acts of war by other states) and non-deliberate damage (as when a home industry suffers from the dumping of excessively cheap foreign goods).[62]

Internal security is maintained by the keeping of order, that is to say, the inculcation of regular modes of behaviour that will guarantee such security. The criminal law, and much of the civil law, of a state which protects personal and property rights enables individuals to pursue their life plans or conceptions of the good life with reasonable security and predictability.[63] Law, with its sanctions, is the main method used by the state to give effect to the maintenance of internal security by the keeping of order. Security against external injury is pursued by the maintenance of armed forces, the making of treaties and alliances with foreign states, and economic measures such as trade agreements and tariffs.[64]

The maintenance of security and the keeping of order are then always emphasized as the original task of political authority when in situations of upheaval and crisis there is a threat to life and property,[65] as well the freedom to pursue one's life-plan or conception of the good life. Obeying the commands of the state is thus a better way of serving the need for security of physical person, property and freedoms of individual members of society subject to a state that is able to guarantee order and inner and external peace of the society in which it operates.

Kaufmann[66] sees the attraction of the formula for the liberal and the problem for an authoritarian interpretation of Hobbes in the fact that this form of legitimacy supplies not only a criterion for the justification of the authority of the sovereign state to rule, but also a criterion of when the authority of the state cannot make a claim to the obedience of individuals subject to the state, that is, when the state is not able to protect its citizens or it

[62] Raphael, *Problems of Political Philosophy,* p.47.

[63] Ibid. Norman P. Barry, *An Introduction to Modern Political Theory,* Hampshire: Macmillan Education Ltd., 1989, p. 54.

[64] Raphael, *Problems of Political Philosophy,* p. 47.

[65] Thomas Würtenberger," Legalität, Legitimität," in Görres-Gesellschaft, ed., *Staatslexikon: Recht, Wirtschaft, Gesellschaft,* Freiburg: Herder, 1987, p. 876.

[66] Kaufmann, *Rechtsphilosophie,* p. 237-238

effectively endangers them by its failure to guarantee a general situation of order and security necessary for preserving rights for the free development of individuals in society.

On account of the fact that this viewpoint absolutely received support from "above", it acquired the heading of "functional legitimacy" in order not to lose sight through fixation on the view "from below", from the vantage point of individuals that is, of the historical as well as systematically important pattern of justifying the legitimacy of the state. In the age of absolutism the reason of the state had to step behind the interests of those subject to it as is well known, which one considered justified, as well as those of the dominant. One only justified the violation of the interests of the individual worth protecting with the common good, or general interest. This is so in both authoritarian states as well as in democratic states.

One could, therefore, not entirely surrender functional legitimacy "from below" to the advantage of the view "from above", because the guarantee of peace, order and stability itself cannot be deemed worth striving for and thus function as an argument for legitimacy. Without any connection to the fate of individuals, the guarantee of peace, order and stability offers no criterion for distinguishing illegitimate states that effectively endanger their citizens from legitimate ones that are able to offer effective protection to their citizens.

Today there is however consensus that a number of regimes still endanger their subjects than protect them and are for this reason to be seen as illegitimate. But, the demand not to endanger subjects appears in a clear way to be somewhat lowly placed, when one should accept it as the only criterion for the recognition of the legitimacy of a state.[67] For it only performs a negative function of preventing harm to existing rights or existing well-being and does not also perform a positive function of adding to well-being or of adding new rights.

In the 17th and 18th centuries, liberal democratic theory held that the negative function was the sole function of the state. The promotion of pursuit of further positive good was thought to be the business of the individual. The individual, according to this minimalist view, should be left with as much liberty as possible for that purpose. State action, which takes the form of laying down and enforcing laws, restricts liberty, in that its requirement to do or not to do this or that limits our freedom to do as we please. The purpose of such laws, it was said, was to prevent individuals from encroaching on each other's rights or liberties. The business of the state was to leave to each individual as large an autonomous sphere for the development of the citizen. Its interventions should therefore be minimal, limited to the negative function of preventing one individual or group from encroaching on the liberty of another.[68]

In the 19th century most western states following the social democratic model added a positive function to the negative one of protecting established rights.[69] It came to be regarded as a responsibility of the state in its organized capacity to raise in some degree for the functional legitimacy of interventions of authority the welfare of its members and make more fair the distribution of rights they enjoy beyond the mere protection of life through improved medical care, introduction of elementary hygienic measures, the upgrading of infrastructure[70] as necessary social and economic conditions for the pursuit of their individual life-plans.

The understanding underlying the positive function was that the state should be responsible for providing a basic minimum of material welfare and individual members should

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[67] *Ibid.*
[68] Raphael, *Problems of Political Philosophy,* p. 48.
[69] *Ibid.*
[70] Kaufmann, *Rechtsphilosophie,* p. 239.

themselves be responsible for trying to rise above a basic minimum. This consideration responds to arguments of the proponents of the minimalist state against an absolutist overprotective welfare state that the collectivised delivery of welfare services (health, education, pensions and so on) brings about a vast increase in public law that authorizes public officials to carry out public plans, thereby investing them with great discretionary power over individuals[71] and thus taking away their right to autonomous development.

With both the negative and positive functions, the demand is that political domination should not be exercised only in the interest of an individual or a class in power, but rather that it should be exercised for the common good or in the general interest that involves both the negative function of the state of protecting the life, property and freedom of the public subject to it, as well as its positive function of the provision of a basic minimum of welfare.

But to be able to decide on controversies about whether domination serves the needs of the common good or those of the dominant, the second principle of affirmative legitimacy is seen by Kaufmann to be an obvious procedure for that purpose[72] which the principle of functional legitimacy does not provide to citizens subject to the authority of the state.

For, the reason one has to obey the directives of a legitimate authority, according to the latter principle, depends on the belief that obedience is the best way of serving the needs of the general interest of those subject to the authority of the state which the state is there to serve. This means that those subject to the authority of the state yield to authority the right to serve their needs of general interest. Affirmative legitimacy in this sense intends to determine whether domination indeed serves the needs of general interest of citizens of a state.

7.3.2.2.   Affirmative Legitimacy.

The procedure for this form of legitimacy requires to take the free, unforced consent of those subject to the state as a standard and to call on the legal principle *volenti non fit iniura,* according to which no wrong is done to one who desires something if one's wish is to be satisfied, for the justification of domination. This is the development that took place in reaction to Hobbes starting with Locke and later Rousseau and Immanuel Kant.[73]

The Hobbesian contract of submission as a basis of domination gives way in the contract theoretical formulation of this position for Locke to the agreement and "mutual consent of those that form society" (Locke, Second Treatise, XV, 171) This consent can again be withdrawn by the ruled from the order of domination by the state if the ruled believe that the state no longer fulfils its negative and positive functions and is therefore not legitimate.

The obvious question with respect to affirmative legitimacy here is, how consent or the lack of it allows itself to be ascertained. The subject of consent is a confusing one. If by consent to power we mean a condition of voluntary agreement to it, then what counts as voluntary and what sort of evidence is needed to demonstrate such agreement ? Simply fulfilling the requirement of the powerful to obey the law is not enough, since obedience can be maintained by coercion. What sort of evidence, then, will count to ascertain consent or the lack of it ?[74]

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[71] Friedrich A. von Hayek, *The Constitution of Liberty,* London: Routledge and Kegan Paul, 1960, ch. 17.

[72] Kaufmann, *Rechtsphilosophie,* pp. 238-9

[73] *Ibid.,*p. 240.

[74] Beetham, *The Legitimation of Power,* p. 91.

We wish to agree with Beetham here that what is important about consent is not the condition of voluntary agreement, but the specific actions that publicly express it, and that these are important because they confer legitimacy on the powerful, not because they provide evidence about people's beliefs. They confer legitimacy for they constitute public expressions by the subordinate of their consent to the power relationship and their subordinate position within it.[75]

What sort of actions, then, will confer legitimacy? If we may ask. The answer of the traditional liberal, individualist view embodied in the practice of Western societies, has typically been that consent is given to a condition of subordination only by a specific and voluntary promise, agreement or contract on the part of each individual in person, say of the worker to the employer at the time of employment, of the woman to her husband at the point of marriage. Necessary conditions for the voluntariness of such an agreement are not only that it should not be coerced, but that there should be a choice available between contract parties.[76]

As regards the political sphere, the early liberal approach to consent was to develop the contract model into the idea of social contract made by all individuals at the original establishment of the state and government. The first form of social contract goes back a long way in history to the time of Plato. It is called *a contract of citizenship*, a contract made by each individual citizen with the state or 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 person remains in a particular state and enjoys its privileges, then she has an obligation to the state to obey its law.[77] Corresponding to this obligation is the state's right to her obedience.

However, as Simmons argues, it is implausible that the subjects of states have voluntarily committed themselves to obey the law. Actual undertakings would be required, not merely hypothetical ones, for hypothetical ones do not bind us. And although some naturalized citizens might have consented to obey the law in the process of becoming citizens, and some citizens might have undertaken to obey the law in some other specific context, such as in course of swearing an oath, very few other citizens have so committed themselves. To commit oneself voluntarily to obey the law would be to do something with the intention to obligate oneself to obey, and very few citizens can be said to have promised this.[78]

The problematical status of this fictional social contract has led to a water-down version of the social contract theory that is designed to avoid the difficulties of the former. The doctrine of consent is this water-down version of the social contract. According to this doctrine, the authority of the state rests on the popular consent of the subjects. The idea of popular consent played an important part in the development of parliamentary institutions in England.

The development originated in the Middle Ages with the idea that property owners could not be taxed by the King without their consent. This led 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 the purpose, to make grievances known to the king. Elements of this procedure are still retained in the usages of the UK Parliament today. All acts of

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[75] *Ibid.*

[76] *Ibid.*

[77] Quoted in Raphael, *Problems of Political Philosophy,* p. 182.

[78] Copp, "The Idea of a Legitimate State", p. 12.

Parliament state that the Queen legislates 'by and with the advice and consent' of Parliament.[79]

This means that a form of consent is essential for the authority of a particular law. The idea that consent supplies the ground of political obligation to obey the law, is commonly associated with the political philosophy of John Locke, though in fact Locke's theory includes also a kind of double contract. On the Lockean model, as Simmons demonstrates this, a mutual consent of members of society transfers to the collectivity those rights whose exercise by a central authority is necessary for a viable political society. Governments are legitimate only if they have been entrusted by the state with the exercise of those same rights.[80]

Since those subject to the state have only agreed to give up their natural right to exercise their legislative and executive powers of the law of nature to the government as a trust that it will protect their natural rights to person, property and freedom (as well as provide a basic minimum of welfare) they have no duty to obey authority once government abuses the trust placed in it to protect natural rights of the ruled. In other words, the consent given to government to obey its authority can be withdrawn from it by the ruled.

Locke in fact thinks of the act of consent of those subject to the state and government as an act of promising, so that this theory is still one of contract. The difficulty with the contract theory, as we have seen, is that most members of a state cannot be said literally to have given a promise. But if consent does not imply a promise, then it does not impose an obligation. It is the problematical status of the fictional social contract that has led to a different approach today, which focuses instead on elections by majority decision as the source of legitimacy.

The convention within contemporary liberal democracies is that it is the act of taking part in elections that secures the obligations of citizens in principle to obey it. Here again, it is for Beetham the existence of a secret electoral choice by majority decision between candidates for public office (both government and parliament or only parliament), their programmes and parties that is crucial. In other words, in government as in employment or marriage, it is making an agreement to subordination under conditions of choice between alternatives that confers legitimacy on the exercise of power, and a corresponding obligation to obey.[81]

Elections are not only in a sense an aristocratic procedure for the occupation of public offices. They are in a full sense democratic, since the assumed equality of all is occasionally practiced through the opportunity that is made available to all eligible citizens to occupy public office. An equally weighty argument for free and secret elections is the possibility for the expression of consent to and dissent against a government depending on whether or not its rule fulfils the functions of the protection of citizens and the provision of a basic minimum welfare to them.

Though the elections are a liberal and individualist model of consent because it is familiar and paradigmatic for modern society, it does not however follow that this is the only form of action that can demonstrate consent or confer legitimacy on the powerful, or that there are other types of action which, while failing to meet the liberal criteria for voluntary agreement may not have or have had a legitimating force within the conventions of different societies.

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[79] Raphael, *Problems of Political Philosophy,* p. 190.

[80] A.J. Simmons, *On the Edge of Anarchy: Locke, Consent and the Limits of Society,* Princeton, N.J.: Princeton University Press, 1993, Ch. 3.

[81] Beetham, *The Legitimation of Power,* p. 92.

Actions which are historically seen as conferring or confirming legitimacy, and which continue even within a liberal society, albeit in a subordinate role, include swearing an oath of allegiance, taking part in consultations or negotiations with the powerful that result in agreement, public acclamation whether of a monarch upon coronation or of a popular leader at a notable event and taking part in mass mobilisation in a regime's cause.[82]

First, swearing an oath of allegiance is of course a form of promise, but differs from the liberal model in that typically there is no choice about whom a person is to obey. However, in societies where such oaths are required of subordinates, the lack of choice has not been regarded as making the promise any less binding. In traditional systems of rule such an oath given by the most important figures in society was a significant element in the legitimation of the leader, chief or monarch. It carried an exemplary force for others, and a binding one for those who took part; for the ruler to show that s/he had the consent of those who carried weight in the society or in its different localities was an important aspect of legitimacy.[83]

A second type of action expressive of consent which Beetham mentions is that of taking part in consultations or negotiations with the powerful, either about aspects of policy or about the terms on which a particular service is rendered, which culminate in agreement. In some respects this resembles a contract, but it does not entail any choice about who the superior will be. Yet it carries with it, not only a commitment on the part of the subordinate to support the policy or observe the terms agreed, but an implication that they acknowledge the authority of the powerful more generally, and this act of public recognition itself confers legitimacy.[84]

A third type of action expressive of consent, which differs from the others in that it does not carry suggestions of promising, is the public acclamation whether of a monarch upon coronation or of a popular leader at a rally or other notable event. Demonstration of popular support and mass mobilisation in a regime's cause confer legitimacy in the age of popular sovereignty; and the continued mobilisation of the people to help carry out its policies can be an effective alternative to the electoral process as a means of popular legitimation. This is the expression of consent through mass participation in activity clearly supportive of a regime.[85]

For the expression of consent through mass participation in activity clearly supportive of a regime to be possible, there is need for a doctrine of limited government, that is, of the principled limitations on the possible scope of the authority of government. Consent can legitimise authority only within the bounds of, or subject to the limitations articulated by the doctrine. Consent to the power of government beyond these limits would not legitimise it.

It seems reasonable according to Raz's view that a doctrine of limited government has two parts. One part would say that it does not have authority to do what it cannot do efficiently. In more positive terms, a limited government has authority to do what it can do efficiently. The other part would set limits to what it is in principle authorized to do, that is, it would exclude from its jurisdiction certain matters even if it handled them efficiently, basic rights.[86]

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[82] David Beetham, "Legitimacy," in *Encyclopaedia of Democratic Thought,* eds., Paul Barry Clarke and Joe Foweraker, London: Routledge, 2001, p. 441.

[83] Beetham, *The Legitimation of Power,* p. 92.

[84] *Ibid.,* p. 93.

[85] *Ibid.,* pp. 93-94.

[86] Joseph Raz, "Introduction," in *Authority,* ed., Joseph Raz, Oxford: Basil Blackwell, 1990, p. 12 ff.

In other words, individuals, at least those considered to be sufficiently rational and responsible to qualify for rights, are seen as 'sovereign authorities' over questions as what religious belief to profess, what family life to lead, what lawful career to pursue, and so forth. The right to make such decisions for oneself may be construed as a right against individuals or the state, but the point is that others would be wrong to use coercion, manipulation, deception, etc., to interfere with an agent's efforts to make and carry out these decisions.[87] The need for limitations on the possible scope of authority makes moral legitimacy necessary.

7.3.2.3.   Moral Legitimacy.

According to this form of legitimacy, the power of the state is justifiable to citizens subject to it if it is based on moral norms that they share with the dominant. On this view, the power of the state cannot then be based on a single comprehensive religious, philosophical and moral conception of the meaning, value and purpose of human life or conception of the good life, or its associated philosophical accounts of truth on which there has been no agreement, at least since the Reformation, and which would require the oppressive use of state power by those holding it to impose it on those who reject it and thus restrict or suppress their basic rights.

A single comprehensive religious, philosophical and moral conception of the good human life, or its associated philosophical accounts of truth requiring the oppressive use of state power to maintain it and thus restricting or suppressing the basic rights of citizens subject to state power cannot be willingly and freely supported by at least a substantial majority of its politically active citizens holding different comprehensive conceptions of the good life.[88]

Thus, argues Rawls, the power of the state is to be justifiable to citizens subject to it if it is based on a moral conception of justice worked out for the 'basic structure' or the main political, social, and economic institutions of a democratic state,[89] that a vast majority of politically active citizens come to freely and willingly support as rational from the standpoint of their own comprehensive views because they consider it worthy of their agreement.

What this means is that the power of the state is justifiable to citizens subject to it only if the moral or political conception of justice on which it is based is such that we could justify it to all citizens in terms that each of them can accept, no matter what comprehensive view of the good life each of them affirms. For it to be justifiable to citizens subject to the power of the state, a political conception of justice providing a public basis of justification must be formulated in terms of certain fundamental intuitive ideas citizens share with the dominant.[90]

The fundamental ideas making up the moral and political conception of justice are derived from such settled convictions (of community) as the belief in religious toleration and the rejection of slavery as inherently unjust. We look, then, to the public political culture of a democratic society including its main institutions and the historical traditions of their own

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[87] Thomas E. Hill, Jr., "Autonomy of Moral Agents," in *Encyclopedia of Ethics,* Vol.I (A-K), eds., Lawrence C. Becker and Charlotte B. Becker, Chicago: St James Press, 1992, p. 73.

[88] John Rawls, "The Domain of the Political and Overlapping Consensus", in *John Rawls: Collected Papers,* ed., Samuel Freeman, Cambridge: Harvard University Press, 1999, p. 474-5.

[89] John Rawls, "Justice as Fairness: Political and not Metaphysical," in *John Rawls: Collected Papers,* ed., Samuel Freeman, Cambridge: Harvard University Press, 1999, p. 389.

[90] *Ibid.,* p. 393.

interpretation, as the shared fund of implicitly recognised basic ideas and principles.[91] These ideas are used to articulate and order in a principled way the political values of a democratic regime, thereby specifying the aims of the constitution and the limits it must respect.

It is hoped that the conception of political justice arising from these political values will be congenial to the firmly held conviction of both those subject to state power and the dominant. Rawls expresses this by saying that a political conception of justice, to be acceptable, must be in accordance with the considered convictions of members of a democratic society.[92]

The fundamental intuitive ideas worked out into a political conception of justice include those of society as a fair system of cooperation over time. Within this overarching fundamental intuitive idea is the idea of citizens as free persons, in virtue of their powers of reason, thought and judgment connected with those powers, and citizens as equal persons in virtue of their having these powers to the requisite degree to be fully co-operating members of society.[93]

In connection with the intuitive idea of citizens as free and equal persons, Rawls further describes citizens as having two moral powers that would enable them to be normal and fully cooperating members of society, namely: a capacity for a sense of justice, as the capacity to understand , to apply, and to act from the public conception of justice which characterizes the fair terms; and, a capacity for a conception of the good, as the capacity to form and to revise and rationally pursue what they consider worthy or of value over a complete life.[94]

Together, the foregoing ideas provide the requisite framework that specifies the primary goods citizens need as free and equal persons. Citizens require roughly the same primary goods, that is, the same basic rights, liberties, and opportunities for the development and full exercise of their two moral powers, as well as the same all purpose means such as income and wealth for the advancement of their conceptions of what they consider to be a good life.[95]

A specification of citizens' primary goods leads to the idea of constitutional essentials or the aims that a constitution is to achieve, for they concern the fundamental principles that determine the "basic structure" of the political process. A fuller idea of the content of a liberal conception of justice specifying the aims that a constitution is to achieve is, for Rawls, this:

1. Political authority must respect the rule of law and a conception of the good that includes the good of every citizen;

2. Liberty of conscience and freedom of thought is to be guaranteed, and this extends to the liberty to follow one's conception of the good, provided it does not violate the principles of justice;

3. Equal political rights are to be assured, and in addition freedom of the press and assembly, the right to form political parties, including the idea of a loyal opposition;

4. Fair equality of opportunity and free choice of occupation are to be maintained against a background of diverse opportunities; and

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[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.*, p. 394- 397.

[94] *Ibid.*, p. 397-398.

[95] John Rawls, "The Priority of Right and the Ideas of the Good," in *John Rawls: Collected Papers,* ed., Samuel Freeman, Cambridge: Harvard University Press, 1999, p. 466.

5. All citizens are to be assured a fair share of material means so that they are suitably independent and can take advantage of their equal basic rights, liberties and fair opportunities.[96]

Thus, the equal political liberties and freedom of speech and thought enable citizens to develop and exercise their moral powers by participating in society's political life and by assessing the justice and effectiveness of its laws and social policies; and liberty of conscience and freedom of association enable citizens develop and exercise their moral powers in forming, revising, and rationally pursuing their own conceptions of the good life.[97]

The idea of the same primary goods is the practicable public basis on which interpersonal comparisons of citizen's well being can be made. The fulfilment of appropriate claims to primary goods by the institutions of the basis structure is publicly accepted as advantageous and thus counted as improving citizens' situation for the purposes of political justice.

Though Rawls' political conception of justice may be considered to be inappropriate for hierarchically-ordered non-western societies, we would still want to contend that the settled convictions that this conception reflects, like the belief in religious toleration and the rejection of all forms of oppression, are today gaining more currency in non-western cultures as worth striving for in the quest for lasting peace and stability in these societies.

All cultures accept in principle the attempt to put into practice the ideal of justice. To this belongs under the greatly accepted premise of a far-reaching equality of humans in a politically relevant area the emancipation movement against racial and sexual discrimination and discrimination against minorities. There also belongs to this the exertion for just social relations - differences over the question of what just social relations are, notwithstanding - as well as the sustainable use of the environment by current generations that leaves enough resources for later generations, that is intergenerational justice.[98]

Of course, it can be pointed out here that residence within the territory of a particular just state does not ground any special relationship between the state and those subject to it, since all human beings, as moral agents, have a natural positive duty to support the justice and happiness of others elsewhere, irrespective of where they are and to which state they belong.

In addition, it can be pointed out that the mere fact that someone resides within the claimed territory of a just state to which he is subject seems inadequate to ground any special duty of obedience to that state and its laws. For mere residence of that sort does no guarantee receipt of any of the benefits and participation in any of the cooperative schemes that make loyalty - or even obedience to the law – appear morally compulsory.

But it can also be convincingly argued that where residents benefit from (or in other ways meaningfully interact with) a particular just state, which is of course more typical, it is as a

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[96] John Rawls, "The Idea of an Overlapping Consensus," in *John Rawls: Collected Papers,* ed., Samuel Freeman, Cambridge: Harvard University Press, 1999, p.440.

[97] John Rawls, "The Domain of the Political and Overlapping Consensus," p. 495.

[98] Matthias Kaufmann, *Rechtsphilosophie,* p. 249.

result of this kind of interaction, not any general duty to support or obey just states, that residents have a special obligation of compliance to that particular state.[99]

The foregoing classification of legitimacy into functional, affirmative and moral legitimacy provides normative principles or criteria by which the exercise of state power can be demonstrated by *a priori* argument whether it is legitimate or not legitimate, that is, whether the state has the right to rule or does not have the right to rule. Having clarified the normative criteria by which it can be demonstrated that the exercise of state power is legitimate or not, we now move on to discuss what is precisely involved in the state's right to rule.

8.   The Right to Rule

The portrayal of the state as having the right to rule is intended to lay claim to a body of rights, the rights in which the state's legitimacy would consist. This way of putting things raises the question of what these rights in which the state's legitimacy consists are. To answer this question, the standard starting point is the American jurist Wesley N. Hohfeld (1879-1918) who saw the phrase 'a right' used with different meanings in the legal literature.

To avoid the resulting confusion, Hohfeld distinguished four meanings of this phrase.[100] He viewed rights as legal relations having "jural correlatives" and "jural opposites," though this typology has also been extended to the sphere of moral philosophy in recent years.

A *claim-right* is the presence of a duty owed to a person by some other person or people in general. A person A has a claim-right to x, and against person B, if B has a duty to assist A in obtaining x. Thus, A has a claim-right to life, and against B, if B has a correlative duty to refrain from taking A's life or a duty not to interfere with A's life.

A *privilege* is the absence of a duty owed to a particular person or to people in general to refrain from doing a certain thing. A has a privilege or liberty-right to x, and against B, if B has no claim-right that A not do or obtain x. Hence, a state by virtue of its expertise and its ability to secure social coordination has a privilege or liberty-right to provide common facilities and services in improving the life of its citizens and meeting their needs.

A *power* is the ability that a person has to alter the rights and obligations between him and other people by performing some (permitted) action. A has a power or power-right to x with regard to B, if A is in a legal or other justified position to effect a change in some relevant status of B, and B has a correlative liability to undergo this change. Thus, a religious official has a power-right to perform a marriage ceremony between a man and a woman, so that their legal status is changed from being unmarried to being married to each other.

An *immunity* is simply the absence of a relevant power in others. A has an immunity or immunity-right to x against B, if A is free or exempt from B's legal or other justified power

[99] Simmons, "Justification and Legitimacy," p. 753.
[100] See Alan Gewirth, "Rights," in *Encyclopedia of Ethics,* Vol. II. L-Index, eds., Lawrence C. Becker and Charlotte B. Becker, London: St. James Press, 1992, pp. 1103-1109.

with regard to x. Thus, A has an immunity to being forced to testify against himself in a criminal case, and the state has a correlative disability to force him to testify.

These distinctions clarify the many usages of the phrase 'a right'; but they also leave many conceptual problems unresolved. For instance, what do all these types of 'rights' have in common? Hohfeld said they are all "legal advantages"; but this is vague. Other problems arise from the very sharpness of his distinctions. To deal with this, one suggestion has been that rights must be viewed not as diverse Hohfeldian types taken separately but rather as "bundles" of these types taken together, with claim-rights being the most important kind of rights, especially because of their stringency as entailing strict duties to forbear or assist.[101]

Equipped with this toolkit, we shall take advantage of the distinctions Hohfeld makes to clarify the usages taken together of the phrase 'a right' to apply them to the state with regard to its right to rule in order for us to demonstrate the rights and powers that a state would claim to have. The rights a state would claim to have in order for it to have the right to rule are minimally those it must exercise if it is to impose and to enforce its law on persons within its largely territorially-bound legal jurisdiction and not to be interfered with by persons, groups, or states outside the state's jurisdiction and thus be able to control its geographical territory.

Often, the rights the state claims in asserting its legitimacy go far beyond this minimum. But whether a state's claims are modest or extravagant, these rights invariably fall into the following three categories of the kinds of things involved in the ruling of a state.

(1) The rights to command persons who fall within the state's claimed legal jurisdiction;

(2) The rights of non-interference against persons, groups, or states without/outside the state's jurisdiction in the exercise of those rights claimed in the first category.

(3) The rights to have control over a particular geographical territory (whose extent largely determines the scope of the state's jurisdiction).[102]

The rights that a state claims in these three categories together define its conception of sovereignty, " which expresses *internally* the supremacy of the governmental institutions and *externally* the supremacy of a state as a legal person."[103]

We want now to specify the contents of the three categories of rights claimed by a state, as put forward by Simmons, so that we can also move on to specify the relations that might be thought to hold between the rights in these three categories.

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[101] *Ibid.*

[102] A. John Simmons, "On the Territorial Rights of States," *Philosophical Issues,* 11, 2001, p. 300.

[103] Malcom Shaw, *International Law,* 4th ed., Cambridge: Cambridge University Press, 1997, 331.

8.1.   The Rights to Command Persons within the State's Legal Jurisdiction

In the first category of rights that it has over its subjects, a reasonable state claims:

(a)   the right to exclusively impose the law on those within its jurisdiction (that is, on its subjects, in one natural sense of that term);

(b)   the right to be obeyed by its subjects (that is, the right to have persons within its jurisdiction perform its imposed legal duties); and

(c)   the right to threaten all subjects with the legal use of coercion and to use such coercion against non-compliers.

The first of these rights, the legislative power of the state to exclusively impose the law on those within its jurisdiction, is generally taken to be limited to making only tolerably just (or, at the very least, procedurally legitimate) law.

The relevant jurisdiction the state claims is always defined principally in terms of the territory in which it has the right to exclusively make law for, and enforce that law on, those within it who are subject to the state. But the class of subjects within a state's legal jurisdiction is seldom thought to be identical to the class of persons within its claimed territory.

States normally claim some, typically partial, jurisdiction over persons outside of their territories (for instance, their citizens abroad or those who have committed crimes against their citizens). And they claim only limited jurisdiction over some persons within their territories (for instance, diplomats or visiting aliens who, while generally held to the observance of the laws – such as parking or traffic, tax, or military service laws).

These rights in the first category – rights to make and enforce law within a territory and to be obeyed by those subject to the law - are normally taken to correlate with the obligation of subjects: obligations not to attempt rival legislation or enforcement, to fulfil lawfully imposed requirements, and not to resist the state's lawfully employed coercive powers.[104]

It is not plausible, however, as earlier alluded to, that subjects have a duty to obey the law regardless of its content and nature. For this reason, a sensible view would propose that whether subjects have a duty to obey a law depends on the law's moral quality. On this view, we would consider then the idea that whether subjects have a duty to obey the law depends on its being the morally unobjectionable law of a legitimate state, insofar as the state does not violate *claim-rights* of its citizens or that it observes limits to the exercise of its power.

If so, then a legitimate state would have a qualified power to put its subjects under a duty to fulfil lawfully imposed requirements and, and not to resist the state's lawfully enforced coercive powers by enacting a morally unobjectionable law requiring them to do it.[105] To explain this, we need to explain the state's right to legislate, which is a privilege or *liberty-right*.

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[104] Simmons, "On the Territorial Rights of States," p. 305.
[105] Christopher W. Morris, *An Essay on the Modern State,* Cambridge: Cambridge University Press, 1998, Ch. 4.

A state is not morally free to enact any law whatsoever, Copp argues, for individuals have *claim-rights* that would be violated by certain laws, including laws interfering with the freedom of religion, and perhaps laws imposing the death penalty. If individuals have a right to choose their own religion, this implies that a state has no privilege to interfere with their choice of religion. A state has no privilege to enact or enforce laws that violate their claims.[106]

Nevertheless, the idea that a state is entitled to enforce and enact law can be understood as the idea that there is a sphere within which it has a privilege or *liberty-right* to legislate. And it surely must be true, if a state is legitimate, that there is a sphere of competence within which it has a privilege to legislate such that the state would not violate any of its subject's claims.[107]

We are thus able to demonstrate by *a priori* argument that a legitimate state has the power to put its subjects under a duty to obey the law and not to resist the state's lawfully enforced coercive powers insofar as the state enacts a law which is able to carefully observe the moral limits for the exercise of the power that it holds by not violating the claims of its subjects.

The fact that a state would possess such a power distinguishes it from an illegitimate state. The duty to comply with the morally unobjectionable law of a legitimate state gives its law a special normative status as compared with an illegitimate state. A legitimate state would also have the power to make it permissible for its officials to enforce the law simply by enacting laws that provide for the enforcement of law, provided again that they do not violate subjects' claim-rights. [108]

The above view implies that a legitimate state can in principle change the moral status of actions. A legitimate state can put its subjects under duties to perform actions that, in the absence of law, would merely have been morally permissible, provided that the relevant laws are not morally objectionable or do not violate claims of those subject to them. For instance, we are under a duty to pay the taxes required by the state assuming the relevant tax laws do not violate the claims of individuals to a limited right to property as against the right to the primary goods that are needed by every human being for the actualisation of his life goals.

The view also implies that a legitimate state can place its officials under duties to do things that would otherwise have been prohibited, provided that the relevant laws are not morally objectionable. For example, in the absence of law, it would be wrong to exact money from people under the guise of taxation. But the law of a legitimate state can give officials permission and a duty to tax people, so long as coercive tax laws are morally unobjectionable.

A legitimate state has a power to put its subjects within its legal jurisdiction under a duty to obey the law, but it does not exercise this power each and every time that it enacts a law. Many laws are not strictly enforced, and some of the less important laws are enforced merely by threatened penalties, rather than by threatened punishment. Thus, we would say that for a state to exercise the power to put subjects within its jurisdiction under a duty to obey the law, it must not only enact a law, but must enforce the law by threatening to punish violations.[109]

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[106] Copp, "The Idea of a Legitimate State," p. 19.
[107] *Ibid.*
[108] *Ibid.,* p. 20.
[109] *Ibid.*, p. 21.

The rights in the first category - rights to make and enforce law and to be obeyed - do not only correlate with the obligations of persons within the jurisdiction of the state. They also correlate with the obligations of persons, groups, or states outside the claimed legal jurisdiction of the state. Here the first category of rights makes contact with the second, with the rights against persons, groups, and states outside the legal jurisdiction of the state.[110]

8.2. The Right to Non-interference by Persons, Groups, or States outside the State's Jurisdiction

The state claims the right not to be interfered with by persons, groups, or states outside its legal jurisdiction in the exercise of those rights claimed in the first category. The state claims rights to non-interference, self-determination, self-government, or external sovereignty.

The state's right to non-interference by other persons, groups, or states outside its jurisdiction in the exercise of its first-category legislative and executive rights is substantiated in international relations by the state's recognition of the exercise of the legislative and executive powers of others within their jurisdiction.[111] Crucially, this right of the state is an aspect of its moral relation to others based on the assumption of the equality between states.[112]

A legitimate state's claimed legal jurisdiction or sphere of privilege is presumably one within which it could exercise its first-category legislative and executive powers without violating any claim of other persons, groups or states since they have no claim to legislate and enforce laws on persons within a legitimate state's claimed legal jurisdiction.

Plausibly, too, a legitimate state would have a claim against other states that they do not interfere with its governing within this sphere of privilege. This means that it would have a claim that it not be interfered with in governing its residents and territory.

Thus, a legitimate state does not merely have a privilege to govern those within its claimed legal jurisdiction; it has a "protected privilege," a privilege that is protected from interference by the duty of others to respect the states' exercise of its first-category legislative and executive rights[113], as well as Locke's federative "power of… peace, leagues and transactions with all the persons and communities without/outside the commonwealth"(II, 146).

The need for peaceful and cooperative relations with other states has become even more important in an increasingly technologically, economically and politically interconnected global world that requires the concerted efforts of both state and non-state actors to solve problems that go beyond the boundaries of the nation-state (i.e. international terrorism, insecurity of financial markets, global warming, and its effects of drought and famine, cross-border drug and human trafficking, global pestilences like bird flu etc.).

It is also because of the need for peaceful and cooperative relations with other relations that it is sensible to attribute to a legitimate state the *immunity-right* to having any of its rights extinguished by any action of any other state using force, or for that matter, by any group or

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[110] Simmons, "On the Territorial Rights of States," pp. 305-6

[111] *Ibid.,* p. 306.

[112] D.D. Raphael, *Problems of Political Philosophy,* p. 160.

[113] Copp, "The Idea of a Legitimate State," p. 26.

person outside its claimed legal jurisdiction. If its rights could simply be extinguished, they would provide no moral protection. For example, if its claim to non-interference could be extinguished by another state, it would not be a significant barrier to interference.

The sovereignty of a legitimate state is its immunity to having its exercise of its first-category legislative and executive rights within its legal jurisdiction as well as its federative power in its relation with other states extinguished by any other states, through the use of force, plus its claim against other states that they not interfere with its governing its residents within its claimed legal jurisdiction. The only exception to this is when states are allowed to intervene on humanitarian grounds, with the support of the United Nations Security Council, to allow states to address a disaster caused by a state's grave and large scale violation of fundamental human rights and thus fulfil the duty to support the justice of a state as well as its citizens.

It is also worth adding that a legitimate state presumably also has the moral power to modify and perhaps to limit the exercise of its own legislative and executive rights over a range of affairs by giving up part of these rights to a higher authority of a supranational organization such as the European Union through membership of the union. For example, members of the European Unions have altered by treaty their rights to control movements across their borders.[114]

8.3.   The Right to Control a Particular Geographical Territory.

We mostly think of a state's territory, of course, in largely positivist terms. Thus, a state's territory is that portion of the earth's surface acknowledged to "belong" to the state by the "world community" or by an appropriate international agency[115]; or, following Weber, we think of a state's territory as the area in which it has a monopoly on the ultimate use of force.

But such accounts either ignore altogether or merely push one step back questions about the moral bases for a state's claim to that portion of the earth's surface in which it does in fact exercise largely unchallenged control. And we know that the actual means by which any existing state has established its territorial claims have largely been through coercion.

Therefore, though it might seem that political philosophers should leave to one side questions about the legitimacy of states' territorial claims for it to accommodate itself to the real world if it is to avoid reasonable charges of utopianism, we should not simply accept as a datum for political philosophy the basic and virtually unchallengeable fact that the world is made of states that have territories. On account of the origin of most modern states, the territorial claims that modern states make are often controversial, contested and plainly unjust.[116]

A legitimate state, therefore, would have more than simply a positivistic jurisdiction that consists in a complex non-moral historical and sociological fact about the territory and the relationships among its residents. It would have a moral jurisdiction or authority over its territory and over subjects within its territory. There are at least three aspects to this.[117]

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[114] *Ibid.,* p. 27.
[115] Simmons, "On the Territorial Rights of States," p. 303.
[116] *Ibid.*
[117] Copp, "The Idea of a Legitimate State," p. 22.

To begin with, a state is territorial in the sense that it imposes and enforces its law on all those who reside within its territory. Though a state normally claims some, typically partial, jurisdiction over persons outside its territory (for instance, its citizens abroad or those who have committed crimes against their citizens). In addition a state claims only limited jurisdiction on non-residents (for instance diplomats or visitors). A legitimate state would have the moral authority to impose and enforce its law on largely all those within its territory.

Second, states presume that their authority over their territory includes rights to full control over land and resources within the territory that are not privately owned. This right presumably includes the privilege to enact a regime of property law, including laws governing the transfer of property, prohibiting the use of force or fraud.

States also presume that their authority over their territory includes rights to tax and regulate uses of property which is privately owned within the state's claimed territory. This is based on the recognition of the limitation to private property rights. A legitimate state would have a privilege to enact and enforce laws restricting owners' use of land, laws regulating the exploitation of mineral resources, laws restricting dangerous activities in populated areas, and so on in order to protect its territory and its resources for posterity, as Rawls reasons.[118]

A further respect in which states are territorial is that they claim to have the right to control access to their territories across their borders (which, of course, involves as well certain quite direct rights against persons outside their claimed legal jurisdiction from our second category of rights). For our notion of a state is of a thing that governs a bounded territory and that does at least claim to have the privilege to control access to its territory.

At this point, we are only concerned with what legitimacy would consist in, and our claim is that a legitimate state would have a privilege to control movement across its borders. But we have not shown how the state's privilege to control movement across its borders can be taken to be morally justified at all relative to the first and second categories of rights.

It is therefore important to show how the three categories of rights claimed by the state might be taken to be justified relative to one another. There is need to demonstrate the nature and basis of the state's rights to rule its members and territory without interference. For this purpose we are going to claw back to the societal needs justification of the state's right to rule that has its origins in the functional legitimacy of the state.

9.   **The Societal Needs Moral Justification of the Legitimacy of State Power**.

We now develop the societal needs view of the legitimacy of state power. According to this view, the state is justifiable to citizens subject to it by the currency of moral norms in society derived from settled convictions of the community, say the belief in religious toleration and the rejection of all forms of oppression as inherently unjust, that they share with the dominant, where the fact that they share them enables society to get along and efficiently meet its needs.

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[118] John Rawls, "The Law of Peoples," in *On Human Rights: The Oxford Amnesty Lectures,* eds., Stephen Shute and Susan Hurley, New York: Basic Books, 1993, p. 57.

The fact that citizens subject to the state and the dominant share moral norms of the same basic rights, liberties and opportunities for the development and full exercise of the two moral powers of a capacity for a sense of justice and the capacity for a conception of the good, as well as the same all purpose means such as income and wealth for the advancement of their particular conceptions of the good life, facilitates the society's needs for continued existence in its normatively determined identity, needs for beneficial cooperation among the subordinate and dominant, and needs for peaceful and cooperative relations with neighbouring societies based on the principles of liberty and equality of societies or states.

The fact that the subordinate share with the dominant norms current in society derived from settled convictions of the community also facilitates the efficient coordination by the state of the efforts of members of society for them to secure public goods and social needs. In this sense, coordination is distinct from cooperation which is governed by shared norms, which when specified into constitutional essentials or rules and regulations, enable free and equal persons to be fully cooperating members of society over time. Coordination is activity that is brought to function in a socially concerted way by 'orders issued by some central authority'[119] of the state, so that benefits can be secured in a way which is agreed to by all as fair or just.

It is evident enough that a society that is organized into a state, or at least included in a state, will tend to do better at meeting the needs of society than it otherwise could expect to do. This view rings true at least for current societies in the world which are the result of the division of the world into states. The formation of a state can lead to the existence of social fault lines between its population and the populations of its neighbours such that its population comes to qualify as a society. In other cases, however, social fault lines may not parallel political borders and societies may not have states, but may come to be included in a state.

A society is a population comparable in size and in social and economic complexity to the population of a state. A society has a multigenerational history. It is characterized by a relatively self-contained network of social relationships, such as relationships of family, friendship and commerce, and by norms of cooperation and coordination. It is comprehensive of the entire population of permanent residents of a relevant territory, with the exception of recent arrivals who may not yet fit into the group's network of social relationships.[120]

What makes Copp think that a society organized into a state, or that is at least included in a state, will tend to do better at satisfying its basic needs than it otherwise could expect to do is that a state is after all essentially the administrative apparatus of a legal system. Therefore, to think that societies could do better at meeting their needs in the absence of states, one would have to think that societies could do better in the absence of law which is certainly doubtful.[121] This doubt already found expression in the thoughts of the ancient Greek thinker, Aristotle, who, like Plato, believed that society originally grew out of human need :

> *Man, when perfected is the best of animals, but, when separated from law and justice, he is the worst of all.*[122]

Though not as extensive as the modern state, the Greek *polis* or city-state was seen by ancient Greek thinkers as providing the requisite social, economic, political and legal framework in

[119] John Rawls, "Justice as Fairness: Political not Metaphysical," p. 396.
[120] David Copp, *Morality, Normativity, and Society*, New York: Oxford University Press, 1995, Ch. 7.
[121] David Copp, "The idea of a Legitimate State," pp. 38-39.
[122] Aristotle, *Politics,* 1, 2 trans. Ernest Baker, 1253 a 31ff, Cf. *Laws*, 874 e.

which man could not only satisfy his physical needs in cooperation with other members of society, but more so realise his natural moral and intellectual capabilities. Similarly, Hobbes later claimed that, in the absence of a common power, 'there is no law: where no law no injustice'. Force and fraud are, in war, the two cardinal virtues. 'There is nothing that a person can make use of, that may not be a help to him in preserving his life against his enemies; it follows that in such a condition, every man has a right to everything, even to another's body.'

Therefore, only a state as an administrative apparatus of a legal system can provide security against deliberate infringement of rights in respect of person or property (against assault or theft) that are necessary for any individual to freely pursue her/his values within society. And only a state can efficiently coordinate the efforts of members of society in developing common infrastructure for the provision of public goods and services that are available to all residents (such as national defence, public safety, clean air, water etc) and in improving the welfare and general conditions of development and justice of society that takes into account its ability to make use of the environment in a sustainable way that meets the needs of present generations without at all compromising its ability to meet the needs of future generations.

The authority of the state is basically justified in terms of the ends it has to serve. The right to rule of the state is the result of the need that human beings have to be ruled, a need that arises from the needs of society and its members, the need for society to develop common facilities for the provision of public goods and in improving the life of its members. The authority of the state is only justified to the extent that it serves the needs of society and its members.[123]

Members of society have a duty to obey the legitimate authority of the state because doing so is meant to serve best the needs of society and their own which the state is there to serve. The directives of the legitimate authorities are to be obeyed not because this complies with the will of the authorities of the state, but because complying with them is a better way of serving the needs of society as well as its members who are subject to the authority of the state.

We can now see they way in which political authority resembles theoretical authority. Just as the word of a theoretical authority or expert is a reason for belief because it attests to the fact that there are other reasons for such a belief (its judgment is a reliable guide as to how things are), so the directive of a legitimate political authority is a reason for action because it attests to the fact that such action would better serve the needs of society and its members.[124]

Raz believes the primary arguments in support of the authority of the state rely on the expertise (or that of its policy-making advisers) on public goods and on its ability to secure social coordination. The former is seen most clearly in consumer-protection legislation, the regulation of the pharmaceutical industry, laws to secure safety at work or on roads,[125] laws restricting owners' use of land, such as zoning laws, laws regulating the exploitation of mineral resources, laws restricting dangerous activities in populated areas, and so on. The latter is most evident in the provision of public goods and services.

Without coordination some public good will not be achieved, or if achieved it will be secured by imposing the full burden of securing the good on a smaller group of people, while the larger group contributes nothing or less than they should, or even stand in the way of the

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[123] Anscombe, "On the Source of the Authority of the State", and Finnis, "Authority".
[124] Raz, "Introduction," p. 5.
[125] *Ibid.,* p. 6.

achievement of the good by their conduct. But it would be unjust to impose the full burden of securing the good on a smaller number of people rather than on a larger group.[126]

Therefore, the state can play a crucial role in securing coordination and establishing the authority of the state if it is less likely to be biased than those subject to the state themselves in judging when there are strong or sufficient reasons for social coordination and has greater expertise than the subordinate themselves on the public goods for which the state may need to efficiently coordinate the efforts of the subordinate by ensuring that they act in ways that are sensitive to the way others are likely to act, so that public goods will be secured, and fairly so.

When the subordinate obey the law, they recognise the ability of the state to meet the needs of society. But for the state to further the satisfaction of the needs of society by means of law, the law must certainly be obeyed with greater likelihood. Moreover, in most circumstances, laws must be enforced in order to ensure a greater likelihood that they will be obeyed. This is the basic justification of a standard permitting the state to enforce law that observes the moral limits for the exercise of its power by not violating the *claim-rights* of its subjects.

But it is a familiar point that the cost of sanctions and of enforcement could be avoided if human beings obeyed freely and willingly, as a matter of subscribing to a moral standard that required them to obey. The advantage of voluntary compliance with the state's arrangements to realize its members' needs is the basic justification of a moral standard requiring members to obey the law, at least in cases where the law does not violate the *claim-rights* of members.

This argument responds to many of the intuitions that drive the argument from the state's efficiency in the coordination of the efforts of members of society, so they do not foil each other, and the state is better able to provide them with public goods. The key to it is the justification of the state based on the moral norms that those subject to the state share with holders of state power, a justification that bridges facts about the performance of a state and the moral credentials of a state, thereby overcoming the "fundamental problem" of consequentialism that attempts to ground state legitimacy in facts about its performance.[127]

The state is justified, in our view, if its members as a whole benefit from what it does. And what is hereby justified more specifically is a standard that requires members' obedience to law that observes the moral limits in the exercise of state power by not violating the claims of those subject to the state, as well as standards that permit the enforcement of the same morally unobjectionable laws and that supports the other moral aspects of legitimacy.

According to the societal needs justification of the state, any claims possessed by persons or states must ultimately be justified on the basis of the needs of society and those of its members. You have a claim just in case some other person has a corresponding obligation; the other person has such an obligation only if a moral standard that requires him to act in the appropriate way in dealing with you is justified on the basis that its currency in the state would promote its ability to meet the needs of society and of those subject to the state.

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[126] *Ibid.*, p. 8.

[127] According to the consequentialist justification as presented by Schmidtz, the legitimacy of a state is determined by how well its servers the goals of its citizens by comparison with how well their goals of its citizens would otherwise be served. David Schmidtz, *The Limits of Government: An Essay on the Public Goods Argument,* Boulder: Westview Press, 1991, p.3.

The fundamental problem of the consequentialist justification is that to have a moral right to rule is to have a moral property importantly different from that of being efficient in ruling which can be had by both a both a legitimate and an illegitimate state.

Indeed, people do have claims of various kinds, including basic liberties. Yet if it is true that human beings need to be organized into states, then any claims that exist and that constrain the privilege of the state are tailored to ensure that the state retains the ability to enact and enforce law, compliance with which will promote its ability to meet the needs of society and its members. Thus, people do not have claims that prevent the state from meeting both needs.

Property rights are similar to the other rights people have. That is, property rights are restricted in a way that gives the state the privilege to control the use of land within its territory, provided that by exercising such control, the state can serve the needs of its current generation better without at the same time compromising its ability to meet the needs of future generations on account of the obligation that present generations have towards them.

Given certain empirical assumptions, the argument supports institutions of private property. It is at least arguable that private ownership gives people incentives to make productive use of property just as a state's privilege to oversee people's use of their property gives it a stake in the long-term protection of its territory and resources for generations to come later.

This brings us to the view that a legitimate state would have a qualified privilege or *liberty-right* to control access to its territory. The simplest argument for this thesis turns on the fact that at least some of the projects that a state undertakes to serve the needs of its members, say social security, might not be successful without some restriction on access to it. Thus, non-state members have no *claim-right* against a legitimate state's control of access to its territory.

But we can also not ignore the coercive and arbitrary carving of existing territorial boundaries driven by the motive of resource exploitation and accumulation and the contribution this made to global economic inequality that is reflected in differential life prospects between members of rich states in the north and members of poor states in the south which imposes a duty on rich states in the north towards improving life prospects of members of poor states in the south[128] and thus meeting their needs through technological and economic cooperation.

It is because of the need of each state for peaceful and cooperative relations with other states, more so in an increasingly interconnected global world that requires the concerted efforts of both state and non-state actors coordinated through multilateral international institutions to solve problems that go beyond the boundaries of the nation state, that we think that it should not have the *power-right* to interfere with another state's governing its people and its territory. A norm of non-interference would tend to preserve peaceful relations among states.

It is each state's responsibility, as it were, to serve the needs of its members. Other states have no *power-right* to intervene, except to assist a state whose government is failing in some significant way to meet the needs of its members. For these reasons, it is plausible to attribute to a state a qualified claim to non-interference by other states. But, in view of the increasing interconnectedness of the fate of members of one state with the fate of other states, the claim to non-interference is better reinforced through peaceful and cooperative state relations.

Finally, a legitimate state would have an *immunity-right* to having its *claim-right* to rule extinguished by the action of any other state or person through military intervention, except only on humanitarian grounds, and with the legitimate support of a United Nations Security Council resolution that gives other states the *power-right* to address a disaster caused by a

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[128] Thomas Pogge, *World Poverty and Human Rights,* Cambridge: Polity Press, 2002, pp. 203-204.

state's grave and large-scale violation of fundamental human rights and thereby fulfils their natural duty to support the justice of another state and its members in a more active way.

The basis of the state's *claim-right* to rule is that the currency of norms attributing to it the relevant *power-claim*, sphere of *privilege-claim*, and the *immunity-claim* to interference from outside, as well as the qualified *power-right* of the United Nations' intervention, all contribute to the ability of the state to efficiently meet the need for justice of society and its members.

If other states, or other persons, had the power to extinguish a state's *claim-rights* to rule without exceptions, they would only do so without regard for the needs of the members of a state. A norm that accorded such a power to others could not be justified on the basis that its currency serves the needs of members of a particular state and is thus justifiable to them.

This completes the societal needs justification of the state. It rests on a debatable moral theory, as well as on contestable efficiency and consequentialist empirical claims, including especially, the claim that human beings need to be organized into states to more efficiently coordinate their efforts and serve their needs and for the state to be thereby justifiable to those subject to it who are either permanently or temporarily resident within the state.

The argument demonstrates how one could support the thesis that a state is legitimate. It illustrates the complexity of the issues and the kinds of claims that might need to be defended to defend the *claim-right*(*s*) of the state to rule. In addition, and more controversially, the argument supports the plausibility of a presumption that a state has the moral authority to rule.

The conclusion of the argument is that there is a presumption that a state has a *claim-right* to rule. The argument did not depend on detailed instances that distinguish one state from another, so if it supports the legitimacy of any state, it supports the legitimacy of all states.

On this view, an existing state is legitimate, other things being equal, unless the needs of its members it governs are so poorly served by it that either its members would be better if they viewed themselves as under no moral duty at all to obey the law, not even in cases where the law does not violate the claims of citizens subject to the state, or the state would do better if other states viewed themselves as under no duty to interfere with the state's right to rule.

Matters would have to be very bad for a state not to be legitimate. For even if an existing state is legitimate, if things are bad enough, members might be justified overall in disobeying laws that violate their claims or basic rights, and other states might be justified in intervening in the affairs of a state in question in the attempt to restore these claims or basic rights.

9.1.   Conclusion.

There has been two sides to our discussion of the quest for the moral authority of the state. To start with, there has been the historical side to the quest for the moral authority of the state that has involved attempting to uncover the metaphysical foundation of intuitive ideas and beliefs from which the modern state developed up to the present.

What is evident from this is the fact that the metaphysical foundation of ideas and beliefs from which the modern state has grown does not come from the state itself, but is to be found

in a two-fold process of secularisation by which the spiritual order of the state that was one with the civil order first retained its spiritual autonomy by setting politics on its own course of a natural rights development, and by which politics placed itself above the confessional dispute of the true faith by making this a private matter of religion and the individual.

From the belief in the toleration of different religious confessions within a state and the rejection of all forms of oppression grew the first rights of worship and conscience that paved the way for the development of a liberal state that plays the instrumental role of providing a neutral framework for guaranteeing the fundamental rights of all citizens within its jurisdiction.

It is on the basis of the moral norms of the same basic rights, liberties and opportunities for the development and full exercise of a person's moral powers, as well as the same all purpose means such as income and wealth for the advancement of a person's conception of the good life that the ruled share with the dominant that the moral authority of the state is built. For the currency of these norms in society derived from settled convictions of the community that the ruled share with the dominant enables society to get along and efficiently meet its needs.

The currency of such norms in society that the ruled share with the dominant are what make it mostly likely that the commands of the state will come to be freely and willingly obeyed by a substantial majority of its politically active citizens holding different conceptions of the good.

However, though the state comes to be recognised as better able to meet the needs of society and those of its members by virtue of the expertise of its policy makers to perform certain functions better than individuals, the quest for the moral authority of the state cannot be complete without a consideration of a theory of participatory government in society whereby every member of society is made to see his well being as tied up with the prosperity of others. The development of such a theory has been the aim of Rousseau's political philosophy and needs to be developed further.

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