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Law, Property and the Rule of Law: A Theoretical Perspectives (Part-I)

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Abstract

This essay seeks to challenge the age-old and traditional conception of the rule of law offered by the venerated authority, Albert Venn Dicey, whose description of the rule of law has become an article of faith rather than a doctrinal concept rooted in its own time and milieu. Dicey's conception of the Rule of Law is premised on certain crucial presuppositions about law, property and the state. For instance, Dicey's concept of the rule of law cherishes the ideal of freedom of the individual and his or her property, which stands on the presupposition that all individuals own property and that the state necessarily and negatively interferes in such property entitlement of the individual. The fact is that more than 4 billion of the world's poor are excluded from the rule of law, resulting in lack of legal protection of their rights and entitlements[1]. Further, Dicey's idea of juridical or formal equality presupposes that equality is an inherent quality of the rule of law. In other words, where there is rule of law, there we will also find equality under the law. This essay then challenges these presuppositions by way of critically examining the relationship between property, law and the state from the writings of great theorists of the Enlightenment (Hobbes, Locke, Montesquieu, Rousseau and Adam Smith) preceding A.V. Dicey, as well as, from historical evidence of 18th century administration of criminal justice in England (presented by social historians like E.P. Thompson and Douglas Hay). In conclusion, it is submitted that Dicey's conception of the rule of law is an anachronism, and is a significant obstacle to the formulation of a modern conception of the rule of law, which meets the aspirations of the 21st century global citizenry. It is further submitted that any modern theoretical conception of the rule of law must also include the material conditions of human beings and the means to its fulfillment. It is the need of the hour to recognize the social content of the rule of law and to understand the rule of law with due regard to the ever-changing conditions of human existence.

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1 http://www.unrol.org/article.aspx?article_id=26 The United Nations Rule of Law.

Introduction

A. The rule of law and its significance

The rule of law is an indispensable feature of the world today and the crown jewel of the liberal-democratic order that is premised on property, individual freedom and equality before the law. The rule of law both encapsulates and guarantees these cherished and fundamental values. It is also a mediator between the individual and the state. In its mediating role, the rule of law shapes the relationship between power and order in society by protecting the individual's civil liberties from the all-powerful state. Being the herald of a just society, the rule of law retains a powerful intellectual and emotional appeal, so much so, that it has assumed a leviathan status. Its expression is found everywhere in society: in the constitution, in the courts, in academic halls of universities, in popular culture and literature, and in the rallying cries of politics.

The object of this essay is to critically examine this understanding of the rule of law in order to lay the foundations for a new theoretical conception of the rule of law. By a theoretical conception, I mean an approach that enables a historical understanding of the Rule of Law whether that be in western legal and political context or in our part of the world, in the context of colonial India, post-colonial Pakistan and presently. In other words, what I do *not* mean to offer as a theoretical conception of the rule of law is a definition or description offered by positivists of what the rule of law *is* or what it *ought* to be, such as the one offered by the Albert Venn Dicey[2] and to a lesser extent by Fredrich Hayek.[3] For such views, as these are universally tutored in schools in Pakistan[4] and abroad, serve as ideological concepts, failing (rather *deliberately*) to even scratch the surface of this fundamental precept. This is indeed a great disservice and the reasons therefore will be explained during the course of this essay.

This essay will outline an understanding of property, law and the state and its connection with the rule of law in the classical liberal tradition, commencing with Thomas Hobbes (1588-1679) and moving on

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2 A.V. Dicey, *An Introduction to the Study of the Law and the Constitution* (London: Macmillan, 1967), First Edition, 1885.

3 For example, Friedrich Hayek, *The Road to Freedom* (Chicago: University of Chicago Press, 1994) and *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt, 1955).

4 Dicey's foundational text, *An Introduction to the Study of the Law and the Constitution* is a compulsory text for constitutional law for civil services examination in Pakistan (http://www.css.com.pk/syllabus/constitutional_law.htm) as well as for similar LLB and LLM courses at law colleges.

to John Locke (1632-1704), Baron de Montesquieu (1689-1755), Jean-Jacques Rousseau (1712-1778) and Adam Smith (1723-1790). The purpose of selecting the above writers as our primary sources on the rule of law may seem strange at first sight for a host of reasons: (i) none of these writers are recognized as experts of law and jurisprudence (except Montesquieu who was a judge in France), (ii) they cannot even be classified into one area of study as they are philosophers, political economists, historians, political thinkers and even sociologists but certainly not lawyers or jurists, (iii) there appears to be no internal consistency in such a selection as what can be less apposite than positing Hobbes (commonly misunderstood as an *authoritarian*) with Rousseau (a *libertine*).

It is therefore important in the first place to explain my selection and, in doing so, the general methodology of this essay. In the classical liberal tradition, in the first place, economics, politics and jurisprudence were not marked out neatly in separate disciplines (as they are today) as these did not and still do not reflect practical realities and social life. In the second place, the works of the above theorists cannot be narrowly and antagonistically viewed as one against the other, for the reason that all of them had one common objective, that is to say, to examine the economic, political, social and legal foundations of modern (capitalist) society, of which the rule of law is but one part. Therefore, there is a common effort amongst them to examine the categories of property, law and the state for in these categories laid the foundations of concepts of individual freedom, equality and the security (the latter three being the underlying themes or clusters embodied in Dicey's concept of the rule of law as will be discussed in detail below). These categories emerged victoriously from the traditional, feudal order but themselves presented many challenges, that of, the nature of property, the nature of the relationship between law and property and between property and the state, and the function of law in society, which the said theorists tried to address. Lastly, western intellectual tradition can be viewed from this perspective as a march towards 'freedom', something each one of the above theorists strove towards with singular devotion.

A formidable obstacle, however, to developing a modern conception of the Rule of Law which meets the requirements of the global citizenry in the 21st century[5] is the deeply entrenched and

[5] For example, see the 'United Nations Rule of Law' http://www.unrol.org. This is an initiative under the leadership of the Deputy Secretary General comprising over 20 UN entities assisted by the UN Rule of Law Unit. The stated objectives of the UN Rule of Law initiative is to further the concept

conservative conception of the rule of law such as those enunciated by Dicey, as mentioned above. This conservative conception of the rule of law was the result of 150 or more years of ideological contest in the west between liberalism and socialism.[6] Dicey, in particular, reacted to the increasing socialization (and democratization) of labour and the incipient welfare state, which he thought would spell doom for the rule of law and along with it traditional legal order and practice. Dicey was especially concerned about the development of administrative agencies such as local government bodies and specialized welfare legislation such as old age pensions, national health insurance,[7] finance acts, and minimum wage regulation, which combined legislative, executive and judicial functions all in one. The result was the development of a large administrative set up which was increasingly impacting the private / individual rights (especially in relation to private property) in the form of public law and welfare legislation.

However, Dicey's contention and arguments against welfare legislation and welfare state is not the subject matter of this essay; and nor are the contentions and arguments of his opponents. Instead, what I propose to argue is that Dicey's understanding of the rule of law suffers both from an internal as well as an external inconsistency or defect. This flaw, in the first place, stems from his failure or neglect to incorporate the rich classical liberal tradition which clearly predated socialism and Marxism, and in particular, their views on law, property and the state and their relationship to the key concepts of individual freedom, equality and security of the individual. These key concepts constitute the core of the doctrine of the rule of law enunciated by Dicey and there is no doubt that Dicey considered his concept of the rule of law as securing the very basis of individual liberty, equality and security of the person.[8] Yet it is remarkable that his primary work, *An Introduction to the Study of the*

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of the rule of law embodied in the United Nations Charter and the Universal Declaration of Human Rights, 1948.

6 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p.60.

7 'Introduction' by E.C.S. Wade to, *An Introduction to the Study of the Law and the Constitution, op.cit.*, 10th edition, 1959.

8 In the chapter relating to 'The Right of Personal Freedom' (Chapter 5), Dicey asserts that individual and personal freedom is the right of every Englishman and unlike Continental Europe and the United States of America, where such rights have been enshrined in written constitutions, in England or 'with us individual rights are the basis, not the result, of the law of the constitution'. A.V. Dicey, 10th Edition, 1959, p.207.

Law and the Constitution, does not even take into consideration the ideas of the above mentioned writers on this subject matter.

The second, external, flaw in Dicey's conception of the rule of law is its total divorce from the real social existence of men and women in society and their relationship with the law. Dicey's overt emphasis on law's formal characteristics is due to his adherence to the legal positivist tradition[9] to which he belonged, which tradition intentionally explained law as an insular phenomenon. In fact, Dicey considered it a duty as an English professor of law 'to state what are the laws which form part of [the] constitution, to arrange them in order, to explain their meaning, and to exhibit where possible their logical connection'.[10] It is for this reason that Dicey, while introducing his work, made a concerted effort to distinguish law (and constitutional law in particular) from political theory and history. Terming history (both legal and social) as 'antiquarianism', Dicey warns his students: 'let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law of England was yesterday, still less what it was centuries ago, or what it ought to be tomorrow, but to know and be able to state what are the principles of law which actually and at the present day exist in England'.[11] Thus, in his view, political and philosophical theory and history have joined hands to 'mislead students in search for the law of the constitution'.[12] In the end, what we have is a skewed conception of the rule of law, richly ornamented in form but hollow and devoid in content.

It is implicitly argued in this paper that it is not enough to 'train' lawyers or students of law. The point of all education is to educate the

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9 See works of John Austin (1790-1859) who remarked that 'The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry'. John Austin 'The Province of Jurisprudence Determined', W.E. Rumble (ed.), 1995 (Cambridge: Cambridge University Press, 1832), p.157.

10 A.V. Dicey, *op.cit.*, 10th Edition, 1959, p.32.

11 *Ibid.*, pp.14-15. Further, Dicey explains with disdain for history that 'An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. He is deeply, sometimes excessively, concerned with the question of "origins". He is but indirectly concerned in ascertaining what are the rules of the constitution in the year 1908 [date of edition]. To a lawyer, on the other hand, the primary object of study is the law as it now stands; he is only secondarily occupied with ascertaining how it came into existence'. *Ibid*., p.15.

12 *Ibid.*, p.19.

individual and in order to do so it is imperative to think outside of the frame of 'presentism' – the kind Dicey is advocating – that is to say, to explain the past or past law in light of present day values and judgments. This is a serious mistake that has in fact misled generations of law students as there is simply no substitute for a lastingly useful and valuable legal education founded on an understanding of history.

B. The rule of law and its significance to Pakistan

Recent events have demonstrated that the rule of law is of historic importance to Pakistan. It is now recognized that the movement for the restoration of the former Chief Justice of Pakistan, Mr. Iftikhar Muhammad Chaudhry by the lawyers, media and civil society of Pakistan was a 'watershed' event, which paved the way for parliamentary democracy and electoral succession of governments for the first time in the history of this country. This movement was not just significant for Pakistan, as one commentator from the United States of America put it: 'I will also take note of the parallels that exist between the Chief Justice's [of Pakistan] brave struggle for an independent judiciary and the courageous efforts of our own Nation's founding fathers to overcome tyranny and establish a regime of "laws and not men".'[13] Such accolades reverberated throughout the international civil and legal community[14] and in an unprecedented move, the American Bar

[13] Joel A. Mintz, 'Introductory Note: A Perspective on Pakistan's Chief Justice, Judicial Independence and the Rule of Law' 15 *ILSA Journal of International and Comparative Law,* 2008, pp.1-2. On this occasion, the Nova Southeastern University bestowed upon the Chief Justice Iftikhar M. Chaudhry an honorary doctors law degree, which was received by Dr. Tariq Hassan on behalf of the Chief Justice. Dr. Tariq Hassan's insightful address: 'The Need for Judicial Activism Acceptance Speech' is also reported at 15 *ILSA Journal of International and Comparative Law,* 2008, pp.7-14. The honorary doctorate was given with the following dedication*:* 'The rule of law, the foundation of democracy, survives only when a nation's citizens recognize its importance and, when necessary, defend it. You and your Pakistani bench and bar colleagues bravely and tenaciously proclaimed the importance of the rule of law and vigorously defended it. Iftikhar Muhammad Chaudhry, you have inspired lawyers and lay people throughout the world. In recognition of your remarkable efforts, the trustees of Nova Southeastern University are proud to award you the Honorary Degree of Doctor of Laws with all of its rights and privileges'.

[14] The former Chief Justice of Pakistan is the recipient of the following international honors and awards: (i) Lawyer of the Year Award of 2007 by *National Law Journal,* U.S.A., (ii) Doctor of Laws, *honoriscausa,* Nova Southeastern University 2008, (iii) New York City Bar honorary

Association wrote a stinging letter to General Pervez Musharraf in 2007 calling for the following actions to be taken:

> The ABA therefore strongly urges (a) that any proceedings against the Chief Justice and any other judge be conducted in an open and transparent manner consistent with the unbiased administration of justice and Article 14 of The International Covenant on Civil and Political Rights; (b) that you reaffirm the need for an independent judiciary; and (c) that you cause the cessation of all acts, whether express or implied, which would tend to intimidate any member of the bar or the judiciary from carrying out his or her duties in an independent and impartial manner.[15]

Therefore, it is clear that the movement for the rule of law not only deeply moved the ordinary people of Pakistan[16] but the international community as well. In one sense, the Pakistani movement for the rule of law gave the west *back* a renewed sense of purpose and hope in this cherished politico-legal principle. These are the sentiments then, both real and imagined, that give rise to the present enquiry into the phenomenon of the rule of law.

The concept of the rule of law presents us with some crucial questions: what is it in the nature of the rule of law that gives it such a powerful and universal appeal? Is the rule of law a unifying force in the sense that it unites all economic and social classes and even people across national boundaries? Is the rule of law an 'unqualified human good'? Is it an end on its own or a means to an end? Is sentiment for the rule of law an innate human characteristic or is it historical and evolutionary? More specially, in the context of Pakistan, why did it take over 60 years to realize the potentiality of the rule of law? How, when and in what form and content was the Rule of Law introduced to the people of the sub-continent and how did it historically evolve in the sub-continent? Was it fashioned in the same manner as it was practiced in England during the early and late colonial period? Was the rule of law of the American founding fathers different than the 'rule of law' of the

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membership, 2008, (iv) Harvard Law School Medal of Freedom 2008, (v) International Jurists Award, U.K., 2012 etc.

15 Karen J. Mathis, President American Bar Association, dated 13 April 2007. [http://www.americanbar.org/content/dam/aba/migrated/op/docs/070413letter_mathis_pakistan.authcheckdam.pdf]

16 'I support the lawyers because if Musharraf can do whatever he wants to this man, the Chief Justice of Pakistan, then none of us is safe'. Taken from 'Notes: The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power' 123 *Harvard Law Review*, 2010, p.1705.

people of the subcontinent? Was the rule of law that Pakistanis struggled for in 2007 qualitatively the same that which we inherited in 1947? In other words, in 2007 did the Pakistanis struggle for same rule of law that was enshrined in India's colonial 'constitutions' or that of the post-colonial 'vice-regent' state of Pakistan?

These and many other like questions have given rise to the present enquiry. It is important to understand that the rule of law is a travelling phenomenon[17] tracing its path from United Kingdom to India and over time elsewhere in the Britain's 'second empire'.[18] However, the content of the law is often lost in these travels as the words 'legal transmission' often convey a "sanitized" meaning of legal order with the world neatly divided into common law, civil law and mixed legal systems (see for example, a map of the world divided neatly into legal systems.[19] However, these convenient classifications ignore the historical content of the law and rule of law, which are invariably lost in translation. It does not, for example, expound on the fact that in colonial India the rule of law was the 'most reliable and consistent accomplice' to white violence against Indians so much so that Bal Gangadhar Tilak remarked in 1907 that 'the goddess of British Justice, though blind, is able to distinguish unmistakably black from white'.[20] It does not tell us that the rule of exception ('rule of colonial difference')[21] rather than the rule of law was the principle feature of colonial administration of justice where laws of martial rule, emergency and arbitrary acts became cornerstones of legal sovereignty of the colonial state.[22] It does not tell us why and how the rule of law was crafted to serve and aid the 'overdeveloped' state apparatus[23] nor the 'vice-regal'[24] linkages in the

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17 Iza Hussin, 'Circulations of Law: Colonials Precedents, Contemporary Questions', 7(2) *Onati Socio-Legal Series 2012*, p.21.

18 The term 'second empire' (post 1783 A.D.) is usually used by historians to define British Empire in the aftermath of the American War of Independence and denotes Britain's non-white colonial acquisitions.

19 Iza Hussin, 'Circulations of Law: Colonials Precedents, Contemporary Questions', *Onati Socio-Legal Series*, 7:2 (2012), http://www.juriglobe.ca/eng/.

20 Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010), pp.4-11.

21 Partha Chatterjee, *The Nation and its Fragments* (Princeton: Princeton University Press, 1993), p.19.

22 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: The University of Michigan Press, 2003), p.5.

23 Hamza Alavi, 'The State in Post-Colonial Societies: Pakistan and Bangladesh' 74(I), *New Left Review*, 1972.

colonial and the post-colonial societies and between rule of law and the state in particular. Lastly, it does not tell us anything useful as to how to interpret the struggle for the rule of law in Pakistan in 2007 – was it a struggle for supremacy of persons (i.e. between General Musharraf and Chief Justice Chaudhry)?;[25] or, was it a case of supremacy and usurpation by the judiciary of other institutions, specifically, that of 'populism, overt moralism, [and] appropriation of functions of other institutions?';[26] or, was it a case of lawyers' movement playing the determinative role in 'restoring' the rule of law and judicial independence;[27] or, was it an instance of something larger – 'about the relationship between entrenched status quo interests and an "independent judiciary"?';[28] or, was it the case that the ruling classes were alarmed at the 'judicial activism' of Chief Justice Chaudhry between the period 2005 and 2007 where the Supreme Court took notice of a series of high profile cases of public importance,[29] besides having taken cognizance of the dozens of human rights cases largely emanating from the Pakistan's vast rural hinterland, and reacted in the preservation of their interests?

A reputed scholar has said that 'the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement upon precisely what it means'[30] while another scholar with a greater flair seconded this view that 'anyone seeking to delve into the history of the rule of law might well be

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24 Paula Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 1995).

25 *Pakistan Rule of Law Assessment – Final Report*, November 2008, [http://pdf.usaid.gov/pdf_docs/PNADO130.pdf]

26 Babar Sattar, 'Hubris as Justice?' *Dawn*, 30 July 2013 [http://dawn.com/news/1032941/hubris-as-justice]

27 Stephen Cohen, *Future of Pakistan* (Washington: The Brookings Institution, 2011), pp.4-5 and Hamid Khan, *Constitutional and Political History of Pakistan*, 2nd Edition (Karachi: Oxford University Press, 2009), pp.522-23.

28 Anil Kalhan, '"Gray Zone" Constitutional and the Dilemma of Judicial Independence in Pakistan', *Vanderbilt Journal of Transnational Law*, 46:1 (2013).

29 (i) on ruling establishment's ire at the so called 'judicial activism of the Chief Justice', see Dr. Tariq Hassan, 'The Need for Judicial Activism Acceptance Speech' 15 *ILSA Journal of International and Comparative Law*, 2008, pp.7-14; and (ii) on 'judicialization of politics' as a reaction to the discontents of economic liberalization policy, see Shoaib A. Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf' 35 *Law & Social Inquiry*, 2010, pp.985-1022.

30 Brian Z. Tamanaha, *op.cit.*, 2004, p.4.

accounted a fool, or, at least, a masochist. If one accepts that the phrase originates with Aristotle … it is so freighted with diverse political, social and legal contexts that one can easily become lost in a maze of contingency'[31] In such diversity, it is submitted that it is all the more pertinent to go back to drawing board in order to formulate a viable theoretical understanding of the rule of law, which above all, enables a historical understanding of this phenomenon. Given the universality of the rule of law, we will find this concept very close to other equally universal concepts, that of property, law and the state. It is only the grounding the law and the rule of law in property and the state that will enable us to extract its true characteristics and place us in a position to answer the difficult questions addressed above.

C. Organization of the essay

This essay is organized into two parts. In Part I, we have traced the origins of property, law and the state in the western intellectual tradition commencing from Hobbes and travelling down to Adam Smith. We will see how each thinker demolished the traditional concepts of natural law and in its place offered a modern conception of law – that based on property. The great advance made by these thinkers was to reason that all laws emanated from property relations. However, they also recognized the contradictions in society arising from property relations and made attempts to resolve these. Each theorist sought to establish the state on a new basis, based on the consent of people, and governed by the rule of law. They saw in the reformulated state the realization of the contradictions of society, inherent in property relations. The nub of our analysis in Part I is to extrapolate main themes from the writings of the above theorists on property, law and the state, which will facilitate our understanding rule of law and its function in society. The point to grasp here is the contradictory nature of the function of law and the rule of law. While the theorists saw law as integrally emerging out of property relations, yet at the same time, they advocated that only law / rule of law can address and alleviate the disparities, ills and other contradictions in society arising from lop-sided property relations. We will be able to discern at the end of this discussion the elementary observations about

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[31] John McLaren, 'The Rule of Law in British Colonial Societies in the 19th Century: Gaseous Rhetoric or Guiding Principle', a paper delivered at the Colloquium on *The Transposition of Empire: Historiographic Approaches to the Translation of Juridical and Political Thought in Colonial Contexts*, Monash Centre, Prato, Italy, 20-22 April 2009.

law and society that Dicey missed or omitted to include in his theoretical conception of the rule of law.

Part II of the essay will examine the rule of law in action in the context of 18th century social and legal history and particularly in the context of the administration of criminal law in 18th century England. Here, the essay will introduce the minimal conception of the rule of law through a critical reading of the works of social and legal historians such as E.P. Thompson and Douglas Hay, whose works (*Whigs and Hunters: Origins of the Black Act* and *Albion's Fatal Tree*) on crime and society in the 18th century England permanently changed the academic landscape of the epoch and sent shockwaves through the polite smoking rooms of eighteenth century studies.[32] The purpose of this historical study is to examine the application of the Rule of Law in society and to see it as a 'lived relation' from the points of view of the rulers as well as the ruled. At the end of this section we may arrive at the conclusion that Dicey's minimal conception of the rule of law playing an inhibitory function viz. the all-intrusive state is an anachronistic concept which no longer applies to the realities and requirements of 21st century global citizenry.

Finally, by way of a few concluding remarks, we would like to offer tentative suggestions towards formulating a modern conception of the rule of law, which conception includes a human being's material conditions as a necessary component of the rule of law. Without these material considerations, the rule of law would remain a hollow rallying cry and serve no purpose as a central organizational principle in our global society. Here, we will assimilate our composite understanding of phenomenon of the rule of law and tentatively offer a theoretical approach which will guide and facilitate an historical understanding of the rule of law, so that we are in a better position to address the difficult questions posed above. Our purpose here is to provide a framework for future research on the historical development of the rule of law in human society as this development is related to property, law and the state so that we are able to connect successive historical periods and trace the development of the rule of law as a historical phenomenon. In doing so, we hope to show that the rule of law is not a mere philosophical speculation but a 'maxim of political action' that has real foundations in institutions, as well as, in the hearts and minds of rulers and the ruled.

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[32] Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson, and Cal Winslow, *Albions Fatal Tree* (New York: Pantheon Books, 1975), Introduction to the Second Edition, p.xix.

I

Law, property and the rule of law in classical jurisprudence

A. Description of the rule of law – Albert Venn Dicey

Any constitutional textbook commenting on common law legal systems would be incomplete without a foundational discussion of A.V. Dicey's monumental work, the *Introduction to the Study of the Law of the Constitution*.[33] Generations of common law students across the common law world are raised on Dicey's fundamental precepts of the rule of law. Indeed, the prescription is so deeply ingrained that the rule of law 'has attained a status in the legal mind more befitting an article of faith than a doctrinal construct'.[34] It has become the catch phrase of liberal democratic order where in the words of one commentator, 'Dicey and his rule of law have acquired, within and beyond legal circles, a transcendent, a symbolic significance'.[35] Dicey was the first to formally formulate the concept of the rule of law in a liberal democratic order of the 19th and early 20th century imperial United Kingdom but it is important to understand the historical background in which he did this.

In the late 19th century, the great intellectual war had begun between liberalism and socialism. Dicey's work was in this sense political, arguing against the growing legislative powers of Parliament to enact social welfare legislation. The impetus for such legislation came from a realization of the massive economic inequalities prevailing in Victorian England. Hence, it was in this context that Dicey wrote his monumental work bemoaning that: 'the ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline. The truth of this assertion is proved by actual legislation, by the existence among some classes of a certain distrust both of the law and of the judges, and by a marked tendency towards the use of lawless methods for the attainment of social or political ends'.[36]

Dicey formulated the meaning of the rule of law in three ways. First, 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'.[37] In the first sense, the

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33 A.V. Dicey, *op.cit.*

34 Bernard J. Hibbitts, 'The Politics of Principle: Albert Venn Dicey and The Rule of Law', 23 *Anglo-American Law Review*, 1994, pp.1-31.

35 *Ibid*, at p.1, note 4; H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in the Nineteenth Century England* (Toronto: University of Toronto Press, 1985), p.5.

36 A.V. Dicey, *op.cit.*, p.iv.

37 *Ibid.*, p.188.

rule of law is explained as a protection or remedy against discretionary powers of persons in authority. Three distinguishable themes are present in this observation: (i) there can be no punishment without a pre-existing law, (ii) ordinary courts are the proper institutions where all cases must be heard and (iii) discretion and law are antithetical.[38] Second, everyone is equal before the law regardless of rank or socio-economic condition.[39] His primary concern was that all public officials must be made accountable through ordinary private causes of action before ordinary courts for their official actions without any special immunity or dispensation. Third, the source of all general principles of the law and constitution derive from judicial decisions determining particular private rights arising from particular cases.[40] For Dicey, the freedoms of the English were inherent in the common law tradition of England and he understood the common law tradition as a whole to be a more secure basis for liberty than the enactment of written constitutions or legislation. Here, Dicey was specifically arguing against the incipient social welfare state with its regulatory bodies, local government and the like, which combined legislative, executive and judicial powers in a single body.

We have intentionally commenced with Dicey's description of the concept of the Rule of Law because of its importance not only as the first of its kind but as being a universally recongnized description of the rule of law. The three descriptions of Dicey represent three distinct but interrelated themes or clusters rooted in the liberal conception of law, which form the subject matter of classical jurisprudence much before Dicey's time. Like Dicey's three formulations, these three themes or clusters are related and inseparable as they revolve around distinct ideas, which ideas have been the subject of vigorous and intense study since the 17th century. The first theme or cluster represents the freedom of the individual and his property from arbitrary or discretionary action. It can be characterized as the 'inhibitory' function of law,[41] the purpose of which is to limit the power of the state *vis-à-vis* the individual and particularly as to his private property. It may be noted here that freedom of the individual and protection of private property are synonymous, for according to an axiom of John Locke, 'there can be no injury where there

38 Brian Z. Tamanaha, *op.cit.*, p.63.
39 A.V. Dicey, *op.cit.*, p.193.
40 *Ibid.*, p.195.
41 Bob Fine, *Democracy and the Rule of Law* (London: Pluto Press, 1984), p.175.

is no property'[42] Importantly, this theme presupposes the existence of private property on the one hand and the state on the other. The second theme or cluster represents the overriding notion of equality of the law, where 'the landlord, the labourer, the capitalist, the proletariat, the minister, the bootblack are equal as 'citizens' and as 'legislators'.[43] This theme presupposes the existence of equality as an inherent quality of law and the rule of law. In other words, where there is law there will be equality. The third theme or cluster goes to the very heart of bourgeois system of government, to its unshakable principles of separation of powers, judicial independence, representative government, and parliamentary democracy.[44] From the perspective of the rule of law, we would emphasize on the independence of the law or judicial independence, for Dicey believed that judge made law was the source of the rule of law. In other words, Dicey considered the rule of law to be the product of the cumulative multitude of judicial decisions determining the rights of private individuals in particular cases. For instance, he argued that England had a rich and historic tradition of free press (as opposed to freedom of press in other European nations) because the common law action of libel brought before judges and juries. In this manner, he argued the common law legal system was superior to any other legislated legal code that was brought into existence by a government interfering in the private rights of its citizens.

Our methodology or analytical framework here is to work backwards in relation to these three identified themes which constitute the core ideas informing Dicey's modern formulation of the rule of law. This essay will extrapolate these themes from the writings of the thinkers under study. After our review, it is hoped the connection between constituent themes of the rule of law and property and the state will become clear and pave the way for a better understanding of the law, property and the rule of law.

We will commence with Hobbes and will see how Hobbes was instrumental in demolishing the natural law theory and its corollary, the divine right of the sovereign. At the same time Hobbes formulated his theory of the state which was consistent with the emerging bourgeois spirit of the times. Thus, Hobbes proposed a theory of social organization that fully supported the unrestricted use of private property and, at the

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42 Jean-Jacques Rousseau, *A Dissertation on the Origin and Foundation of the Inequality of Mankind and is it Authorized by Natural Law*, Part II.

43 Leon Trotsky, *The Struggle Against Fascism in Germany,* Pathfinder, 1971.

44 H.W. Arndt, 'The Origins of Dicey's Concept of the Rule of Law', *The Australian Law Journal,* 31, 1957, pp.18, 117-23, 118.

same time, encouraged people to submit to the rule of a legal state (as opposed to rule by royal absolutism). Locke picked up the mantle from Hobbes and offered a more radical treatise of government. His main concern was to preserve the liberties of the English won by them after the bloody struggle of the English Civil War. The chief aim of government, accordingly to Locke, was the protection and preservation of private property. Locke consequently built an entire theory of state premised on the preservation of private property wherein he subjected the state, civil society, and the individual to the rule of private property, which for him was the true expression of individual freedom. Like Locke, Montesquieu's chief concern was the political liberty of the individual in society. He therefore proposed a theory of laws that assessed legal systems by the yardstick of liberty prevailing in such legal systems. Democracy was, of course, the most suitable of all systems affording the individual with the most liberty. However, concerned that the mercantile system brought with it excessive inequality, which would endanger the spirit of liberty in such society, he called for the establishment of a legal state where power was checked by power i.e. based on the doctrine of separation of powers. In this arrangement, the independence of judiciary played a primary role. Rousseau was the first Enlightenment theorist to systematically deal with the concept of equality in society. He made definite correlations between social inequality and private property going so far as to suggest that the roots of all inequality lay in concentration of wealth in the hands of a few. He made an equally forceful connection between property and the institution of law in the sense that laws' function is to preserve property and by extension social inequality. Rousseau's solution to social inequality and disparity of wealth was an egalitarian civic government, again premised on the rule of law. Lastly, after refuting the vulgar liberal caricature of Smith as a bourgeois apologist, we examine his materialist theory of jurisprudence, which made an intimate connection between law and property on the one hand, and property and civil government on the other. Being a stringent critic of the powerful classes (particularly mercantilist class) and weary of their propensity to manipulate legislation to extract state privileges and exceptions, Smith advocated a truly neutral and limited government divorced from class interests.

B. Thomas Hobbes (1588-1679)

(i) Abolishing natural law and divine rights: Hobbes (*Leviathan* published in 1651) was among the first bourgeois theorists to develop a materialist account of law and state: 'all that is real is material and what is not material is not real'. He de-mystified the natural law theory and its

corollary, the divine right of the sovereign. In an abstract sense, Hobbes freed the individual from the entanglements of divine law by positing humans as semi-barbaric, living in a state of perpetual chaos, and driven by the pursuit of private interest[45] (exemplified in private property). Thus, Hobbes took natural law to its logical limit; it meant that in a state where all had equal rights to the world the rule of the strongest would ultimately prevail.

(ii) Private property: Next, Hobbes recognized labour as the constitutive element of private property and thus sought to sever property from natural law constraints and instead posit it as a natural relation of people to the world around them (for a man's labour also is a commodity exchangeable for benefit, as well as any other thing).[46] Hobbes' project was to free private property to the maximum extent possible, that is to say, exclude or alienate absolutely from private property everyone, except, the sovereign or the commonwealth.[47]

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45 'Every man by nature hath right to all things, that is to say, to do whatsoever he listeth to whom he listeth, to possess, use, and to enjoy all things he will and can … it followeth that all things may rights also be done by him … that Nature hath given all things to all men. But that right of all men to all things, is in effect no better than if no man had right to anything. For there is little use and benefit of the right a man hath, when another is strong, or stronger than himself, hath right to the same…. Seeing then to the offensiveness of man's nature one to another, there is added a right of every man to everything, whereby one man invadeth with right, and another with right resisteth; and men live thereby in perpetual diffidence, and study how to preoccupate each other; the estate of men is this natural liberty is the estate of war….The estate of hostility and war being such, as thereby nature itself is destroyed, and men kill one another…he [man] therefore that desireth to live in such an estate, as is the estate of liberty and right of all to all, contradicteth himself. For every man by natural necessity desireth his own good, to which this estate is contrary, wherein we suppose contention between men by nature equal, and able to destroy one another'. Thomas Hobbes, *Elements of Law*, Chapter 14.

46 Hobbes, *Leviathan*, p.151.

47 'From whence we may collect that the propriety [property or status] which a subject hath in his lands consisteth in a right to exclude all other subjects from the use of them; and not to exclude their sovereign, be it an assembly or a monarch. For seeing the sovereign, that is to say, the Commonwealth (whose person he representeth), is understood to do nothing but in order to the common peace and security, this distribution of lands is to be understood as done in order to the same: and consequently, whatsoever distribution he shall make in prejudice thereof is contrary to the will of

(iii) The reformulation of the state: Hobbes, however, recognized that the pursuit of self-interest and egoism would keep humans suspended in a state of nature of all against all. He thus sought a solution which at once would retain the natural propensity of people to follow self-interest and at the same time to create an authority to which the negative aspects of social obligations attached to property could be transferred to: the Leviathan. Hobbes's answer to the 'fundamental contradiction'[48] between individual and the collective was through a single contract, a universal act of consent, to submit all public authority to a commonwealth.[49] Since all power now by act of consent was transferred to the sovereign, the basis for independent rights at law (divine or customary) no longer held sway and the command of the sovereign now constituted the only law.[50] However, this 'act of command' should not be construed as being an absolutist sanction.

(iv) The rule of law and the legal state: What Hobbes is not known for is his theory of the legal state that was intended to go side by side with the commonwealth, whether that commonwealth was constituted as a monarchy, oligarchy or democracy, for in Hobbes' opinion, the rationale for 'these three kinds of Commonwealth' is 'not in the difference of power, but in the difference of convenience or aptitude to produce the peace and security of the people; for which end they were instituted'.[51]

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every subject that committed his peace and safety to his discretion and conscience, and therefore by the will of every one of them is to be reputed void … In the distribution of land, the Commonwealth itself may be conceived to have a portion, and possess and improve the same by their representative; and that such portion may be made sufficient to sustain the whole expense to the common peace and defence necessarily required'. *Ibid.*, pp.152-53.

48 Alan Hunt, *Explorations in Law and Society* (London: Routledge, 1993), pp.156-60.

49 Bob Fine, *op.cit.*, pp.22-7.

50 'And first it is manifest that law in general is not counsel, but command; nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him. And as for civil law, it addeth only the name of the person commanding, which is persona civitatis, the person of the Commonwealth. Which considered, I define civil law in this manner. Civil law is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of that is contrary and what is not contrary to the rule'. Hobbes, *Leviathan*, p.162.

51 *Ibid.*, p.115.

Thus, the commonwealth for Hobbes is a public authority constituted for the peace, prosperity and security of the individual and the collective; and the guarantor of such peace and security was the rule of law.[52] Hobbes advocated for an independent judiciary, not in the sense of a separate power, but in the sense that the individual judge should be in materially or personally interested in the controversy.[53] By the same token he believed that the rule of law should guarantee that no innocent should be punished in the commonwealth for punishment of innocents would vitiate the very purpose of forming commonwealths. Hobbes was of the view that whatever the form of government, it was crucial for the state to exercise authority through law and so long as the sovereign exercised powers through laws, the sovereign could rule absolutely.

(v) Concluding remarks: To sum up, Hobbes elevated the rule of law into a natural requirement of any and every social order. Obedience to civil law is the law of nature. He was writing at the time when the rule of law as a doctrinal concept and organizing principle was just emerging from the tumultuous and bloody period of constitutional strife during the English Civil Wars and the Glorious Revolution. After all, the English Civil War was itself a war personified by the right of Parliament to limit the powers of the monarch, in particular, his power over the private property of the

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52 'Another thing necessary for the maintaining of peace, is the due execution of justice; which consisteth principally in the right performance of their duties, on the parts of those, who are the magistrates ordained for the same by and under the authority of the sovereign power; which being private men in respect of the sovereign, and consequently such as may have private ends, whereby they may be corrupted by gifts, or intercession of friends, ought to be kept in awe, by a higher power, lest people, grieved by their injustice, should take upon them to make their own revenges, to the disturbance of the common peace; which can by no way be avoided in the principal and immediate magistrates, without the judicature of the sovereign himself, or some extraordinary power delegated by him. It is therefore necessary, that there be a power extraordinary, as there shall be occasion from time to time, for the syndication of judges and other magistrates, that shall abuse their authority, to the wrong and discontent of the people; and a free and open way for the presenting of grievances to him or them that have the sovereign authority'. Hobbes, *Elements of Law*, Chapter 28.

53 'First, that the judge ought not to be concerned in the controversy he endeth; for in that case he is party, and ought by the same reason to be judged by another; secondly, that he maketh no covenant with either of the parties, to pronounce sentence for that one, more than for the other ... And thirdly, that no man ought to make himself judge in any controversy between others, unless they consent and agree thereto'. *Ibid.*, Chapter 17.

propertied classes. In the aftermath of the civil war, one immediate result was the juggernaut of the 'enclosure movement', which gave the propertied classes the right to alienate their properties, and with the execution of Charles I and abolishment of the Star Chamber, the peasants lost their chief protection against the advance of enclosures.[54] Further, historians have pointed out that the 16th and 17th century English society was rapidly evolving out of its feudal mold where the 'command of men' began to give way to the 'command of money'.[55] Thus, in this milieu, Hobbes at once supported the unfastening of private property relations and, at the same time, encouraged the war-weary and guilt-ridden (due to regicide) English to submit to a state authority, reordered and aligned with the emerging concept of the rule of law and the legal state.

C. John Locke (1632 – 1704)

(i) Historical context: Locke (*Two Treatises of Government* published in 1689) refined Hobbes' contractual logic by emphasizing that the civil government, in addition to maintaining order, must also serve to guarantee the property and freedom of individuals.[56] In other words, 'the government has no other end but the preservation of property'.[57] By so arguing, Locke was not only promoting the emerging capitalist foundations of society but also a theory of the state that restricted the power of the absolutist monarch. We must recall that this struggle for rule by government and laws as opposed by royal prerogative found its most brutal expression in the English Civil War and its resolution in favour of bourgeois classes with the subsequent victories of the Glorious Revolution[58] (1688). The great stride made by Locke was his treatment of the status of property, on which his theory of the state rested.

(ii) Labour as the foundation of all property: Locke succeeded in providing a theoretical basis for the divorce of labour from all bounds of

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54 Barrington Moore Jr. *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World* (Boston: Beacon Press, 1994), p.19.

55 Tawney R.H., *The Agrarian Problem in the Sixteenth Century* (London: Longmans, Green & Co., 1912), pp.188-89.

56 Lucio Colletti, 'Introduction', in K. Marx, *Early Writings* (New York: Vintage Books, 1975), p.31.

57 John Locke, *Second Treatise of Government*, Section 94.

58 In fact, Locke wrote his *Two Treatises of Government* in immediate aftermath of the Glorious Revolution, in favour of monarchy but strictly along the lines of the liberty fought for by the bourgeois during the Civil War.

natural or divine law and made it the fundamental unit of private property.[59] Locke was one of the first theorists to discover in categorical terms that labour was the foundation of all private property. Without labour there would be no value to property, society, no prosperity and indeed no government. It is the act of taking land or other things in nature and turning them into useful articles for maintenance of life is what gives rise to private property: 'it is labour then which puts the greatest part of value upon land, without which it would scarcely be worth any thing: it is to that we owe the greatest part of all its useful products'[60] In the state of nature man enjoyed complete dominion over his property then why, Locke asks, would he consent to form a commonwealth and transfer his liberty to it? He answers, to protect the dominion of property.[61] Locke's state of nature, although chaotic, prefigured the foundation of property through man's constant acquisition through labour. Therefore, the 'great and chief end' for man for joining in civil society was preservation of property.[62]

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59 'Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others'. Locke, *Second Treatise of Government*, Section 27.

60 *Ibid.*, Section 43.

61 'To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property'. *Ibid.*, Section 123.

62 'The great and chief end … of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.

(iii) Equality and the rule of law: Having developed the basis for his theory of the state, Locke expanded on the idea of citizenship and equality of persons. The first act of creating a commonwealth was therefore that of 'consent'.[63] Thus, man only parts with his natural liberty in the state of nature on the condition that such liberty, equality and freedom would be fully secured and guaranteed by the state of which he will be an equal citizen in the sense that all other men likewise will have done the same to enter into such a society.[64] For the preservation of property and security of person, Locke formulated the theory of separation of powers (unlike Hobbes). For him, exercise of arbitrary power vis-à-vis the individual and his property was abhorrent and, indeed, a worse condition to suffer than the state of nature. The solution for Locke was (as he never advocated the independence of judiciary) was to have pre-established rules and laws.[65] To Locke, there is nothing more dangerous than arbitrary power of the state which is 'apt to increase their own riches and power' at the expense of society.[66] Therefore, it is essential for legislative power to be limited at the first instance of

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To which in the state of nature there are many things wanting'. *Ibid.*, Section 124.

63 'The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties'. *Ibid.*, Section 95.

64 *Ibid.*, Sections 127-130.

65 'Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men 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 of right and property to secure their peace and quiet. It cannot be supposed that they should intend, had they a power so to do, to give to any one, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them. This were to put themselves into a worse condition than the state of nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man, or many in combination … For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure with the limits of the law; and the rules too kept within their bounds'. *Ibid.*, Section 137.

66 *Ibid.*, Section 138.

forming a civil community. In this manner, Locke not only confined the powers of the sovereign but also that of Parliament.[67]

What then is the nature of government that Locke proposes? It is a government that cannot tax its citizens without their consent as to the proportion of such tax;[68] it is a government where the legislature cannot delegate its law-making powers to anyone not chosen by the people;[69] it is a government that is founded on trust in discharge of a fiduciary duty,[70] fixed by pre-established and equal laws for rich and poor alike and constituted for no other end than the 'good of the people.[71] Whilst all public bodies are subordinate to the legislature, the legislature in turn is subordinate to the people as the supreme power, with whom resides the power to alter or remove the legislature, as encapsulated by the maxim: salus populi suprema lex.[72]

(iv) Property, law and government: What then is the mechanism by which this limited government is to be maintained in check and for the good of the people? That mechanism is the rule of law. In order to hold the government to the ends for which it was originally formed, it was necessary for Locke to give law and the rule of law a measure of independence.[73] Moreover, public authorities cannot rule by

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67 'A man … cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects'. *Ibid.*, Section 135.

68 *Ibid.*, Section 140.

69 *Ibid.*, Section 141.

70 *Ibid.*, Section 149.

71 *Ibid.*, Section 142.

72 *Ibid.*, Section 158.

73 'Where-ever law ends, tyranny begins, if the law be transgressed to another's harm; and whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject, which the law allows not, ceases in that to be a magistrate; and, acting without authority, may be opposed, as any other man, who by force invades the right of another. And why this should not hold in the highest, as well as in the most inferior magistrate, I would gladly be informed. Is it reasonable, that the eldest brother, because he has the

'extemporary arbitrary decrees' but are bound to dispense justice and rights of the people by 'promulgated standing laws and known authorized judges'; in order to avoid disruption to people's lives and properties humans give up their natural power and rights so that 'there shall be government by declared laws, or else their peace, quite, and property will still be at the same uncertainty, as it was in the state of nature'[74] However, Locke does not explain the genesis of laws or the rule of law but presupposes the same and attributes to the function of law the supremacy of the principle of public good and public good alone (*salus populi suprema lex*). In other words, Locke equates primacy of the law to the good of the community.[75]

As we have observed, for Locke the rule of private property was sacrosanct and with it all laws that protected this cardinal principle for which humans organized themselves in a state.[76] Even the royal prerogative was subject to the prescription of law 'for the king's authority being given him only by the law, he cannot impower any one to act against the law, or justify him, by his commission, in so doing; the commission, or command of any magistrate, where he has no authority, being as void and

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greatest part of his father's estate, should thereby have a right to take away any of his younger brothers portions?' *Ibid.*, Section 202.

74 *Ibid.*, Section 136.

75 'And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled and standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offences which any member hath committed against the society, with such penalties as the law has established…'. *Ibid.*, Section 87.

76 'The reason why men enter into society, is the preservation of their property; and the end why they chuse and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society, to limit the power, and moderate the dominion, of every part and member of the society: for since it can never be supposed to be the will of the society, that the legislative should have a power to destroy that which every one designs to secure, by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavour to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence'. *Ibid.*, Section 222.

insignificant, as that of any private man'.[77] Further, all unlawful acts of abuse of powers and discretion were deemed to be a declaration of war on the people, in which case, the people had the right to remove such a state of affairs by force.[78] Thus, the failure of the rule of law to end arbitrariness and tyranny marks the dissolution of the social contract, in which event people are justified in exercising their political power for the preservation of their possessions as this political power is the very same power and the very first act by which every man had given himself up to the multitude for the preservation of life, limb and property.[79]

(v) Concluding remarks: To sum up, Locke's conception of the social contract is one of the most influential formulations of social theory. Locke's state is a society of property owners. Locke's thesis was the bourgeois world-view which premised the organization of the entire society on private property from which all rights, duties, freedoms and limitations emanated. For Locke 'great and chief end' of civil government, civil society and justice was preservation of property for without labour / property, there would nothing to distinguish man from beast. It is thus, Locke stated that 'every man has a property in his own person'.[80] Whereas Hobbes demolished the concept of natural law and its corollary, the divine right of the monarch, and commenced anew with a state premised on public authority and expressing public will, Locke subjected the sovereign, parliament, civil society and the man (both propertied and property-less) to the rule of property, which was the true expression of individual freedom. The period after the Glorious Revolution marked the triumph of the 'capitalist principle and that of parliamentary democracy' as 'directly antithetical to the ones they superseded and in large measure overcame during the Civil War: divinely supported authority in politics, and production for the use rather than for individual profits in economics'.[81]

D. Baron de Montesquieu (1689 – 1755)

(i) Nature of political liberty: Having examined the hypothesis of Hobbes and Locke, we now turn to *Montesquieu* whose *Spirit of Laws'*

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77 *Ibid.*, Section 206.

78 'In all states and conditions, the true remedy of force without authority, is to oppose force to it. The use of force without authority, always puts him that uses it into a state of war, as the aggressor, and renders him liable to be treated accordingly'. *Ibid.*, Section 155.

79 *Ibid.*, Section 171.

80 *Ibid.*, Section 27.

81 Barrington Moore Jr., *op.cit.*, p.20.

(published in 1748) primary objective was to explain laws and social institutions of the world's legal and political systems. Montesquieu's great achievement lay in comparative methodology based on his hypothesis that there is dialectical or complimentary relation between laws of a nation and the totality of its surrounding environment.[82] He understood and attempted to explain laws through history of social institutions of nations. Accordingly to this system he classified forms of states into despotic, monarchical and republican. His analysis of the despotic states (e.g. Ottoman, Japan, China and so forth) and the social institutions prevailing there led him to conclude that despotic states' governing principle is fear. Monarchy in turn was based on honour and republics or democracies on the principles of virtue. The overriding theme of the *Spirit of Laws*, however, was the degree of liberty each individual is afforded in these three political systems.[83] Much in tune with the spirit of the times, Montesquieu's central concern was to maintain the political liberty of individuals and avoid tyranny and despotism. For the present purposes, we will consider Montesquieu's views on liberty, democracy, commerce and law as his main formulations on the separation of powers, independence of the judiciary, and a legal state premised on legal liberty, all stem from his views that commerce, democracy and liberality are inseparable concepts and together as a legal system best afford political liberty to its citizens.

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82 'Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied … They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered. This is what I have undertaken to perform in the following work. These relations I shall examine, since all these together constitute what I call the Spirit of Laws'. Baron de Montesquieu, *The Spirit of Laws*, Book I, Chapter 3.

83 *Ibid.*, Book XI, Chapter 20.

(ii) The connection between liberty, commerce and property … and England: Montesquieu believed that commerce was the basis of knowledge, progress and civilization.[84] Commerce not only promotes peace between nations through reciprocal trade,[85] but also liberty, democracy and freedom.[86] In another passage, Montesquieu clearly set out the complimentary nature of liberty and commerce.[87] For Montesquieu, the ideal-type nation best suited for political liberty, democracy, moderation and consequently commerce was England, to which we now turn our attention to.

Montesquieu was living in a time where it became evident that countries in the north of Europe such as England and Netherlands were fast gaining regional and international supremacy over traditional continental empires like France and Spain due to their economic, political and legal systems. He, therefore, spent a great deal of his time in England studying its people, laws and institutions, and indeed his ideas on the separation of powers, rule of law and liberty comes from his keen analysis of English social, political and legal institutions. He wrote that the English were a 'free people',[88] as opposed to other nations 'this nation is passionately fond of liberty because this liberty is real',[89] where 'every individual is independent';[90] with respect to liberty, commerce and progress he stated that the English have yielded all aspects of social

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84 'commerce is a cure for the most destructive prejudices; for it is almost a general rule that wherever we find agreeable manners, there commerce flourishes; and that wherever there is commerce, there we meet with agreeable manners … commerce has everywhere diffused a knowledge of the manners of all nations: these are compared one with another, and from this comparison arise the greatest advantages'. *Ibid.*, Book XX, Chapter 1.

85 *Ibid.*, Chapter, 2.

86 'True is it that when a democracy is founded on commerce, private people may acquire vast riches without a corruption of morals. This is because the spirit of commerce is naturally attended with that of frugality, economy, moderation, labor, prudence, tranquility, order and rule. So long as this spirit subsists, the riches it produces have no bad effect'. *Ibid.*, Book V, Chapter 6.

87 'Commerce is sometimes destroyed by conquerors, sometimes cramped by monarchs; it traverses the earth, flies from the places where it is oppressed, and stays where it has liberty to breathe: it reigns at present where nothing was formerly to be seen but deserts, seas, and rocks; and whence it once reigned now there are only deserts'. *Ibid.*, Book XXI, Chapter 5.

88 *Ibid.*, Book X, Chapter 3.

89 *Ibid.*, Book XIX, Chapter 27.

90 *Ibid.*

life to commerce / private property.[91] Echoing Locke, he commends the English on their inherent anti-authoritarianism and love of liberty.[92] Thus, he writes, in England, there is (i) equality of law;[93]

(ii) religious liberty and toleration;[94] (iii) freedom of thought;[95] and political freedom.[96] It is no wonder that the founders of the United States of America were so beholden by Montesquieu, who had a major influence on the making of the U.S. Constitution.

(iii) Separation of powers and rule of law: The 'real' liberties Montesquieu witnessed in the English economic, social, political and legal system contributed to the formation of his ideas on the legal state, separation of powers, and the rule of law. For Montesquieu, liberty was

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91 'Other nations have made the interests of commerce yield to those of politics; the English, on the contrary, have ever made their political interests give way to those of commerce. They know better than any other people upon earth how to value, at the same time, these three great advantages — religion, commerce, and liberty'. Baron de Montesquieu, *The Spirit of Laws*, Book XX, Chapter 7.

92 'All the nations of Europe are not equally submissive to their princes: the impatient humour of the English, for instance, leaves their king hardly any time to make his authority felt. Submission and obedience are virtues upon which they flatter themselves but little. On this subject they say most amazing things. According to them … if a prince, instead of making the lives of his subjects happy, attempts to oppress and ruin them, the basis of obedience is destroyed; nothing binds them, nothing attaches them to him; and they return to their natural liberty. They maintain that all unlimited power must be unlawful, because it cannot have had a lawful origin. For, we cannot, say they, give to another more power over us than we ourselves have: now, we have not unlimited power over ourselves; for example we have no right to take our own lives: no one upon earth then, they conclude, has such a power'. Baron de Montesquieu, *Persian Letters No. 105*.

93 'Their laws not being made for one individual more than another, each considers himself a monarch; and, indeed the men of this nation are rather confederates than fellow-subjects'. Baron de Montesquieu, *The Spirit of Laws*, Book XIX, Chapter 27.

94 'Regard to religion, as in this state every subject has a free will'. *Ibid.*, Book XIX, Chapter 27.

95 'As the enjoyment of liberty, and even its support and preservation consist in every man's being allowed to speak his thoughts, and to lay open his sentiments, a citizen in this state will say or write whatever the laws do not expressly forbid to be said or written'. *Ibid.*

96 'In a free nation it is very often a matter of indifference whether individuals reason well or ill; it is sufficient that they do reason: hence springs that liberty which is a security from the effects of these reasonings'. *Ibid.*

not the right to do whatever one pleases, but the 'right of doing whatever the laws permit' and, thus, the notion of formal equality under the law.[97] Montesquieu argued for moderation in government, which would alleviate the burden of tyranny and for this reason he formulated his theory of separation of powers, which has become the cornerstone of a liberal and democratic society. The three separate powers are of course, the legislature for law making, executive for execution of the laws and the 'judiciary power' for administration of justice. He was of the view that human nature cannot be trusted and hence there ought to be a power to check power[98] and formulated his views on the separation of powers and the independence of the judiciary.[99] Therefore, Montesquieu carefully crafted his theories on separation of powers and the rule of law borrowing from the historical circumstances of England. There are definite correlations between his conception of liberal state and its laws and the bourgeois conception of property and commerce. Montesquieu fully endorsed Locke's view of the primacy of private property.[100]

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97 *Ibid.*, Book XI, Chapter 3.

98 'Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go … to prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits'. *Ibid.*, Chapter 4.

99 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there can be no liberty, if the judiciary power be not separated from the legislature and executive. Were it joined with the legislative, the life and liberty of the subject would be subject to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals'. *Ibid.*, Chapter 6.

100 '*Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by law, or a political regulation. In this case, we should follow the rigour of the civil law, which is the Palladium of property'*. *Ibid.*, Book XXVI, Chapter 15.

(iv) Equality, liberty and democracy: However, like Hobbes, Montesquieu acknowledged the negative aspects of private property that would lead to inequality, which would be fatal for good governance and, ultimately, liberty itself. Montesquieu's thinking on this aspect is as interesting as it is circuitous: he explains that the principle of virtue in a democracy is that of love for the republic and this love resides in the principle of equality.[101] The principle of equality in turn can only be maintained by frugality of the nation.[102] While the love of equality limits ambition as a desire, the love of frugality limits superfluities of riches, which would in turn destroy equality and democracy. Further, the effects of such frugal manners and customs would be most beneficial to a democracy as it ensures relative equality between citizens and discourages excessive inequality of wealth.[103] Therefore, Montesquieu recognized the dangers of inequality of wealth in a democracy and warned it would likely lead to either aristocracy or monarchy and, in the worst case, despotism.[104]

Montesquieu's concern was to ensure that the spectacular progress and splendor of Europe would not be arrested and fall into decline like the Roman Empire given that 18th century Europe was at the pinnacle of its prowess.[105] The Roman legacy of decline and fall was painful for Enlightenment thinkers and provided the best historical anecdote to 18th century Europe so as to avoid making the mistakes of Rome, which led to her demise and ruin, and at the same time, casting Europe in the dark ages for over a millennium. Montesquieu considered

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101 *Ibid.*, Book V, Chapters 2 and 3.

102 'Every individual ought here to enjoy the same happiness and the same advantages, they should consequently taste the same pleasures and form the same hopes, which cannot be expected but from a general frugality'. *Ibid.*, Chapter 3.

103 'The good sense and happiness of individuals depend greatly upon the mediocrity of their abilities and fortunes. Therefore, as a republic, where the laws have placed many in a middling station, is composed of wise men, it will be wisely governed; as it is composed of happy men, it will be extremely happy'.

104 'Democracy has, therefore, two excesses to avoid — the spirit of inequality, which leads to aristocracy or monarchy, and the spirit of extreme equality, which leads to despotic power, as the latter is completed by conquest'. *Ibid.*, Book VIII, Chapter 2.

105 'Europe has arrived at so high a degree of power that nothing in history can be compared with it, whether we consider the immensity of its expenses, the grandeur of its engagements, the number of its troops, and the regular payment even of those that are least serviceable, and which are kept only for ostentation'. *Ibid.*, Book XXI, Chapter 21.

the downfall of Rome carefully and attributed its causes to war, excessive expansion and ultimately the loss of republican and civic virtues.[106] This theme of the loss of civic virtue was to be picked up a few decades later by the historian Edward Gibbon (1737 – 1794) in his *History of the Decline and Fall of the Roman Empire* (published in 1776).

(v) The rule of law and the legal state: How then are the virtues of equality and frugality and a republic to be maintained? These virtues must be established by laws.[107] Like Locke, Montesquieu gave pre-eminence to the laws to establish good virtues which would be the foundations of a democratic order guaranteeing liberty of the individual.[108] And how would the laws enforce and uphold equality and frugality in a democracy: through redistribution of wealth. Here, Montesquieu gave a number of examples from classical Greek and Roman laws which devised ways to redistribute wealth in order to ensure that sufficient equality prevailed in society.[109] In modern democracies founded on private property, trade and commerce, these are likewise in falling foul of excessive inequality of wealth.[110] Thus, moderation of

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106 'When the domination of Rome was limited to Italy, the republic could easily maintain itself. A soldier was equally a citizen. Every consul raised an army, and other citizens went to war in their turn under his successor. Since the number of troops was not excessive, care was taken to admit into the militia only people who had enough property to have an interest in preserving the city. Finally, the senate was able to observe the conduct of the generals and removed any thought they might have of violating their duty. But when the legions crossed the Alps and the sea, the warriors, who had to be left in the countries they were subjugating for the duration of several campaigns, gradually lost their citizen spirit. And the generals, who disposed of armies and kingdoms, sensed their own strength and could obey no longer'. Baron de Montesquieu, *Considerations on the Causes of the Greatness of Romans and their Decline*, Chapter XI.

107 Baron de Montesquieu, *The Spirit of Laws*, Book VIII, Chapter 4.

108 'A true maxim it is, therefore, that in order to love equality and frugality in a republic, these virtues must have been previously established by law'. *Ibid*.

109 *Ibid.*, Chapters 5 and 6.

110 'True is it that when a democracy is founded on commerce, private people may acquire vast riches without a corruption of morals. This is because the spirit of commerce is naturally attended with that of frugality, economy, moderation, labour, prudence, tranquillity, order, and rule. So long as this spirit subsists, the riches it produces have no bad effect. The mischief is,

government must be mirrored in moderation of equality and frugality to produce a virtuous society on the principles of love and brotherhood. The price for such an ideal-type society lies in fair distribution of wealth (or to be precise, taxation).[111] Like his theory of separation of powers where each power in tension with the other power checks one another, just so, equality of fortunes would support frugality, which in turn would produce liberty and civic virtue.[112]

(vi) Concluding remarks: Montesquieu gives us important directions as to the make-up of a modern socio-legal system based on private property and commerce. Whilst he clearly recognizes the need for such a system as best promoting liberty of the individual, yet the seeds of discord and division in society are contained in the same system which gives rise to such wonderful things. Like Locke before him, Montesquieu's solution to these problems is the legal state, separation of powers, and the rule of law. In sum, even the manners and customs of commerce which carry within it the seeds and potentiality for corruption and immorality can be checked by goods laws that would act as a counterbalance to eliminate vice from an otherwise perfect social order. And like Locke and Hobbes, Montesquieu found the solution to the contradictions of society arising out of private property in the rule of law and the legal state – albeit clearly recognizing that the root of the laws and the state lay in the very same institutions of private property / commerce.

(To be continued)

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when excessive wealth destroys the spirit of commerce, then it is that the inconveniences of inequality begin to be felt'. *Ibid.*, Book V, Chapter 6.

111 'That very equality of the citizens which generally produces equality in their fortunes, brings plenty and vigour into all the parts of the body politic, and spreads these blessings throughout the whole state. It is not so in countries subject to arbitrary power: the prince, the courtiers, and a few private persons, possess all the wealth, while all the rest groan in extreme poverty'. Baron de Montesquieu, *Persian Letters No.123*.

112 'As equality of fortunes supports frugality, so the latter maintains the former. These things, though in themselves different, are of such a nature as to be unable to subsist separately; they reciprocally act upon each other; if one withdraws itself from a democracy, the other surely follows it'. Baron de Montesquieu, *The Spirit of Laws*, Book V, Chapter 6.