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

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E. Jean-Jacques Rousseau (1712 – 1778)

(i) A critic of bourgeois society: Rousseau's *Discourses*[113] and *Social Contract* (published in 1762) posed more acutely than Hobbes, Locke and Montesquieu the contradictions of civil society:

> Man is born free; and everywhere he is in chains. One thinks himself the master of others, and still remains a greater slave than they. How did this change come about? I do not know. What can make it legitimate? That question I think I can answer.[114]

From the very outset the tenor of Rousseau's reasoning is dialectic in that he recognizes more than any classical thinker before him the contradictions of civil society as being based on inequality as a fundamental premise. It is perhaps for this reason that some critics of Rousseau label him as a counter-Enlightenment thinker and also perhaps why Marxist writers (such as Lucio Colletti) give Rousseau the credit of formulating the first modern critique of bourgeois society.[115]

There were some key differences between Rousseau and other Enlightenment thinkers. Firstly, he rejected the traditional concept of the state of nature and presented his own view on the state of nature in which he posited humans as being timid and peaceful. Rousseau believed that social tensions and conflict (i.e. state of war) arises from historically specific circumstances when societies have sufficiently developed concepts of self and other through development of language, social

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113 *Discourse on the Arts and Sciences* (1750) and *Discourse on the Origin and Foundation of the Inequality of Mankind* (1754).

114 Jean-Jacques Rousseau, *The Social Contract*, Book I, Chapter 1. http://www.earlymoderntexts.com/pdfs/rousseau1762book1.pdf

115 Lucio Colletti, *From Rousseau to Lenin* (London: New Left Books, 1972), p.174.

institutions and notions of property. Thus, history of society was for Rousseau divided into stages of human progress through which humans evolved to their present states. Secondly, Rousseau had a moral philosophy by which he firmly believed that human beings are fundamentally good in that although their instinct is that of self-preservation, the flip-side of this attribute is tempered by pity for fellow human beings: 'an innate repugnance to see his fellow suffer'.[116] Thirdly, Rousseau clearly recognized that the social contract was never an idyllic notion in which humans got together in peace and harmony and shed away their supposed state of war. Rather, quite the opposite, social contract, at the very outset, in its content was driven by inequality and division, strife and conflict between social classes.[117]

(ii) [In]equality, private property and law: Rousseau proceeded to build his theory of social contract with an underlying critique of equality or, to put in another way, his theory of inequality presented in his *Discourse on Inequality*,[118] in which he traced the origins of inequality as resulting in the socialization of human beings and particularly stemming from the private property. However, on the one hand, he recognized that through the institution of property 'finer feelings' of humanity, love, justice, civilization, etc. became possible; on the other hand, he saw it as a curse in that 'the loss of one man almost always constitutes the prosperity of another'.[119] It was the dialectics of haves and have-nots that brutalized civil society from time immemorial.[120] It was clear for Rousseau that all

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116 Jean-Jacques Rousseau, *A Dissertation on the Origin and Foundation of the Inequality of Mankind and is it Authorized by Natural Law*, 1754, Part Two. http://www.marxists.org/reference/subject/economics/rousseau/inequality/ch01.htm

117 'Such was, or may well have been, the origin of society and law, which bound new fetters on the poor, and gave new powers to the rich; which irretrievably destroyed natural liberty, eternally fixed the law of property and inequality, converted clever usurpation into unalterable right, and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labour, slavery and wretchedness.' Jean-Jacques Rousseau, A Dissertation on the Origin and Foundation of the Inequality of Mankind and is it Authorized by Natural Law, Part Two.

118 *Ibid.*

119 *Ibid.*

120 'Thus, as the most powerful or the most miserable considered their might or misery as a kind of right to the possessions of others, equivalent, in their opinion, to that of property, the destruction of equality was attended by the most terrible disorders. Usurpations by the rich, robbery by the poor and the

conflicts in societies were rooted in inequality amongst people characterized by social classes.[121] Rousseau's critique of equality left no room for doubt his contempt for the social inequality as the root cause for the evils of society. He also was under no illusion that private property and law, both social institutions rooted in historical precedence have a tendency to produce and perpetuate inequality.[122]

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unbridled passions of both, suppressed the cries of natural compassion and the still feeble voice of justice and filled men with avarice, ambition and vice between the title of the strongest and that of the first occupier, there arose perpetual conflicts, which never ended but in battles and bloodshed'. *Ibid.,* Second Part.

121 'If we follow the progress of inequality in these various revolutions we shall find that the establishment of laws and of the right of property was its first term, the institution of magistracy the second, and the conversion of legitimate into arbitrary power the third and last; so that the condition of rich and poor was authorized by the first period; that of powerful and weak by the second; and only by the third that of master and slave, which is the last degree of inequality'. *Ibid.,* Second Part.

122 'It is not to my present purpose to insist on the indifference to good and evil which arises from this disposition, in spite of our many fine works on morality, or to show how, everything being reduced to appearances, there is but art and mummery in even honour, friendship, virtue, and often vice itself, of which we at length learn the secret of boasting; to show, in short, how, always asking others what we are, and never daring to ask ourselves, in the midst of so much philosophy, humanity and civilisation, and of such sublime codes of morality, we have nothing to show for ourselves but a frivolous and deceitful appearance, honour without virtue, reason without wisdom, and pleasure without happiness. It is sufficient that I have proved that this is not by any means the original state of man, but that it is merely the spirit of society, and the inequality which society produces, that thus transform and alter all our natural inclinations. I have endeavoured to trace the origin and progress of inequality, and the institution and abuse of political societies, as far as these are capable of being deduced from the nature of man merely by the light of reason, and independently of those sacred dogmas which give the sanction of divine right to sovereign authority. It follows from this survey that, as there is hardly any inequality in the state of nature, all the inequality which now prevails owes its strength and growth to the development of our faculties and the advance of the human mind, and becomes at last permanent and legitimate by the establishment of property and laws. Secondly, it follows that moral inequality, authorised by positive right alone, clashes with natural right, whenever it is not proportionate to physical inequality; a distinction which sufficiently determines what we ought to think of that species of inequality which prevails in all civilised, countries; since it is plainly contrary to the

With respect to law as a social institution, Rousseau was under no illusions that without the idea of property ('of *meum* and *tuum*' or mine and yours) no true conception of justice could have arisen. Holding that men's passions and vices are historically rooted in being socially organized, which in turn is rooted in inequality, Rousseau remarked that the more a society is based on inequality the more laws it will promulgate to maintain this very same inequality.[123] For Rousseau, the true nature of law was inextricably linked to inequality arising from property relations for as early as the first instance of social formation.[124] At another place, Rousseau stripped bare the façade of law and directly linked this institution to private property.[125] In an impassioned statement on inequality and social and economic disparity, Rousseau without inhibition, finesse or care blasts the prevailing social order.[126] Coming at

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law of nature, however defined, that children should command old men, fools wise men, and that the privileged few should gorge themselves with superfluities, while the starving multitude are in want of the bare necessities of life'. *Ibid.*

123 'The more violent the passions are, the more are laws necessary to keep them under restraint. But setting aside the inadequacy of laws to effect this purpose, which is evident from the crimes and disorders to which these passions daily give rise among us, we should do well to inquire if these evils did not spring up with the laws themselves; even if the laws were capable of representing such evils, it is the least that could be expected from them, that they should check a mischief which would not have arisen without them'. *Ibid*.

124 'The origin of society and law, which bound new fetters on the poor, and gave new powers to the rich; which irretrievably destroyed natural liberty, eternally fixed the law of property and inequality, converted clever usurpation into unalterable right, and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labour, slavery and wretchedness'. *Ibid*.

125 'Under bad governments, this equality is only apparent and illusory: all it does is to keep the pauper in his poverty and the rich man in the position he has usurped. Laws in fact are always useful to those who have possessions and harmful to those who don't; from which it follows that the social state is advantageous to men only when everyone has something and no-one has too much'. Jean-Jacques Rousseau, *The Social Contract*, Book I, Chapter 9.

126 'A third relation, which is never taken into account, though it ought to be the chief consideration, is the advantage that every person derives from the social confederacy; for this provides a powerful protection for the immense possessions of the rich, and hardly leaves the poor man in quiet possession of the cottage he builds with his own hands. Are not all the advantages of society for the rich and powerful? Are not all lucrative posts in their hands?

this critical juncture of understanding i.e. that the movement of history is that of sustained inequality and increased servitude and oppression of the multitude by the ruling / wealthier classes, Rousseau asks: 'What then must be done? Must societies be totally abolished? Must meum and tuum [mine and thine i.e. property] be annihilated and must we return again to the forests to live among bears?'.[127] His answer is an emphatic no.

> Are not all privileges and exemptions reserved for them alone? Is not the public authority always on their side? If man of eminence robs his creditors, or is guilty of other knaveries, is he not always assured of impunity? Are not the assaults, acts of violence, assassinations, and even murders committed by the great, matters that are hushed up in a few months, and of which nothing more is thought? But if a great man himself is robbed or insulted, the whole police force is immediately in motion, and woe even to innocent persons who chance to be suspected. If he has to pass through any dangerous road, the country is up in arms to escort him. If the axle-tree of his chaise breaks, everybody flies to his assistance. If there is a noise at his door, he speaks but a word, and all is silent. If he is incommoded by the crowd, he waves his hand and everyone makes way. If his coach is met on the road by a wagon, his servants are ready to beat the driver's brains out, and fifty honest pedestrians going quietly about their business had better be knocked on the head than an idle jackanapes be delayed in his coach. Yet all this respect costs him not a farthing: it is the rich man's right, and not what he buys with his wealth. How different is the case of the poor man! The more humanity owes him, the more society denies him. Every door is shut against him, even when he has a right to its being opened: and if ever he obtains justice, it is with much greater difficulty than others obtain favours. If the militia is to be raised or the highway to be mended, he is always given the preference; he always bears the burden which his richer neighbour has influence enough to get exempted from. On the least accident that happens to him, everybody avoids him: if his cart be overturned in the road, so far is he from receiving any assistance, that he is lucky if he does not get horse-whipped by the impudent lackeys of some young Duke; in a word, all gratuitous assistance is denied to the poor when they need it, just because they cannot pay for it. I look upon any poor man as totally undone, if he has the misfortune to have an honest heart, a fine daughter, and a powerful neighbour. The terms of the social compact between these two estates of men may be summed up in a few words. 'You have need of me, because I am rich and you are poor. We will therefore come to an agreement. I will permit you to have the honour of serving me, on condition that you bestow on me the little you have left, in return for the pains I shall take to command you'. Jean-Jacques Rousseau, *A Discourse on Political Economy*, 1755, Part III.

[127] Jean-Jacques Rousseau, *A Dissertation On the Origin and Foundation of the Inequality of Mankind and is it Authorized by Natural Law*, Appendix.

(iii) Freedom, rule of law and the state: The task as Rousseau saw it was not to disturb private property but to construct a form of authority which would do away with all the contradictions of private property and, therefore, of inequality. Rousseau offered a political solution to the underlying economic problems: to establish an authority which would express the 'general will' of the people and divorce it emphatically from the 'particular will' of private individuals. The object and rationale of civil and political society should be such that it 'will bring the whole common force to bear on defending and protecting each associate's person and goods, doing this in such a way that each of them, while united himself with all, still obeys only himself and remains as free as before'.[128] Thus, the general will would mean this: 'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole'.[129] While Hobbes was instrumental in breaking the *pactum societatis* [social compact in civil society] and subordinated the people to the state,[130] Rousseau repudiated the *pactum subjectionis*[131] [act of submission to authority]. Rousseau explains this in detail in his attack on Hobbes and other classical theorists, who advocated the theory by which humans abdicated their natural liberties to the sovereign. The argument that man's liberty can be transferred to the sovereign in the same manner as property is transferred is rebutted by Rousseau who holds that liberty being 'an essential gift of nature' cannot be divested by contract or agreement and to do so otherwise would be a negation of man himself and nature.[132] Accordingly, all sovereignty is 'unalienable', 'untransferable' and 'indivisible'. It follows from this that since sovereignty is inalienable, so too is the system of government, which is a system of stewardship on part of the government functionaries and direct democracy on part of the citizens, where each citizen must give his positive consent to legislation.[133] Thus, for Hobbes the rational

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128 Jean-Jacques Rousseau, *The Social Contract*, Book I, Chapter 6.

129 *Ibid*.

130 Bob Fine, *op.cit.*, pp.30-31

131 Lucio Colletti, *op.cit.*, pp.182-83.

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

133 'Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation; it is either the same, or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. Every law the people has not ratified in person is null and

self-interest of the individual is equated to the will of the state, while for Rousseau the state is that which accords to the rational will of the individual. In other words, for Hobbes, to presuppose consent to the state, it was sufficient that a rule of law or public authority be established; for Rousseau it was necessary to constitute public authority into a democratic one; based on a legal state premised constitutionally on the rule of law.

On the rule of law and its importance to a society founded on the 'general will', Rousseau remarked that it is only for the sake of protection of property, life and liberty that individuals form civil societies[134] But once the society is comprised of the general will how can we guarantee freedom of the individual and at the same time force him to submit to the general will where an individual is no longer the master of his property? The answer he gave lies in the rule of law. Like Montesquieu, Rousseau ascribed great importance to the rule of Law and a system of civic rule through law and law alone.[135] Since all laws are to

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void – is in fact, not a law'. Jean-Jacques Rousseau, *The Social Contract*, Book III, Chapter 15.

134 'Look into the motives which have induced men, once united by their common needs in a general society, to unite themselves still more intimately by means of civil societies: you will find no other motive than that of assuring the property, life and liberty of each member by the protection of all'. Jean-Jacques Rousseau, *A Discourse on Political Economy*, Part I.

135 'This difficulty, which would have seemed insurmountable, has been removed, like the first, by the most sublime of all human institutions, or rather by a divine inspiration, which teaches mankind to imitate here below the unchangeable decrees of the Deity. By what inconceivable art has a means been found of making men free by making them subject; of using in the service of the State the properties, the persons and even the lives of all its members, without constraining and without consulting them; of confining their will by their own admission; of overcoming their refusal by that consent, and forcing them to punish themselves, when they act against their own will? How can it be that all should obey, yet nobody take upon him to command, and that all should serve, and yet have no masters, but be the more free, as, in apparent subjection, each loses no part of his liberty but what might be hurtful to that of another? These wonders are the work of law. It is to law alone that men owe justice and liberty. It is this salutary organ of the will of all which establishes, in civil right, the natural equality between men. It is this celestial voice which dictates to each citizen the precepts of public reason, and teaches him to act according to the rules of his own judgment, and not to behave inconsistently with himself. It is with this voice alone that political rulers should speak when they command; for

be ratified by the citizens there is no question that the government is the master of laws, though it is its guarantor as well. Most of all the rule of law must protect private property since it is the 'most scared of all rights of citizenship and even more important in some respects from liberty itself … and the true foundation of civil society'.[136]

(v) Concluding remarks: Thus, the defence of private property is at the very heart of Rousseau's social contract and the rule of law's purpose is to defend this fundamental right. He further stated that it is the duty of all governments to guarantee the law and administer it in such a way that 'it is impossible for anyone to set himself above the law'[137] and to subject both rich and poor to observe reciprocal obligations. Thus, while it is the duty of the government to ensure that all laws conform to the general will, it is likewise the duty of all citizens to respect laws as the first law is to respect the law.[138] To ensure such state of affairs, Rousseau advocates separation of powers (much like Montesquieu) but goes further by calling for bureaucratization of government officials and reducing the body of magistrates to a 'commission' or employment instead of one based on privilege or hereditary basis.[139]

In this manner then, did Rousseau present his republic as the solution to societies underlying contradictions in civil society. Despite his best efforts however, to address the problem of private property (private will) with community (general will), it appears that he could not

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no sooner does one man, setting aside the law, claim to subject another to his private will, than he departs from the state of civil society, and confronts him face to face in the pure state of nature, in which obedience is prescribed solely by necessity'. *Ibid.*

136 *Ibid.*

137 *Ibid.*

138 'In fact, the first of all laws is to respect the laws: the severity of penalties is only a vain resource, invented by little minds in order to substitute terror for that respect which they have no means of obtaining'. *Ibid.*

139 'I call the government or supreme administration the legitimate exercise of executive power, and … the man or body entrusted with that administration … the government [i.e. administration] gets from Sovereign [i.e. the parliament / people] the orders its gives to the people … the body of magistrates is simply and solely a commission, an employment, in which the rulers were officials of the Sovereign, exercise in their own name the power of which it makes them depositories. This power it can limit, modify or recover at pleasure; for the alienation of such a right is incompatible with the nature of the social body'. Jean-Jacques Rousseau, *The Social Contract*, Book III, Chapter 1.

reconcile the two. On the one hand, Rousseau was the first of the Enlightenment philosophes who brilliantly grasped the contradictions found in private property and inequality resulting there from. On the other, he could not but build a social and political complex around the very same institution he so exposed. To ameliorate this condition, Rousseau advocated progressive taxation and social redistribution of wealth (like Locke and Montesquieu) on the ground that the state provides a powerful protection for the immense possessions of the rich and since most advantages are for the richer classes they should pay a more than proportionate share in the costs of public authority.[140] The nature of taxation should be such as to take into account the real social inequalities between the rich and the poor.[141]

F. Adam Smith (1723 – 1790)

(i) Debunking Smith's libertarian caricature: Adam Smith is perhaps one of the most misunderstood political philosophers largely due to the libertarian caricature of him, portraying him in the light of a free market theorist and brazen proponent of *laissez-fair*e, self-interest and egoism of commercial classes. Nothing can be further from the truth. At the outset, therefore, we need to forcefully dispel this vulgar notion of Smith from our intellectual imagination.

Smith was above all a moral philosopher and like Hobbes, Locke and Rousseau before him his life-long endeavour was to find ways to marry human egoism and self-interest with altruism and general interest of the community. In this objective, Smith was ever mindful of the fact that human beings are fundamentally equal and inequality between them is a result of social and economic forces, with inequality imbedded in the very nature of the division of labour.[142] Thus for Smith, the goal of

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140 'It is therefore one of the most important functions of government to prevent extreme inequality of fortunes; not by taking away wealth from its possessors, but by depriving all men of means to accumulate it; not by building hospitals for the poor, but by securing the citizens from becoming poor'. Jean-Jacques Rousseau, *A Discourse on Political Economy,* Part II.

141 'Putting all these considerations carefully together, we shall find that, in order to levy taxes in a truly equitable and proportionate manner, the imposition ought not to be in simple ratio to the property of the contributors, but in compound ratio to the difference of their conditions and the superfluity of their possessions'. *Ibid*.

142 'The difference of natural talents in different men, is, in reality, much less than we are aware of; and the very different genius which appears to distinguish men of different professions, when grown up to maturity, is not upon many occasions so much the cause, as the effect of the division of

political economy (and conversely of moral philosophy) was a system that produces 'universal opulence which extends itself to the lowest ranks of the people' and a 'general plenty [that] diffuses itself through all the different ranks of the society'.[143] Smith envisioned a society of plenty not for those who were already in possession of great wealth and opulence (such as the merchants/manufacturers and landowners) but the toiling poor. In the *Wealth of Nations* (published in 1776), he rhetorically asks: 'Is this improvement in the circumstances of the lower ranks of the people to be regarded as an advantage or as an inconveniency to the society?' And provides the answer is no uncertain terms:

> The answer seems at first sight abundantly plain. Servants, labourers and workmen of different kinds, make up the far greater part of every great political society. But what improves the circumstances of the greater part can never be regarded as an inconveniency to the whole. No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable. It is but equity, besides, that they who feed, cloath and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well fed, cloathed and lodged.[144]

Smith like Rousseau (and far more acutely than Rousseau) clearly grasped the division of society into classes where the laboring poor toiled under oppressive inequality, forever enriching the wealthier classes with their labour and carrying on their shoulders the whole burden of human society, Yet, like Rousseau, Smith recognized that the poor, while

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labour. The difference between the most dissimilar characters, between a philosopher and a common street porter, for example, seems to arise not so much from nature, as from habit, custom, and education. When they came in to the world, and for the first six or eight years of their existence, they were, perhaps, very much alike, and neither their parents nor playfellows could perceive any remarkable difference. About that age, or soon after, they come to be employed in very different occupations. The difference of talents comes then to be taken notice of, and widens by degrees, till at last the vanity of the philosopher is willing to acknowledge scarce any resemblance'. Adam Smith, *The Wealth of Nations*, The Electronic Classics Series, Pennsylvania State University, 2005, Book I, Chapter 2, p.20. http://www2.hn.psu.edu/faculty/jmanis/adam-smith/wealth-nations.pdf

143 *Ibid.*, Chapter I, p.16.

144 *Ibid.*, Chapter 8, p.70.

deserving the most from society, always receive the least from it.[145] Smith clearly saw society divided into 'three great orders': the landowners, the merchants/manufacturers and the labourers. We will however return to this discussion after a brief review of Smith's moral philosophy in which he developed his principle of human sympathy, which is a key to understanding Smith's theory of justice, classes and state.

(ii) The neutral state: Smith's moral philosophy was set out in his earlier work, *The Theory of Moral Sentiments* (published in 1759), which *inter alia* explains the principles of moral purpose of man and how these relate to other aspects of human social organization. Rejecting theories of states of nature (of Hobbes, Locke and Rousseau), Smith finds human beings as being naturally compassionate: 'However selfish man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though they derive nothing from it except the pleasure of seeing it'.[146] This is so because human beings are constantly trying to understand each other and seeking approval for their actions from others. For Smith, the principle that binds self-interest with public good is the human capacity of sympathy, which operates in a self-corrective manner in that in search of approval from our fellows, we continually modify our behavior so as to gain approbation for our actions from our fellows. Thence, arises the concept of the 'impartial spectator', which is an

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145 'In a civilized society the poor provide both for themselves and for the enormous luxury of their superiors. The rent, which goes to support the vanity of the slothful landlord, is all earned by the industry of the peasant …. Among savages, on the contrary, every individual enjoys the whole produce of his own industry. There are among them, no landlords, no userers, no taxgatherers … [the labourer] bears, as it were, upon his shoulders the whole fabric of human society, seems himself to be pressed down below ground by the weight, and to be buried out of sight in the lowest foundations of the edifice … In a society of an hundred thousand families, there will perhaps be one hundred who do not labour at all, and who yet, either by violence, or by orderly oppression of law, employ a greater part of the labour of the society than any other ten thousand in it. The division of what remains, too, after this enourmous defalcation, is by no means made in proportion to the labour of each individual. On the contrary, those who labour the most get least'. Lucio Colletti, *From Rousseau to Lenin*, p.156. From Adam Smith, 'An Early Draft of Part of the Wealth of Nations'.

146 Adam Smith, *Theory of Moral Sentiments*, Book 1, Chapter 1, Section 1.1. http://www.linkiesta.it/sites/default/files/uploads2/imgs/smith.pdf

imaginary / ideal depiction of self, which acts as the conscience, judge, arbitrator of each individual in relation to his interactions with his fellows. The notion of injury which formed the basis of Smith's jurisprudence is based on this very principle of injury and the ideal impartial spectator. Thus when a person suffers an injury, it is only from the point of view of the impartial spectator that retaliation for the said injury constitutes a just punishment for invasion of rights. However, Smith warns us that sympathy as a principle is only useful as a moral judgment when there are less differences or distinctions between human beings.[147] Therefore, for Smith, extreme inequality in society will tend to reduce or widen the bonds of sympathy between members of society, will lead to injustice and eventually destruction of society. It is on the concept of sympathy and impartial spectator that Smith constructs his notion of the 'wise and virtuous' legislator / statesman, that he proposes should man the administration of the state to which we will return to later.

(iii) Connection between law, government and property: Coming back to Smith's idea of property, law and the state, it was clear to Smith that positive law was not merely the command of the sovereign but a complex social phenomenon closely intertwined with the mode of economy in a society. In a famous passage from Smith's *Lectures on Jurisprudence* read to his students at Glasgow University, it is stated that: 'Property and civil government very much depend on one another. The preservation of property and the inequality of possession first formed it, and the state of property must always vary with the form of government … till there be property there can be no government, the very end of which is to secure wealth and to defend the rich from the poor'.[148] Smith offers an evolutionary theory of justice based on law and economics, a theory firmly grounded in history rather than reason or rationality. Smith explained the rise and development of property and laws through 'four distinct states or ages' through which mankind passes: first stage being the age of hunters, the second age of shepherds, the third the age of agriculture and the fourth that of commerce.[149] It was

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147 'Those persons most excite our compassion and are more apt to affect our sympathy who most resemble ourselves, and the greater the difference the less we are affected by them'. Adam Smith, *Lectures on Jurisprudence*, LJ(A) iii.109. http://oll.libertyfund.org/Home3/index.php

148 Adam Smith, *Lectures on Jurisprudence*, Cannan (ed.), pp.8, 15.

149 *Ibid.*

Smith and not Marx who identified that forms of government (law and state) and property are inseparable as social institutions.[150]

There is every reason to believe that Smith was influenced by Rousseau's theory of inequality. However, Smith did much more in the sense that he advanced a theory of jurisprudence, one that is based on the institution of property.[151] Thus, not only a concept of ownership develops but with it 'subordination' and 'distinction of ranks' between men. As for the notion of justice, it was clear to Smith that justice was a 'negative virtue' in the sense the justice can only hinder people from injuring their neighbours. Attributing no positive action to the role of justice, Smith stated that a: 'man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit. He fulfills, however, all the rules of what is peculiarly called justice, and does everything which his equals can with propriety force him to do, or which they can punish him for not doing. We may

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150 'Among nations of hunters, as there is scarce any property, or at least none that exceeds the value of two or three days labour ; so there is seldom any established magistrate, or any regular administration of justice. … Wherever there is a great property, there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the few supposes the indigence of the many. The affluence of the rich excites the indignation of the poor, who are often both driven by want, and prompted by envy to invade his possessions. It is only under the shelter of the civil magistrate, that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security. He is at all times surrounded by unknown enemies, whom, though he never provoked, he can never appease, and from whose injustice he can be protected only by the powerful arm of the civil magistrate, continually held up to chastise it. The acquisition of valuable and extensive property, therefore, necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days labour, civil government is not so necessary'. Adam Smith, *The Wealth of Nations*, Book V, Chapter I, Part II, 'Of the Expense of Justice', pp.579-80.

151 'The first period of society, that of hunters, admits of no such inequality. Universal poverty establishes their universal equality; and the superiority, either of age or of personal qualities, are the feeble, but the sole foundations of authority and subordination. There is, therefore, little or no authority or subordination in this period of society. The second period of society, that of shepherds, admits of very great inequalities of fortune, and there is no period in which the superiority of fortune gives so great authority to those who possess it. There is no period, accordingly, in which authority and subordination are more perfectly established'. *Ibid*.

often fulfill all the rules of justice by sitting still and doing nothing'.[152] Smith, therefore, discerned the deeper connections between property and justice / rule of law, in that justice is merely a 'negative virtue', a reflux only activated at the moment of injury suffered by the property owners. The contradiction here is self-evident, inasmuch as in a society clearly plagued by chronic inequality of wealth, justice as a concept can only be availed by property owners. Thus, in such a society which grants formal equality to everyone under law is in content no equality at all, but the right to maintain – inequality.

Smith elaborates further as ownership of land and moveable property develops and so do forms of state in the age of shepherds which process matures in feudal or agricultural age. In his *Lectures on Jurisprudence*, Smith also gives a detailed historical account of the development of feudalism, the reasons for its decline and consequently the rise of bourgeois. He notes that in earlier stages of feudalism the tenure of land is necessarily and essentially based on personalized services of dependents and protection and adjudication by the lord in return for the same. The feudal economy requires the landlords to increase the number of dependents. However, the growth of trade and manufacture gives the landlord a new outlet for the excess of production of his land, namely the purchase of luxury goods.[153] As tastes for luxury grows and funds are diverted thereto, gradually, the personal dependency gives way to money payments and rent. Such a transformation of social relations goes hand in hand with changes in the law, which gives rise to contractual relations and particularly alienability of property. This process is of course cemented in a commercial society. The aim of this brief survey is to bring to light the way in which Smith viewed laws and legal institutions as an inherent part of the economy. By doing so, Smith shows that state forms are ultimately related to property relations: 'civil government, so far as it is instituted for the security of property, is, in reality, instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all'.[154] Smith shows that the administration of justice was never in history dispensed gratis. In the feudal age, it was a source of important revenue for the king and the feudal barons. Of course, the notions of justice very much varied on how much property one had at his disposal to achieve a particular end

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152 Adam Smith, *The Theory of Moral Sentiments*, Book II, p.73.

153 Neil MacCormick, 'Adam Smith on Law', *Valparaiso University Law Review*, 15(1981), p.253.

154 Adam Smith, *The Wealth of Nations*, Book V, Chapter I, Part II, 'Of the Expense of Justice', p.584.

and this forced Smith to conclude that 'the rich, in particular, are necessarily interested to support that order of things, which can alone secure them in the possession of their own advantages'.[155] Smith's ideas of private property, law and state led him to investigate the division of society into classes.

(iv) Civil society, social classes and the state: As noted above, Smith saw society divided into three great orders or classes, each deriving their wealth from the produce of labour, which constituted the universal measure of all value: 'Labour, therefore, it appears evidently, is the only universal, as well as the only accurate measure of value, or the only standard by which we can compare the values of different commodities at all times and at all places'.[156] He further adds that the material sources of income or wealth behind each class is as follows: of labourers, the wages of labour;[157] of landlords, the rent of land;[158] and of merchants / manufacturers, the profits of stock.[159] It is between these three great classes that all wealth of a society is divided.[160] Smith then analyzed and compared each class in turn to draw out their basic social characteristics and, more importantly, to assess how much each class contributes to the 'general interest' of society. The term 'general interest' was of great importance to Smith's political economy as for him the object of political economy was (i) 'to provide a plentiful revenue or subsistence for the people' and (ii) 'to supply the state or commonwealth with a revenue sufficient for the publick services'. Thus the general interest, which is the science of a statesman or legislator, is intended 'to enrich both the people and sovereign'.[161] However, ultimately, as noted above, for Smith the purpose of political economy is to provide 'universal opulence which

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155 *Ibid.*, Book I, Chapter 5, p.36.

156 *Ibid.*, Chapter 5, p.36.

157 *Ibid.*, Chapter 8.

158 *Ibid.*, Chapter 11.

159 *Ibid.*, Chapter 9.

160 'The whole annual produce of the land and labour of every country, or what comes to the same thing, the whole price of that annual produce, naturally divides itself, it has already been observed, into three parts; the rent of land, the wages of labour, and the profits of stock; and constitutes a revenue to three different orders of people; to those who live by rent, to those who live by wages, and to those who live by profit. These are the three great, original and constituent orders of every civilized society, from whose revenue that of every other order is ultimately derived'. Adam Smith, *The Wealth of Nations*, Book I, Chapter 9, p.212.

161 *Ibid.*, Book IV, p.341.

extends itself to the lowest ranks of the people' and a 'general plenty [that] diffuses itself through all the different ranks of the society'.

The landlord class was in possession of great majority of land and made its income from rent of land. Smith notes that during the feudal times the function of landed property owners was to perform state and defence functions, but in a commercial society this function was no longer useful. As for the characteristics of this class, Smith described the quintessential 'country gentleman' as a slothful and indolent person steeped in personal luxury and devoid of any public virtue.[162] Hence, this class with its great deficiencies is not capable of securing the general interest and Smith immediately discounted its contribution to the general interest as desirable.

The next class under discussion is that of merchants / manufacturers whose characteristics are dominated by egoism and abject self-interest though, at the same time, this class is most tenacious and inventive. The merchants / manufacturers' individual and collective interest, however, are in fact directly opposed to the general interest: '[t]he interest of the dealers … in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the publick'.[163] The numerous vices of the merchants

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[162] 'The elegance of his dress, of his equipage, of his house, and houshold furniture, are objects which from his infancy he has been accustomed to have some anxiety about. The turn of mind which this habit naturally forms, follows him when he comes to think of the improvement of land. He embellishes perhaps four or five hundred acres in the neighbourhood of his house, at ten times the expence which the land is worth after all his improvements; and finds that if he was to improve his whole estate in the same manner, and he has little taste for any other, he would be a bankrupt before he had finished the tenth part of it'. *Ibid.*, Book III, Chapter 2, p.666. And further: 'to figure at a ball is his great triumph, and to succeed in an intrigue of gallantry, his highest exploit. He has an aversion to all public confusions, not from the love of mankind, for the great never look upon their inferiors as their fellow–creatures; nor yet from want of courage, for in that he is seldom defective; but from a consciousness that he possesses none of the virtues which are required in such situations, and that the public attention will certainly be drawn away from him by others. He may be willing to expose himself to some little danger, and to make a campaign when it happens to be the fashion. But he shudders with horror at the thought of any situation which demands the continual and long exertion of patience, industry, fortitude, and application of thought. These virtues are hardly ever to be met with in men who are born to those high stations'. Adam Smith, *The Theory of Moral Sentiments*, Book I.iii.2, p.51.

[163] Adam Smith, *The Wealth of Nations*, Book I, Chapter 9, p.213.

have the following ill-effects on the general interest: (i) their desire to monopolize keeps labour and productivity low but profits high, (ii) their desire to drive wages lower to subsistence levels has the effect of splitting society, destroying its moral fiber (i.e. eradicating sympathy and compassion) and oppressing the greatest class of workers, and (iii) keeping tariffs and trade barriers retard economic growth and development. However, this class is the most powerful class in society and ensures that legislation and administration of the state maintains their interest first and foremost. In this vein, Smith warns his ideal statesman or legislator to be cautious of legislative proposals from this class as any such proposal is bound to promote the particular interests of that class at the cost of the general interest.[164] In fact, the main theme of the *Wealth of Nations* is to outline a severe critique of the mercantilism and consequently, this class too cannot be trusted with the affairs of the state and to safeguard the general interest.

Although Smith had great sympathy for the working class, he found their existence in society as horribly 'mutilated and deformed' due to society's division of labour and class-based system: 'in the progress of the division of labour, the employment of the far greater part of those who live by labour, that is, of the great body of the people, comes to be confined to a very few simple operations; frequently to one or two … and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him, not only incapable of relishing or bearing a part in any rational conversation, but of conceiving any generous, noble, or tender sentiment, and consequently of forming any just judgment concerning many even of the ordinary duties of private life. Of the great and extensive interests of his country, he is altogether incapable of judging...'; and 'the uniformity of his stationary life naturally corrupts the courage of his mind, and makes him regard with abhorrence the irregular, uncertain, and adventurous life of a soldier. It corrupts even the activity of his body, and renders him incapable of exerting his strength with vigour and perseverance, in any other employment than that to which he has been bred. His dexterity at his own particular trade seems, in this manner, to be acquired at the

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164 'The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the publick, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it'. *Ibid.*, p.213.

expense of his intellectual, social, and martial virtues'.[165] Thus, Smith foresaw that this situation would not be tenable as commercial society tends towards further economic growth: 'in every improved civilized society this is the state into which the laboring poor, that is, the great body of the people, must necessarily fall, unless government takes some pains to prevent it'.[166] It is with this in mind that Smith proposed this theory of state and political economy of an ideal commercial society.

(v) The invisible hand: We have demonstrated that Smith's views on property, law and the state, where the chief purpose of civil government is the protection of property to defend the rich against the poor and to maintain and perpetuate the status quo. Although in a commercial society, the state is manipulated at all levels by mercantile prejudices and vices, the key advances of the bourgeois order was the destruction of all bonds to privilege and dependence that marked the feudal society. For Smith, despite the many 'inconveniences' of commercial society, it was still a great improvement over the feudal order where disparities were at their worst. It is the independence of labour and his discovery that labour is the universal measure of all value that holds the key to Smith's theory of state and political economy. Smith extoled value of labour in that 'the annual labour of every nation is the fund which originally supplies it with all the necessaries and conveniences of life'.[167] Thus, the object of political economy and the role of the state is to free the great potential of labour and not to restrict the same as it is done in a mercantilist society. On labour's intrinsic connection with the human propensity of exchange, it is useful to refer to the famous passage of the 'woolen coat' from the *Wealth of Nations*.[168] In this passage, Smith is demonstrating that the

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165 *Ibid.*, Book V, Chapter 1, p.637.

166 *Ibid.*, p.63.

167 *Ibid.*, Introduction, p.9.

168 'Observe the accommodation of the most common artificer or day-labourer in a civilized and thriving country, and you will perceive that the number of people of whose industry a part, though but a small part, has been employed in procuring him this accommodation, exceeds all computation. The woollen coat, for example, which covers the day-labourer, as coarse and rough as it may appear, is the produce of the joint labour of a great multitude of workmen. The shepherd, the sorter of the wool, the wool-comber or carder, the dyer, the scribbler, the spinner, the weaver, the fuller, the dresser, with many others, must all join their different arts in order to complete even this homely production. How many merchants and carriers, besides, must have been employed in transporting the materials from some of those workmen to others who often live in a very distant part of the

extent of interconnectedness of labour is unfathomable and people without evening knowing it do and have the greater potential of helping each other by pursuing their self-interest, which on its very own motion, promotes the general interest. This is essentially the notion of Smith's

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country! how much commerce and navigation in particular, how many ship-builders, sailors, sail-makers, rope-makers, must have been employed in order to bring together the different drugs made use of by the dyer, which often come from the remotest corners of the world! What a variety of labour too is necessary in order to produce the tools of the meanest of those workmen! To say nothing of such complicated machines as the ship of the sailor, the mill of the fuller, or even the loom of the weaver, let us consider only what a variety of labour is requisite in order to form that very simple machine, the shears with which the shepherd clips the wool. The miner, the builder of the furnace for smelting the ore, the feller of the timber, the burner of the charcoal to be made use of in the smelting-house, the brick-maker, the brick-layer, the workmen who attend the furnace, the mill-wright, the forger, the smith, must all of them join their different arts in order to produce them. Were we to examine, in the same manner, all the different parts of his dress and household furniture, the coarse linen shirt which he wears next his skin, the shoes which cover his feet, the bed which he lies on, and all the different parts which compose it, the kitchen-grate at which he prepares his victuals, the coals which he makes use of for that purpose, dug from the bowels of the earth, and brought to him perhaps by a long sea and a long land carriage, all the other utensils of his kitchen, all the furniture of his table, the knives and forks, the earthen or pewter plates upon which he serves up and divides his victuals, the different hands employed in preparing his bread and his beer, the glass window which lets in the heat and the light, and keeps out the wind and the rain, with all the knowledge and art requisite for preparing that beautiful and happy invention, without which these northern parts of the world could scarce have afforded a very comfortable habitation, together with the tools of all the different workmen employed in producing those different conveniencies; if we examine, I say, all these things, and consider what a variety of labour is employed about each of them, we shall be sensible that without the assistance and co-operation of many thousands, the very meanest person in a civilized country could not be provided, even according to what we very falsely imagine, the easy and simple manner in which he is commonly accommodated. Compared, indeed, with the more extravagant luxury of the great, his accommodation must no doubt appear extremely simple and easy; and yet it may be true, perhaps, that the accommodation of an European prince does not always so much exceed that of an industrious and frugal peasant, as the accommodation of the latter exceeds that of many an African king, the absolute master of the lives and liberties of ten thousand naked savages'. *Ibid.*, Book I, Chapter 1, pp.16-17.

'invisible hand'.[169] Therefore, unlike Rousseau, Smith shows that one man's gain is not another man's loss as the gains of both are mutual and reciprocal.[170]

(vi) The Smithian state: Since Smith exposed the vices of mercantilism and the effects of that on state policy both domestic and foreign, it followed that the state infiltrated with class interests could not be trusted to let society flourish in an abundance of labour and opulence. He, therefore, proposed his wise and virtuous legislator and a 'science' of legislation grounded in natural jurisprudence. The object of this science is not only to understand the needs of a society based on public virtue and general interest but to separate completely private interests from performance of public duties. Thus, it is this virtuous legislator that ties Smith's moral philosophy with his political economy and in this sense the Smithian state is but an extension of the 'impartial spectator'. Smith's general theory of class and state can be summarized in this manner:[171] (i) the legislator ought to promote the general interest of society guided by the notion of sympathy / impartial spectator; (ii) the economy of a commercial society is capable of promoting general interest if allowed to function freely on its own, without ill-effects of manipulation from class interests (e.g., monopolies); (iii) the real wealth

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169 'But the annual revenue of every society is always precisely equal to the exchangeable value of the whole annual produce of its industry, or rather is precisely the same thing with that exchangeable value. As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it'. *Ibid.*, Book IV, Chapter 2, pp.363-64.

170 Adam Smith, *The Wealth of Nations*, Book III, Chapter 1, p.307.

171 Paul Alexander Rækstad, *Class and State in the Political Theory of Adam Smith: A Chapter in the History of a Neglected Strand of Political Thought*, Master's Thesis in Philosophy, University of Oslo, 2011. https://www.duo.uio.no/bitstream/handle/10852/24836/Raekstad.pdf?sequence=3

of the labouring class will increase where rates of economic growth are highest as an economy left to its own dynamics will determine the highest rates of economic growth through proliferation of trade and production; (iv) the state or government in general is an instrument in the hands of the class of merchants/manufacturers and landlords and therefore must be divorced from such class interests; (v) the interests of merchants / manufacturers is never the same and is always opposed to increasing wealth of workers and therefore opposed to the general interest; (vi) the economic system of free trade can and does promote general interest and (vii) the state must intervene though only in key matters of concern namely, defence, administration of justice, public works and particularly the education sector to uplift the poor.

(vii) Concluding remarks: The key however, to understanding Smith's theory of state is to divorce private interests from public interest and the crucial link for doing so is to institute the ideal sentiments of the impartial spectator, who being in a neutral position, operates from the principle of sympathy and is a check on human passions and egoism. This can be illustrated from Smith's notions of the rule of law and independence of the judiciary. The threat to the rule of law comes from the particular interests of the social classes. Thus, judicial power should not only be separated from private interests but also from the executive so that: 'every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power but that it should be rendered as much as possible independent of that power'.[172] Further, the judicial power must act in every instance morally in the same manner as that of an 'impartial spectator'.

II

Law, property and the rule of law in history

A. Recapitulating the position

In Part I above, we moved backwards from Dicey's conception of the rule of law and the three themes represented by it in the writings of classical thinkers of the western legal tradition. We must now move forwards in order to consolidate our understanding of these concepts before moving on to the substance of our discussion in this Part. We have seen how property, law and state formed the fundamental themes in works of classical thinkers. They discovered not only that property and law were products of human activity but also gave detailed historical

[172] Adam Smith, *The Wealth of Nations*, Book V, Chapter I, Part II, p.590.

account of its trajectory and noted at several instances the contradictions and antagonisms associated with these categories. Hobbes and Locke demolished natural law tradition and rooted property and the state on the basis of positive (human made) law. While Hobbes tilted his theory in favour of the state, Locke proposed a more radical protection of private interest from government interference. It appears at first sight as if Hobbes and Locke stood at polar ends with Hobbes stressing on a strong state and Locke on weaker one. However, the truth is that both thinkers sought to radically separate private interest (property) from authorities' all-intrusive claims – one by divorcing the state completely from private interest / civil society and the other by exiling the state from the sphere of private interest / civil society. With a maturing bourgeois system, in Montesquieu and Rousseau, we begin to see a critique of the bourgeois system and explorations of the problems associated with private property. The former saw the concept of liberty being threatened by the dangers of excessive inequality and the latter saw excessive inequality itself besetting the bourgeois system of property. In Smith, we find a through-going critique of the mercantilist order, a materialist theory of jurisprudence and a sociological explanation of contradictions of 'capital'. Smith sought to give back those wealth-producing freedoms to civil society which the merchant classes were usurping in their drive towards monopolization of domestic and international markets.

B. Administration of criminal justice in 18th century England

As mentioned above, Dicey's formulation gave a minimal conception of the rule of law i.e. a government limited by law, formal legality (formal equality) and rule by law, not man.[173] As one commentator stated, Dicey's formulation of the rule of law 'belonged to credulous conservatives and apologists for inequality who revered Dicey's century-old polemic against socialism in the name of "rule of law".'[174] This is not to reject Dicey's conception but to show that it is but one theoretical expression of the rule of law, rooted in its time and milieu, replete with political, economic and social tensions. These tensions, as stated above, arise from the tensions rooted in society as demonstrated in the writings of great social theorists canvased above.

It may be useful here to investigate further and explore this minimal conception of the rule of law in history. In this connection, prominent historians of crime and punishment of 18th century England

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173 Brianz Tamanaha, *op.cit.*, p.114-126.

174 Douglas Hay, et.al. *op.cit.*, p.xli.

(like Edward Thompson[175] and Douglas Hay[176]) have shown us how the 'thin' conception of the rule of law in the criminal justice system used discretionary instruments of 'majesty, justice and mercy' to maintain hegemony of the propertied elite. They offered explanations as to how the social, economic and political elites maintained order and control, without an army or police, despite the harsh penal code against offences relating to property.[177] These historians explained how the English legal system, practice and ideology maintained authority in a manner that preserved the *status quo* in the service of existing power structures.[178] They further explained how despite the 'Bloody Penal Code' in the 18th century, why the landed elite who dominated Parliament resisted reform of the law even when it was clear that as an instrument of crime control it was failing badly.[179] The answer was to be found in the 'mental and social structure of the eighteenth century' and in the role that discretionary enforcement of the criminal law had come to play not merely in the protection of property, important as that was, but in the maintenance of those bonds of obedience and deference that enabled the landed elite to sustain its leadership of the society without a need for repressive state security apparatus.[180] These important works on legal and social history demonstrate through examination of 18th century evidence[181] the intimate connections between authority, power, law, justice and social inequality[182] with the law being an integral part of the structures of inequality, central to the gross maldistribution of wealth, power and respect. Most importantly, these historical works challenge

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175 E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975).

176 Douglas Hay et.al., *op.cit*.

177 The term 'bloody penal code' of the 18th century England is notorious due to the dramatic increase of legislation by Parliament, from 50 to over 200 laws, enacted between 1688 and 1820, of capital statutes, almost all of them concerning offences against property.

178 James Muir, 'Property, Authority and the Classroom' *Legal History*, 10 (2006), p.32.

179 John Beattie, 'Looking Back at Property, Authority and the Criminal Law', *Legal History*, 10 (2006) p.16.

180 *Ibid*.

181 For example, Douglas Hay's groundbreaking essay 'Property, Authority and Criminal Law' was based on a complete archive of court records for 1900 cases, a survey of another 2100 cases, and manuscript and printed sources for decisions of judges, government, manufacturers, magistrates, gentry and peers in those cases, from prosecution to execution.

182 Douglas Hay, et.al., *op.cit.*, p.xxxv Introduction.

the very assumptions about law and the rule of law that this essay raises in connection with Dicey's conception of rule of law:

> We take so many of the cultural assumptions of our own system for granted that it is hard to see outside it. It is a belief system rather like a religious cosmology, and we can be led into attributing to the powerfully attractive (and important) idea of the rule of law the perfection of a universal church and promised salvation. We may criticize deficiencies, while at the same time being hardly aware how deep is our assumption that our particular form of law is good, or how important it is in generating injustices. The danger of importing unexamined beliefs about current law, and our valuations of it, into our accounts of past law is correspondingly great. If we then use our sources to justify our inherited law, rather than critique it, we risk writing apologetics rather than history. In fact, much legal history has always been written that way. Our conviction, in writing this book, was that to ignore how law distributes and reinforces economic and social power was to miss one of its most salient characteristics, in the past and in the present.[183]

Douglas Hay in his seminal work *Property, Authority and Criminal Law*[184] examines the criminal justice system of 18th century England in relation to capital crimes for all kinds of offences relating to property.[185] This historical fact represents the culmination of the Glorious Revolution of 1688, which established the freedom not of men but of men of property. As we have seen, at the time Locke wrote his *Two Treatises of Government* only 3% of the population of England had the right to vote their members in Parliament.[186] The age of property was formally ushered by Parliament and deified by lawyers and jurists as a sacred and

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183 *Ibid.*

184 *Ibid.*

185 *Ibid.*, p.18.

186 In fact, in a 'survey conducted in 1780 revealed that the electorate in England and Wales consisted of just 214,000 people - less than 3% of the total population of approximately 8 million. In Scotland the electorate was even smaller: in 1831 a mere 4,500 men, out of a population of more than 2.6 million people, were entitled to vote in parliamentary elections. Large industrial cities like Leeds, Birmingham and Manchester did not have a single MP between them, whereas 'rotten boroughs' such as Dunwich in Suffolk (which had a population of 32 in 1831) were still sending two MPs to Westminster. http://www.nationalarchives.gov.uk/pathways/citizenship/struggle_democracy/getting_vote.htm

inalienable right of every Englishman (whether or not he owned property).[187] It was thus through laws and criminal code which enabled the political elite to rule England without any standing army or police. We would benefit here from recalling Adam Smith's passage: It is only under the shelter of the civil magistrate, that the owner of that valuable property, which is acquired by the labour of many years, or perhaps of many successive generations, can sleep a single night in security on the importance of the criminal justice system to maintenance of authority, order and property in 18th century England.

However, what is remarkable as a historical anomaly for this period is not that the Parliament enacted act after act to keep capital sanction in force in order to protect every conceivable kind of property (from theft to malicious damage) but the fact that, (i) despite the increasing number of convictions for capital offences corresponding to the increased number of capital laws, there were relatively and surprisingly few lives claimed as compared with earlier periods,[188] and (ii) despite a strong movement for reform of the criminal justice system (along Beccarian[189] lines), which suggested that 'gross and capricious terror should be replaced by a fixed and graduated scale of more lenient but more certain punishments', the governors of England failed to implement reform even though reform of the criminal law would strengthen the protection of property, as it was argued by liberal reformers.[190]

With the Parliament comprising property owning aristocracy, gentry and wealthy merchants and secured in its supremacy to legislate, it is difficult to believe that they would have been complacent about unreformed law unless they were convinced that the prevailing system was serving their interests. This mental and social attitude can be gauged

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187 In his *Commentaries on the Laws of England*, Blackstone remarks that 'there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'. William Blackstone, *Commentaries on the Laws of England,* Vol. II, 12th Edition by Edward Christian, 1793, p.2.

188 Douglas Hay, et.al *op.cit.*, p.22.

189 Cesare Beccaria (1738-1794), an Enlightenment thinker and author of the famous treatise on criminal justice, *On Crimes and Punishment* (published in 1764), which argued for reform in the criminal justice system and stringently criticized the use of terror, torture and cruel and inhuman treatment to extract confessions.

190 Douglas Hay et.al. *op.cit.*, pp.23-24.

from the testimony of notable conservatives of the period. One notable commentator and defender of the unreformed justice system recommended the use of terror to bridle the 'rough and savage' common people. The instruments to deal with intransigence of the lawless were 'Beadles, Catchpoles, Gaolers, Hangmen … such like Engines of Humanity are the fittest Tools in the World for a Magistrate to work with in the Reformation of the obdurate Rogue'.[191] However, terror could not alone give law its legitimacy and had to be combined with discretion and mercy. Another notable conservative put it thus:

> there is nothing in the human character which would more surprise us, than the almost universal subjugation of strength to weakness – than to see many millions of robust men, in the complete use and exercise of their faculties, and without any defect of courage, waiting upon the will of a child, a woman, a driveller, or a lunatic. And although … we suppose perhaps an extreme case; yet in all cases, even in the most popular forms of civil government, the physical strength lies in the governed. In what manner opinion thus prevails over strength, or how power, which naturally belongs to superior force, is maintained in opposition to it; in other words, by what motives the many are induced to submit to the few, becomes an inquiry which lies at the root of almost every political speculation … Let civil governors learn hence to respect their subjects; let them be admonished, that the physical strength resides in the governed; that this strength wants only to be felt and roused, to lay prostrate the most ancient and confirmed dominion; that civil authority is founded in opinion; that general opinion therefore ought always to be treated with deference, and managed with delicacy and circumspection.[192]

Thus, the administration of criminal law was important in ensuring that opinion (law's legitimacy) prevailed over brute strength (multitude of the governed). In this way, the criminal law combined terror through capital punishments for every conceivable crime against property with discretion, mercy and pardons. Thus, the law was the chief ideological weapon of the governing classes and administration of criminal justice system lay at the heart of the supremacy of the law.

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191 Timothy Nourse, *Compania Foelix,* 2nd Edition, 1706, pp.15-16.

192 William Paley, *Principles of Moral and Political Philosophy,* Book VI, Chapter 2, 1785. http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=703&Itemid=27

(i) Law's majesty: The crown's managing of public executions of convicted men and women was a consistent feature of 18th century England, which was part of the routine administration of the law. In one instance, King George III in a routine mitigation of a death sentence to one of transportation in case of a highway robber commuted the sentence with the following instructions to the sheriffs:

> As his Majesty hopes so to terrify this unhappy Man, on the present occasion that he may not hereafter be guilty of the like offence; it is the King's intention that he should not be acquainted of his Majesty's having extended his royal mercy towards him, till he comes to the place of execution. It will be proper therefore, that you give orders to the sheriffs, for this purpose, so that he be carried with the others, who are to suffer; to the place of execution, and that he be informed, then, and not before then, of the reprieve.[193]

This kind of behind the scenes staging of pardons was indicative of the fact that the governors of England viewed the prerogative of mercy as an ideological weapon to impress upon the masses the instruments of power and authority. Other instances of ideological display were the twice-yearly visits of the high court judges to the counties. These were a spectacle to behold, as one contemporary French commentator on English judicial system put it:

> Upon their approach are received by the sheriff, and often by a great part of the wealthiest inhabitants of the county; the latter come in person to meet them, or send their carriages, with their richest liveries, to serve as an escort, and increase the splendor of the occasion. They enter the town with bells ringing and trumpets playing, preceded by the sheriff's men, to the number of twelve or twenty in attendance on them during the time of their stay, and escort them every day to the assize-hall, and back again to their apartments.[194]

Whilst in the court-room, the judges conducted themselves with an elaborate ritual with an eloquence rivaling with that of a leading statesman. The judges and law officers were acutely aware that the courts were platforms for addressing the multitude, which often thronged to witness the grand proceedings of the court, especially during criminal trials. The proceedings were also marked with an affected and

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193 C. Jenkinson to Recorder of London, 22 May 1761; PRO, SP 44/87, fos.19 and 20.

194 Charles Cottu, *The Administration of Criminal Justice in England*, 1832, p.43.

exaggerated rhetoric especially during the time of reading of the charge and the sentencing. The following is diary entry of one judge who was 'constrained' to sentence to death a girl (who was found to be insane) for murdering her baby:

> Before I pronounced the sentence, I made a very proper speech extempore and pronounced it with dignity, in which I was so affected that the tears were gushing out several times against my will. It was discerned by all the company – which was large – and a lady gave me her handkerchief dipped in lavender water to help me.[195]

The twice-yearly visits of high court judges were a uniquely upper class affair with dinners and balls hosted for law's principal officers. The same French official mentioned above, observed the intimacy between the court officials and local dignitaries in this manner:

> By a condenscension sufficiently extraordinary, the judge permits his Bench to be invaded by a throng of spectators, and thus finds himself surrounded by the prettiest women of the county – the sisters, wives or daughters of grand jurors … They are attired in the most elegant neglige; and it is a spectacle not a little curious to see the judge's venerable head, loaded with a large wig, peering among the youthful female heads.[196]

These few examples demonstrate the fact 18th century judges displayed a novelty and pride which was designed to promote the image of the law as a fundamental pillar of social order. To borrow from Blackstone, the 18th century judges were well aware that their 'novelty and the very parade of their appearance have no small influence upon the multitude'.[197]

(ii) Justice and the rule of law: The term 'justice' was an important organizational concept of 18th century English society. It was reminiscent of the bloody civil wars which marked the constitutional struggles of the 17th century and which had helped establish the rule of law at the expense of royal prerogative. The English elevated law to a higher pedestal in order to regulate royal greed and tyranny, eventually giving way to the law deriving its own power and logic:

> The punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued

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195 Harrowby MSS, Vol.1129, doc.19(f), p.5.

196 Charles Cottu, *op.cit.*, pp.103-4.

197 William Blackstone, *Commentaries on the Laws of England*, Vol. III, 12th Edition by Edward Christian, 1793, p.356.

> that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of a ruling class - it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them, too, of course, the law was The Law. The fact that they reified it, that they shut their eyes to its daily enactment in Parliament by men of their own class, heightened the illusion.[198]

Equality before the law was the new catchphrase and part of the lore that English class divisions did not preserve a man even from the extreme sanction of death. This was certainly true to a great degree and far more secure as a principle that anywhere else in Europe. Hanging a man of property and status (e.g., Lord Ferrers[199] and Reverend Dr. Dodd,[200] in 1760 and 1777, respectively) made a deep impression on the population reinforcing their belief in the magical equality of the law as the great leveler. Douglas Hay cites reports that described an execution of a great propertied lord (Lord Ferrers) who had murdered his steward. Although the House of Lords sentenced the man to death by hanging and to be dissected like 'a common criminal', he was hanged in his 'silver brocade wedding-suit, on a scaffold equipped with black silk cushions for the mourners'.[201] The popular literature of the time also bears witness to the 'breeding of values'. One anti-Jacobin pamphleteer expressed sentiments of equality following this execution in the following manner:

> We have long enjoyed that Liberty and Equality which the French have been struggling for: in England, ALL MEN ARE EQUAL; all who commit the same offences are liable to the same punishment. If the very poorest and meanest man commits murder, he is hanged with a hempen halter, and his body dissected. If the Richest Nobleman commits a murder, he is hanged with a hempen halter, and his body dissected - all are equal here.[202]

This was certainly the case, at least in cases of capital crimes such as murder and manslaughter. But when we look at the fact that over 90 per cent of capital punishments fell within the realm of property related offences, then, equality as a concept readily unfolds. For instance, in the

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198 Douglas Hay, et.al, *op.cit.*, p.33.

199 For a background snippet please see http://en.wikipedia.org/wiki/Laurence_Shirley,_4th_Earl_Ferrers

200 For a background snippet please see http://en.wikipedia.org/wiki/William_Dodd_(clergyman)

201 Douglas Hay, *op.cit.*, p.34.

202 *Ibid*.

case of food riots (carrying death penalty) the modern conception of justice quickly prevailed over the older (feudal) conception of justice, which condoned stealing of enough food in case of extreme hunger or starvation in order to stay alive. This was not so in the 'age of capital'[203], and eminent jurists like Hale and Blackstone equated absolute property with absolute reason in order to deprive customary rights of the poor: 'for men's properties would be under a strange insecurity if liable to be invaded according to the wants of others; of which wants no man can possibly be an adequate judge, but the party himself who pleads them'.[204] The result was that poverty as a legal defence was forever stripped away from the toiling masses. The other great dissonance impacting equality was the jury system. All men of property knew that the judges, juries, justices had to be chosen from their own ranks and the supposed guarantee that an Englishman would be tried by his equals had a marked property qualification. The reason was the mental and social attitude towards the un-propertied people that they could not be trusted with the administration of justice of England. Hence, for all property related offences the jury was already socially rigged against the accused with all the twelve men sitting opposite the accused being employers, overseers of the poor, masters and necessarily men of property.

(iii) Law's mercy: One of the powerful ways in which belief in the rule of law was inculcated was the discretion of pardon. It was instrumental in that the act of mercy on part of the ruling elite actually demonstrated compassion and humanity alongside a draconian penal code. This peculiarity of the legal system 'allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity .... [and encouraging] loyalty to the king and state'.[205] The lawgivers accommodated an unrelenting legal system, which was in fact the rule of law of property, by forgoing punishment in favour of pardon. Thus in 1765, one judge after vowing to execute all rioters brought before him only managed to convict four:

> And, when I passed the sentence upon them, I said a good deal to show the heinous nature of their crime, and the great folly of the attempt ... And I ordered the captain and another notorious offender to be executed ... and told ... the others

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[203] Eric Hobsbawm, *Age of Capital: 1848-1875* (London: Abacus Books, 1975).

[204] William Blackstone, *Commentaries on the Laws of England*, Vol. IV, 12th Edition by Edward Christian, 1793, pp.31-32.

[205] Douglas Hay, *op.cit.*, pp.48-49.

> that I would adjourn 'till Monday's end night, and that then, if the insurrection was quite at end. I would apply to his Majesty to pardon them.[206]

Roughly half of those condemned to death during the 18th century did not go to the gallows and were transported to colonies or imprisoned.[207] It was the social significance of pardon that is important to grasp and its relationship with power and authority, which can be gauged from the manner in which pardons were administered. In the first place, claims of class saved more men and women from death than the judge's sense of humanity and compassion. The 'excuse of respectability' was valued over and above the excuse of poverty. If a criminal had respectable parents, siblings or other relations then a pardon could be invoked for their sake so that they be spared from the ignominy of the accused's crimes.[208] Pardons also favoured those with connections for another reason that mercy was part of the great 'currency of patronage'[209] where throughout the social scale men were bound to each other by links of patronage and obligation. A landlord who could not obtain a pardon in a reasonable case could suffer a loss to this prestige and social standing. Pardons also played a more sinister role in 18th century life, in instilling an ideology of mercy among the non-propertied population. Pardons were presented as acts of grace and benevolence rather than as favours to interests and had a great personal flavor to it. To the desperate poor, the intercession of a local gentleman was proof of his power to approach the throne.[210]

It was thus the paternalism of the hegemonic class combined with judicial equality, mercy, justice, and patronage[211] that enabled not

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206 *Ibid*., p.49.

207 *Ibid*., p.43.

208 In John Say's case, he came from 'an exceedingly Worthy & respectable family who will feel the disgrace of a Public Execution beyond expression, his Young Sister also now at Boarding School will be irreparably Injured by a disgrace which no time can Obliterate & which will greatly affect her future Interests thro' Life'. Letter from Philip Slater, PRO, HO 42/11 fo.39, Hay et al, *Albions Fatal Tree,* p.45.

209 Douglas Hay, *op.cit.,* p.45.

210 *Ibid.,* p.48.

211 The system of patronage was one of the hallmarks of the power of the ruling class, as Hay writes:

> 'Circumspection' is a euphemism in such circumstances. The private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy, in the most exact meaning of the word. The king, judges, magistrates, and

merely the governance of England but also a belief in the rule of law as an ideal. However, the genius of the law was that it made pardon an important tool in the hands of the rulers of England and by doing so it also placed the principle instrument of legal terror – the gallows – directly in the hands of those who held wealth and power:

> It allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinancy. Their political and social power was reinforced daily by bonds of obligation on one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to show mercy. Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighbourhood as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity. It encouraged loyalty to the king and the state … and in the countryside the power of gentlemen and peers to punish or forgive worked in the same way to maintain the fabric of obedience, gratitude and deference. The law was important as gross coercion; it was equally important as ideology. Its majesty, justice and mercy helped to create the spirit of consent and submission, the 'mind-forged manacles' which Blake saw binding the English poor. But consent, in Archdeacon Paley's phrase, must be managed 'with delicacy and circumspection.[212]

> gentry used private, extra-legal dealings among themselves to bend the statute and common law to their own purposes. The legal definition of conspiracy does not require explicit agreement; those party to it need not even all know one another, provided they are working together for the same ends. In this case, common assumptions of the conspirators lay so deep that they were never questioned, and rarely made explicit.... The cunning of the ruling class is a more substantial concept, however, for such a group of men is agreed on ultimate ends. However much they believed injustice (and they did); however sacred they held property (and they worshipped it); however merciful they were to the poor (and many were); the gentlemen of England knew that their duty was, above all, to rule. On that depended everything. They acted accordingly'. Hay et al *Albions Fatal Tree*, pp.52-53.

[212] Douglas Hay, *op.cit.*, pp.48-49.

Thus, benevolence and mercy, was not a simple positive act but an act loaded with malice and malevolence. In economic terms, the landlord keeping his rents low was benevolent because he could, with impunity, raise them. A justice of the peace giving charity to a wandering beggar was benevolent because he could whip and imprison him instead. Thus, benevolence and mercy went hand in hand with what lay at the other end of barrel – terror and force. However, what is important to understand about the 18th century law and society is that the idea of law or the rule of law cannot be reduced to a ruling class conspiracy as a transcendent purpose. The ruling classes themselves believed in the rule of law as justice; they believed in the sacredness of property and worshiped it; many of them were genuinely merciful to the poor; but above all, 'the gentlemen of England knew that their duty was, above all, to rule'. In this they acted accordingly and with unison.[213]

C. E.P. Thompson and the rule of law

An avowal of the rule of law has come from the prominent historian E.P. Thompson. The very contradictions that Thompson unearthed in his historical study of the eighteenth century England, led him to the conclusion that the rule of law is an 'unqualified human good'. In *The Making of the English Working Class*, Thompson remarks that 'the paradox' in the eighteenth century England of 'a bloody penal code' existing 'alongside a liberal … administration and interpretation of laws' is that there was a conviction amongst the ruling classes, the Whig elite, 'that the Rule of Law was the distinguishing inheritance of the "free-born Englishman",' and was his defence against arbitrary power.[214] Nine years later in *Whigs and Hunters*, Thompson was still unable to reconcile this paradox that, in his view, was unique to English history. Discussing the role of legal ideology and the Rule of Law, Thompson states that:

> The essential precondition for the effectiveness of law, in its function as an ideology, is that it shall display an independence from gross manipulation and shall seem to be just.... The rhetoric and rules of a society are something a great deal more than sham. In the same moment they modify … the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the

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213 See footnote 208 above.

214 Morton. J. Horwitz, 'The Rule of Law: An Unqualified Human Good?' *Yale Law Journal*, 86 (1976-77) pp.561, E.P. Thompson, *The Making of the English Working Class* (London: Vintage, 1966), pp.80-83.

same time, they curb that power and check its intrusions.[215]

The subject of Thompson's work in *Whigs and Hunters* was the draconian Black Act of 1723 in which Parliament extended the death penalty to those who defied the enclosure laws (i.e. laws supporting alienation and exclusive use of landed property), for committing acts such as deer stealing, tree cutting, hunting and foraging what once, in the feudal times, used to be common lands.[216] The enclosure phenomenon had been ongoing since the sixteenth century, but culminated in the eighteenth century, where common lands (with multiple feudal interests thereon) were converted to private ownership exclusive to the legal owner of the land, whilst turning customary users of the commons into criminal trespassers.

This socio-economic movement was seen as a paradigm shift from a customary, moral economy to a market-oriented regime based on capitalist property rights.[217] The effect of the Black Act upon the structurally inferior (i.e. the property-less) was profound. The rights of the age-old customary users of commons were simply converted into criminal offences with the severest of penalties. Although Thompson concluded in his book that the Black Act was a 'bad law, drawn by bad legislators and enlarged by the interpretation of bad judges', it did not lead him to conclude that all laws are inevitably instruments of injustice. Admonishing reductionist tendencies (i.e., reducing all law as an instrument in the hands of the dominant classes) of some Marxists, Thompson insists that there is a qualitative difference between arbitrary power and the rule of law:

> We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century ... a desperate error of intellectual abstraction.[218]

Thus, rejecting the notions that the rule of law is nothing but masked

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215 E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, 1975, pp.263-65.

216 Daniel H. Cole, 'An Unqualified Human Good: E.P. Thompson and the Rule of Law', *Journal of Law and Society*, 28(2001), p.179.

217 Bob Fine, *Democracy and the Rule of Law* (London: Pluto Press, 1984), p.181.

218 E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, 1975, p.266.

ideology of the ruling classes, Thompson explains: 'If the law is evidently partial and unjust, then it will mask nothing, legitimate nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its formation as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.[219]

Thompson, here, is alluding to the value inherent in the rule of law, which in the least (or minimally) operates to constrain state power and guarantees that laws would apply to both the rich and the poor and the powerful and the powerless, alike. This value or a 'minimum conception' of the rule of law, was discovered by Thompson in his historical studies where he observed that the rulers became 'prisoners of their own rhetoric' as the rulers could not 'dispense with the rule of law, dismantle their elaborate constitutional structures, countermand their own rhetoric and exercise power by force; or they could submit to their own rules and surrender their hegemony'; ultimately, 'rather than shatter their own self-image and repudiate 150 years of constitutional legality, they surrendered to the law'.[220] Thus, Thompson recognized the value of the rule of law and as one commentator puts it thus:

> Thompson articulated a defence of the Rule of Law that, although not intended to constitute a fully-fledged theory, supports a certain minimal conception of the Rule of Law. That conception boils down to this: the Rule of Law is an 'unqualified good' to the extent it (actually) limits ruling powers by requiring equal application of the legal rules to rich and poor, the powerful and powerless. The Rule of Law is by no means sufficient to ensure just legal rules or a just society in general, but it is a necessary condition in that its opposite – unbridled power – ensures injustice.[221]

To summarize our position, we find the 'thin' conception of the rule of law historically in those bodies of individuals who have the most need of its protection i.e. in the propertied segments of the society. Hence, it is natural for them to seek a minimal intrusion of the state in their private, economic affairs in order to protect their liberties and properties. Thus, the negative (e.g., crime, taxation etc.) points of contact between this segment of society and the state should be minimal and lean, while the

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219 *Ibid.*, p.263.

220 *Ibid.*, p.269.

221 Daniel H. Cole, 'An Unqualified Human Good': E.P. Thompson and the Rule of Law', *Journal of Law and Society*, 28(2001), p.189.

positive aspects of their relationship (i.e. privileges, exceptions, relaxations, tariffs and monopolies) should be maximal. On the other hand, the great multitude of society who are generally who own no substantial property and are tenants of the propertied segments have little recourse to the benefits of the rule of law, given that, in the early stages of its historical development, the rule of law has very little of offer them but the 'thin' conception of the Rule of Law, being intimately and inextricably tied to ownership of property.

Moreover, if we presuppose the minimal conception of the rule of law as the only conception of the rule of law, it is submitted, that we arrive back at Dicey's description of the rule of law, that of: a government limited by law, formal legality (formal equality) and rule by law, not man. This conception although certainly of great importance, nonetheless, fails to explain the role and function of the rule of law in authoritarian, racist, colonial and class-based social contexts as for example, in the context of fascist Germany or the history of racial segregation in the United States of American, which lasted until almost one century after end of the U.S. civil war. Consequently, in light of these historical limitations, we need to re-think our understanding of the rule of law as an organizational principle for the 21st century global society. Dicey's minimal conception, as demonstrated by our discussion above both from within and without suffers from serious flaws which carries with it an inherent danger of disenfranchising the vast multitude that cannot economically afford the benefits of the rule of law.

It is perhaps for these reasons that the African intellectual Issa Shivji urges a complete re-thinking of the foundations of western legal traditions:

> On the legal front, we have to re-think law and its future rather than simply talk in terms of re-making it. I do not know how, but I do know how not. We cannot continue to accept the value-system underlying the Anglo-American law as unproblematic. The very premises of law need to be interrogated. We cannot continue accepting the Western civilisation's claim to universality. Its universalization owes much to the argument of force rather than the force of argument. We have to rediscover other civilisations and weave together a new tapestry borrowing from different cultures and peoples.[222]

[222] I Shivji, 'Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law', *Law, Social Justice & Global Development Journal*

With the dawn of the 20th century things began to change and particularly after the horrors of the Second World War a new order based *inter alia* on universal suffrage and recognition of the dignity of human beings began to emerge. These principles began to be enshrined in the constitutions of the newly formed nations emerging out of their own horrors of colonial experience. The colonial experiences and especially the national struggles of the peoples to throw off the colonial yoke gave the non-propertied sections of society a new found social power in the nature of the newly formed political movements and thereafter in the newly found states. Unfortunately, the people of Pakistan had to wait until 1973 to get a constitution that recognized, at least on paper, the people's role in the freedom movement and consequently their rights to participate and reap the benefits of society. They did, however, have the benefit of the 'thin' version of the rule of law, which was a marginal improvement over the colonial conception of the rule of law. It may be noted that I will endeavor to fully develop this colonial conception of the rule of law and its 'post-colonial' variant in a sequel essay but, for now, I am afraid this brief mentioned will have to suffice.

Conclusion

What does all this mean for the rule of law? How can we derive a theoretical conception of the rule of law, one that is sensitive and receptive to history, as discussed above? The discussion in Part I of this essay reveal several points of tensions in society. These tensions arise with private property, which are given sanctification and legitimation through law and the state. At one end of the scale, formal equality is guaranteed by the state and, at the other end, the right to inequality in private property is fundamental and absolute. The principles of equality enshrined in the form of the state ignore the real divisions of society and its inequalities. It is in this thesis and anti-thesis of equality, the rule of law emerges as a dominant ideal to mitigate inter-class conflicts as well as the relationship between private property and the state. To fully appreciate the value of the rule of law, it is important to view it as a product of its time – that is rooted in the material relationship out of which it has emerged.

Just as the formal nature, inner content and the extent of alienation of private property and state relations are not fixed and immutable, so too, the rule of law as a mediator of these relations is not and cannot be fixed. For instance, a democratic republic premised on

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(LGD), 1(2003), 30 May 2003. http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/

equality, individual freedom and legality is far more preferable than an absolutist monarchy or a dictatorship, where the rule of law undoubtedly exists in varying degrees. Further, accountability of government officials, subordination of bureaucracy and army to the legislature and courts, right of citizens not to be subjected to arbitrary acts of government, due process, etc., are all progressive inhibitions of power. But as history shows us, these freedoms are always hard won and always characterized by people's struggles for further emancipation from the uneven distribution of freedom, equality, recognition of dignity and rights associated with private property and the state. In other words, these cannot be taken for granted and presupposed. In fact, in this sense, the history of western intellectual movement itself can be characterized as a relentless march towards freedom, traveling as well through several periods of un-freedom.

Thus, in my view, the rule of law as a concept is a 'thin' or minimal phenomenon when the material gulf between people is great and where inequality is severe. As we have seen, at the time Locke wrote his *Two Treatises of Government* only 3% of the population of England had the right to vote their members in Parliament.[223] In this sense, despite the rule of law as a bloody minded trait of the 'free born Englishman', it took the English society (no doubt, as history shows after a great struggle)[224] until 1918 to grant universal suffrage to all men, and in 1928 to women. Prior to that, the true qualification for the right to vote was, of course, private property as, for instance, the 'Great' electoral reforms of 1832 of England gave a right to vote only to those who owned property with yielding an annual revenue of at least 10 pounds. On the other hand, the rule of law can be seen as a 'thick' conception where inequality is less severe and the material gulf between people is likewise less severe. The former ('thin' conception) tends to limit the functions and role of the rule of law to suit the requirements of dominant classes in society, as a result of which it appeared to radical thinkers that all law was simply an instrument in the hands of the ruling elite and likewise the state was nothing but a committee of ruling classes. While in the latter sense ('thick' conception), the people, being more conscious of inequality and in possession with some degree of social power brought about through universal suffrage in the aftermath of the Second World War, demand a greater role for the rule of law. For instance, they equate the rule of law with greater democracy, with substantial equality, with welfare rights and with redistribution of wealth in society, to name a few.

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223 See footnote 183 above.

224 For example, the 'Peterloo Massacre' of 1819.

A classical formulation of the thick version of the rule of law comes from the findings on the meaning of the rule of law by the International Commission of Jurists (ICJ) in 1959, which became known as the Declaration of Delhi. The Declaration attempts to pin a meaning to the difficult concept of the rule of law and in doing so '[r]ecognizes that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized'. (emphasis is supplied). The reasoning behind the declaration comes from an outright recognition that human being's material condition of life has a necessary relation to the form and content of the rule of law i.e. to his freedom, and sense of dignity and equality under the law. ICJ's global *Report on the Rule of Law*[225] gives a fuller rationale behind this thinking. The report calls the rule of law a 'dynamic concept' in the sense that the rule of law had been shown to have not only the 'negative task of protecting the individual against the state but also to be a dynamic and expanding concept recognising that the state itself had positive duties to achieve conditions in which the Rule of Law could be effective'.[226] Furthermore, the rule of law has also acquired a new dimension in as much as it laid out the terms of a new relationship between the state and the individual. In other words, the 'social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realized' cannot be realized where the 'freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercized by demagogues over an unenlightened electorate; [and the] freedom from governmental interference must not spell freedom to starve for the poor and destitute … This social content of the Rule of Law and the recognition of the necessity to make law and find law with due regard to the ever-changing conditions of human existence expands the concept of the Rule of Law from the limited scope of static notions and approximates it with the Rule of Life'. This essay could not have better expressed the fundamental relationship between material conditions of life and the rule of law.

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225 International Commission of Jurists, *The Rule of Law in A Free Society: A Report of the International Congress of Jurists*, Geneva, 1959. http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf

226 *Ibid.*, p.179.

Traditional or conservative liberal conceptions of the rule of law (such as Dicey's) do not have the heart to incorporate the expanded version of the rule of law in today's world arguing that the rule of law 'cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged'.[227] It begs the question, the same question that Hobbes, Locke, Rousseau, Montesquieu and Smith so diligently tried to address: if the people cannot expect 'good' (i.e. quality of life, happiness, freedoms, equality in fact, justice etc.) then what on earth is the reason for them to stay in a society or within a state that cannot offer them these comforts and securities? With the greatest respect to these traditions, we must register our dissent for the reasons not only provided by great thinkers discussed above, but also more importantly that law is not only a restricted force or as Adam Smith said of justice as 'a negative virtue', it is embedded in the very fabric of our society and is found at each and every turn. As Edward Thompson remarked in his book, *The Theory of Poverty*, that: 'I found that law did not keep politely to a 'level' but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights …) … it contributed to the self-identity both of rulers and of ruled'.[228] Therefore, given the multitude of points of interaction between our social and material existence and the rule of law, it would be an act of intellectual negligence and at worse, an omission tantamount to intellectual dishonestly, to ignore this unavoidable facet of the rule of law and, by extension, intellectual incompetence to not include the material conditions of human beings and the means to their fulfillment in the theoretical conception of the rule of law.

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227 Brain Z. Tamanaha, *op.cit.*, p.113.

228 E.P. Thompson, *The Poverty of Theory and Other Essays* (London: Merlin Press, 1978), p.288.