THE ELEMENTS

OF

POLITICS

BY

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'THE METHODS OF ETHICS,' 'THE PRINCIPLES OF POLITICAL ECONOMY,' ETC.

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Comparing these cases, I arrive at the conclusion that "a right" is really an obligation regarded from a different point of view: *i.e.* regarded in relation to the person to whom the obligation is intended to be useful. In the case of such rights as the right of property, the rule which binds or obliges the members of the community to abstain from interfering with the owner's use of the appropriated thing has at the same time the effect of securing or protecting the owner's freedom of action in respect of the thing in question: and hence some thinkers have conceived a "Right" as being essentially "secured or protected liberty." But there are other cases to which this definition clearly would not apply: *e.g.* when a child is said to have a "right to education" there is no liberty secured to the child, but merely an obligation imposed on other persons of rendering it certain positive services.[1]

Accordingly, in forming a definite conception of any right, it is indispensable to ascertain the obligation implied in it, and the persons on whom this obligation is thrown. For instance, in speaking of rules determining the rights of private members of the community, we may imply either obligations imposed on private persons, or obligations imposed on members of the Government. The distinction thus drawn is important in separating the discussion of the work that Government has to do from the discussion of the methods and instruments by which the work should be done. It will be somewhat further developed in the next chapter.

[1] Some writers hold that a legal right implies that the person who is said to have the right must be able to obtain, by a legal process, redress or punishment for any violation of his right. I agree that such redress or punishment must be somehow obtainable—otherwise the rule professing to determine the right would not deserve the name of a law: but it does not seem to me necessary that the individual whose right is violated should himself have the right of suing or prosecuting the violator: it seems to me better to regard this latter as a secondary and additional right, which is ordinarily given for the better security of the first, but may in some cases be withheld. Thus I should say that a destitute pauper had a legal right to relief in England, because the poor-law officials are liable to punishment if they refuse him relief, though the pauper himself cannot sue or prosecute them.

CHAPTER III

THE GENERAL PRINCIPLES OF LEGISLATION

§ 1. In the preceding chapter we have been concerned with the general conception of Law, in the strict political sense,—the "law of the land," which judges and magistrates are appointed to administer and enforce; as distinct from other kinds of recognised rules of conduct,—such as those contained in the moral code, the code of honour, the code of social behaviour,—which are also in a looser sense called moral laws, laws of honour, social laws. Law, in the sense in which we are primarily[1] concerned with it, is a body of rules intended to control the conduct of members of a political society, for the violation of which penalties may be expected to be inflicted by the authority of the government of that society; and which, therefore, may be regarded as imposed by government. For, though they may not have actually been laid down by any existing person or body of persons whose orders are habitually obeyed by the rest of the community, there is always some possible combination of persons and bodies which is recognised as competent to modify them; and any resistance to them may be expected to be overborne by the force which the habitual obedience of the community places at the disposal of government. This general definition of law is of course applicable not specially to laws as they ought to be, but to good and bad laws alike: it states the

[1] The propriety of the phrase "international law" will be discussed later. See Chap. XVII.

characteristics which, in accordance with usage, we agree to consider essential to the right application of the term "law," in its special political sense. Hence the discussion of this definition belongs to the study of actual laws as they are and have been, no less than to the study of the principles on which an ideal system of legislation ought to be constructed: it forms, in fact, a region common to the two studies. At the same time, though the definition carefully avoids any implication that the law spoken of is good, right, or just, it does not altogether exclude an ideal element from the conception of law, and of the community to which the law belongs: for it assumes that the orders of government, whether good or bad, are habitually obeyed by the bulk of the community: whereas in many communities at many times the greatest practical difficulty and the most urgent practical need has been not to get the (so-called) government to issue good orders, but to get them generally obeyed when they have been issued. When, however, the commands of persons attempting to govern are widely disobeyed with impunity, though such persons are still by courtesy commonly called a government, we do not come into serious conflict with common sense by affirming that they do not really govern, and that their impotent commands are not really laws: and it is in the stricter sense of this affirmation that I shall generally use these fundamental terms.

Bearing, then, in mind that the political community we are considering is assumed to be orderly and not anarchical, so that government is able to bring irresistible physical force to crush any open disobedience to law; let us now proceed to consider on what principles laws ought to be established and administered. First, however, it will be convenient for the present to take a narrower view of the Law for which we are to lay down principles, than that given in my definition; by excluding any rules which relate to the appointments and duties of persons exercising governmental functions, such as the rules issued to the subordinate officers of government in (*e.g.*) the Home Office, or any

similar departments of the executive. Such rules would not ordinarily be called "laws," except so far as they are laid down by Parliament: but in any case they do not form part of the law that is primarily the subject of our present investigation: for we are considering the establishment and maintenance of Law as a main part of the work which government should be constructed to do: whereas these administrative rules relate to the manner in which the complex instrument for performing governmental work should be constituted and kept in action. The Law then, for determining which we have now to lay down principles, should be conceived as a body of rules intended to control the conduct of private persons, so far as they are *subjects* but not in a narrower sense *servants* of government.

Accordingly, in considering the rights that a good system of legislation ought to secure to such persons, I shall for the present omit rights that correspond to obligations imposed not on other private persons, but on members of the government itself. It is important to note this, because among what are commonly recognised in free countries—or countries struggling towards freedom—as "fundamental rights of individuals," there are several important cases in which the obligation that constitutes the other aspect of the right is a governmental obligation. Such, for instance, are the right to freedom of speech and of the press, the right to freedom of assembly, free exercise of religion. In any country where these rights are not completely realised, it is through the action of government that they are withheld or impaired: hence it is convenient to distinguish these as *constitutional* rights from the *civil* rights with which we are now primarily concerned. Whether the governmental obligation corresponding to such a constitutional right is strictly legal, or only moral or quasi-legal, depends on conditions which will be appropriately considered in the second part of the treatise; in which I shall examine the structure of the different organs of government, and the relations of government to the governed. I will here only observe that the establishment and the

maintenance of such rights do not form part of the ordinary work of Government—regarded as a harmonious whole [1]—in the same sense in which the enforcement of legal obligations on private citizens forms part of its work; but only in the negative sense that it is bound not to encroach upon such rights.

There are, however, other governmental duties of a positive kind, which have a closer connection with civil rights, as they are directly required for the effective realisation of the latter: I mean especially the work to be done by governmental officials—judges, magistrates, policemen, and others—for the prevention or reparation of wrongs to individuals. These will be most appropriately considered later on: [2] after we have discussed the civil rights, of which the actual or threatened violation gives occasion for the exercise of these preventive or reparative functions of Government. For somewhat similar reasons, I reserve the consideration of the obligations that it is expedient to impose on ordinary members of the community *in the interest*—so to say—of government, *i.e.* in order to enable government to perform its work efficiently;—as, for instance, the general obligation imposed on male adults to assist, when occasion arises, in the repression of crime and the maintenance of order. At present, I wish to concentrate attention on the rules by which the mutual relations of private members of the community—as contrasted with their relations to the government—should be determined, so far as these rules require the aid of governmental force to secure their adequate observance.

But again, when we examine those rights of private individuals that correspond to obligations imposed on other private persons, we find that one class of these also only

[1] This qualification is indispensable, because, as I shall hereafter explain, I regard it as a normal part of the duty of the Legislative and Judicial organs of government to prevent encroachments by the Executive organ on the constitutional rights of private persons:—the Executive being ordinarily, by the nature of its functions, under the strongest temptation to such encroachments.

[2] See Chaps. VIII. and IX.

come into operation in consequence of the violation of other rights; such as the right to compensation for injury wilfully or carelessly inflicted, and the right to repel violence by violence. Such remedial rights are obviously to be regarded as secondary and subordinate to the antecedent rights, the violation of which renders them necessary: they only come into operation because law is imperfectly obeyed—or perhaps in some cases imperfectly defined. The rights which we may distinguish as primary, and which we should begin by determining, are rights which would be established and operative if the law was perfectly defined and perfectly obeyed.

§ 2. What then are the principles on which the laws defining the primary civil rights of private members of a civilised community should be constructed, or the criteria by which the goodness or badness of any actual body of such laws should be tested? In answering this question, I do not seek, as I said in my first chapter, to propound and establish any new principles, not recognised in ordinary political thought and discussion; my aim is merely to render somewhat more precise in conception the principles that I find commonly recognised, and to make their application to particular cases as clear and consistent as possible.

In the first place, we are all agreed that laws ought to be just or not unjust: [1] and by this we do not merely mean that they ought to be justly *administered*—*i.e.* that the general rules of law ought to be impartially applied without "respect of persons" to the particular cases brought before the courts for judgment—but we mean also that these general rules themselves ought to be framed so as to avoid injustice. But when I try to give a definite signification to this principle, the only signification I can find which would really carry with it universal agreement is, that all *arbitrary* inequality is to be excluded: that persons in

[1] I say "or not unjust," because it would be commonly recognised that there is an ideal justice which we cannot hope to realise in the legal relations of the members of any actual community. But we shall certainly agree in holding that laws ought not to be unjust.

similar circumstances are to be treated similarly; and that, so far as different classes of persons receive different treatment from the legislator, such differences should not be due to any personal favour or disfavour with which the classes in question are regarded by him. This agreement therefore gives no positive guidance as to the plan on which our impartially framed laws are to be constructed: it does not enable us to say how far and on what grounds persons in different circumstances are to be treated differently.

I think, however, that we may go a step further, and claim general—if not universal—assent for the principle that the true standard and criterion by which right legislation is to be distinguished from wrong is conduciveness to the general "good" or "welfare." And probably the great majority of persons would agree to interpret the "good" or "welfare" of the community to mean, in the last analysis, the happiness of the individual human beings who compose the community; provided that we take into account not only the human beings who are actually living but those who are to live hereafter. This, at any rate, is my own view. Accordingly, throughout this treatise I shall take the happiness of the persons affected as the ultimate end and standard of right and wrong in determining the functions and constitution of government.

I draw special attention to the inclusion of posterity in my statement of the ultimate end of legislation: because it appears to me that whatever force there is in the arguments urged [1] against the view that the end of government is the happiness of the individuals governed, depends on the conception of these individuals as present, actually existing, members of the particular community in question. I fully concede that there are crises of national life in which it is the duty of the present generation of citizens, the actually living human beings who compose any political community, to make important sacrifices of personal happiness for the "good" or "welfare of their country," and that this good or welfare cannot be completely analysed into private happiness

[1] *E.g.* by Bluntschli. *Theory of State* (translated), Book v.

of the individuals who make the sacrifices. I should add that there are cases in which it is the duty of the members of one political society to make sacrifices for the good or welfare of other sections of the human race. But I hold that if this good is not chimerical and illusory, it must mean the happiness of *some* individual human beings: if not of those living now, at any rate of those who are to live hereafter. And I have tried in vain to obtain from any writer who rejects this view, any other definite conception of the "good of the State." [1]

If it is urged [2] that there are many most important sources of the happiness of human beings with which government has little or nothing to do, and which it will only make a mistake if it tries to control—art, literature, and for the most part industry—the answer is, that it appears from this very argument that the limits of government interference in these departments are capable of being determined on utilitarian principles; for the argument is that interference beyond those limits will be demonstrably the reverse of useful—will be *not* conducive to the general happiness.

§ 3. We have thus arrived at the utilitarian doctrine that the ultimate criterion of the goodness of law, and of the actions of government generally, is their tendency to increase the general happiness. The difficult question how far, if at all, the interests of any one community are to be postponed by its government to the interests of other sections of humanity is one that it will become necessary to deal with at a later stage; but we are hardly called upon to consider it when we are discussing the internal functions of government—the principles of its action in relation to the governed. The happiness then of the governed community will be assumed as the ultimate end

[1] *E.g.* Bluntschli, *l.c.* (Book v. ch. iv.) speaks of "development of a people's natural gifts" and the "perfecting of a people's life"; but I know no criterion for determining wherein the perfection of life consists and for distinguishing the right development of natural gifts from the wrong development, if the utilitarian criterion be rejected.

[2] As by Bluntschli, *l.c.*, Book v. ch. iii. § 2.

of legislation, throughout the nine chapters that follow.[1] But even the acceptance of this principle gets us very little way towards a system of legislation: since we find it admitted equally by persons differing profoundly in their political aims and tendencies: indeed, there is scarcely any widely spread political institution or practice—however universally condemned by current opinion—which has not been sincerely defended as conducive to human happiness on the whole. Hence, when we have agreed to take general happiness as the ultimate end, the most important part of our work still remains to be done: we have to establish or assume some subordinate principle or principles, capable of more precise application, relating to the best means for attaining by legislation the end of Maximum Happiness.

Now when we consider the different ways in which the happiness of individuals may be promoted by laws, the most fundamental distinctions appear to be two.

I. In the first place, legal control may be exercised in the interest of the person controlled, or of other persons: the government may either aim at making each of the individuals to whom its commands are addressed promote his own happiness better than he would without interference, or it may aim at making his conduct more conducive to the happiness of others. So far as the former is the avowed aim of government, its control resembles that properly exercised by a father over his children: accordingly this kind of governmental interference is commonly spoken of as "paternal"; and I shall adopt this as the most convenient name for it. The term is used with more or less sarcasm, because such interference—as applied to sane adults—is commonly regarded as being in general undesirable in modern civilised communities. The grounds for this opinion are chiefly these: (1) that men, on the average, are more likely to know what is for their own interest than government is, and to have a keener concern for promoting

[1] Except so far as the pain of inferior animals is also taken into account, in legislation prohibiting cruelty to animals.

it, so that, even supposing paternal legislation would be generally obeyed, its direct effects are likely to be on the whole mischievous—taking into account the annoyance caused by coercion; and (2) that, even if its direct effects are beneficial, its indirect effects in the way of weakening the self-reliance and energy of individuals, and depriving them of the salutary lessons of experience, are likely to outweigh the benefit: while (3) such laws are specially liable to evasion, since, in cases where they are felt to be coercive, there will usually be no private individuals who feel directly interested in the effectiveness of the coercion—the persons whom the laws are primarily designed to benefit being the very persons who require to be coerced. It is further held that, even if any little good were done by this kind of legislation, it would not be worth the expense entailed by it both of money and of the energies of statesmen needed for other functions: and finally, that there is a serious political danger in the increase of the power and influence of government that would be involved in a consistent application of the "paternal" principle. I shall consider hereafter how far these arguments are valid to the complete exclusion of this principle: at present it is enough to say that neither in current political reasoning nor in the actual facts of legislation is anything more than a very subordinate place now ever allowed or claimed for its application. We are all agreed that, in the main, the coercion of law is and ought to be applied to adult individuals in the interest primarily of other persons.

II. But here a second fundamental distinction suggests itself. The services which an individual is legally bound to render to others may be positive or negative: they may consist in doing useful acts, or in forbearing to do mischievous acts. Now there is no doubt that the constant rendering of reciprocal positive services is indispensable to the production of the greatest attainable happiness for the human beings who compose a modern civilised community; all agree, indeed, that such exchange of services has continually to

become more complex and elaborate, if we are to realise the economic advantages of that development of industry which the progress of the arts continually renders possible. And most of us would readily accept, as a moral ideal, what I may call *ethical* as contrasted with *political* socialism; that is, the doctrine that the services which men have to render to others should be rendered, as far as possible, with a genuine regard to the interests of others: that, as J. S. Mill, after Comte, lays down, "every person who lives by any useful work should be habituated to regard himself, not as an individual working for his private benefit, but as a public functionary," working for the benefit of society; and should regard "his wages of whatever sort . . . as the provision made by society to enable him to carry on his labour." But it is widely held that it is the business of the moralist and the preacher, not of the legislator, to aim at producing in the community this habit of thought and feeling; and that it will be on the whole conducive to the general good to leave the terms of positive social co-operation—except so far as it is needed to prevent aggression—to be settled by private agreement among the persons co-operating. It is held, in short, that what one sane adult is legally compelled to render to others should be merely the negative service of non-interference, except so far as he has voluntarily undertaken to render positive services; provided that we include in the notion of non-interference the obligation of remedying or compensating for mischief intentionally or carelessly caused by his acts—or preventing mischief that would otherwise result from some previous act. This principle for determining the nature and limits of governmental interferences is currently known as "Individualism," and I shall refer to it by this name; the requirement that one sane adult, apart from contract or claim to reparation, shall contribute positively by money or services to the support of others I shall call "socialistic." I shall also apply this term to any limitation on the freedom of action of individuals in the interest of the community at large, that is not required to prevent interference with other individuals,

or for the protection of the community against the aggression of foreigners.[1]

The legislation of modern civilised communities then, is, in the main, framed on an Individualistic basis; and an important school of political thinkers are of opinion that the coercive interference of government should be strictly limited to the application of this principle. I propose, accordingly, in subsequent chapters, to trace in outline the chief characteristics of the system of Law that would result from the consistent application of the Individualistic principle to the actual conditions of human life in society. I shall then examine certain difficulties and doubts that arise when we attempt to work out such a consistent and exclusive individualistic system: I shall analyse the cases in which, in my judgment, it tends to be inadequate to produce the attainable maximum of social happiness: and I shall consider to what extent, and under what carefully defined limitations, it is expedient to allow the introduction of paternal and socialistic legislation, with a view to remedy these inadequacies.

[1] The distinction and relations between these two meanings of the term "socialistic" will be fully discussed later. See Chap. XII.

CHAPTER IV

INDIVIDUALISM AND THE INDIVIDUALISTIC MINIMUM

§ 1. In this and the four following chapters I propose to work out in some detail what I may call the "Individualistic minimum" of governmental interference: that is, the distribution of legal rights and obligations among private persons that results from applying the Individualistic principle, as strictly as seems practically possible, to the actual conditions of human life in society. But before I proceed to this examination, it ought to be noted that some Individualists view this principle in a light fundamentally different from that in which I have regarded it in the preceding chapter. They hold the realisation of freedom or mutual non-interference to be not merely desirable as most conducive to human happiness, but absolutely desirable as the ultimate end of law and of all governmental interference: an ideal good which would be degraded if it were sought merely as a means of obtaining pleasure and avoiding pain. This opinion, however, may I think be shown to be inconsistent with the common sense of mankind, as expressed in actual legislation, and even with the practical doctrines—when they descend to particulars—of the thinkers who profess to hold it.[1] For the kind of laws which Individualists generally agree to recommend may be shown to require for their justification a utilitarian interpretation of the individualistic principle: that is, they require us to conceive, as the general aim of law and government, not the prevention among the governed of mutual interference with freedom in the ordinary sense, but the prevention of mutual interference with each one's pursuit of happiness for himself and his family. And I think that the attempt to show this, under each of the chief heads of individualistic legislation, will be the best way of clearing up our general conception of the individualistic principle; while at the same time it will afford a convenient opportunity of surveying the whole range of the subject before we proceed to consider it in detail.

[1] In arguing against any opinion as to ultimate ends, either in the ethics of private conduct or in politics, there are two lines of demonstration open to the assailant: (1) Demonstration of inconsistency, if the person holding it is known, or may be presumed, to hold any other opinions with which it is not reconcilable, and (2) Demonstration of paradox, or proof of the inconsistency of the doctrine in question—or its consequences—with views commonly accepted. The former method, however, is chiefly available in controversy with particular individuals, which I do not here profess to undertake. I therefore only suggest it here in a general way.

Let us begin by examining the usage of the words "Freedom," or "Liberty"—which I take to be synonymous. When employed without qualification "freedom" signifies primarily the absence of physical coercion or confinement: A is clearly not a free agent if B moves his limbs, and he is not free if he cannot get out of a building because B has locked the door. But in another part of its meaning—which from our present point of view is more important—"freedom" is opposed not to physical constraint, but to the moral restraint placed on inclination by the fear of painful consequences resulting from the action of other human beings. There is, however, some disagreement as to the extent of this latter meaning: it is disputed whether the moral restraint that impairs my freedom may be caused by fear of any other man's action or only by fear of *governmental* action. The latter view was taken by Hobbes, who regarded the "state of nature"—that is, of no government—as a state of unlimited liberty, though also one of intense mutual fear. But this view is paradoxical: it seems absurd to say that it is contrary to liberty to be restrained by dread of the magistrate, and not contrary to liberty to be similarly or

more painfully restrained by dread of the lawless violence of a neighbour: we should generally agree with Paley that not only happiness but liberty is less in the Hobbist state of nature than in a well-ordered political society. If it be granted, then, that my liberty is impaired by the restraint on volition caused by fear of the acts of human beings generally, the statement sometimes made that "every law is contrary to liberty" is misleading, though in a sense true: since the diminution of liberty caused by the fear of legal penalties may be more than balanced by the simultaneous diminution of private coercion. It may be fairly said that the end of government is to promote liberty, so far as governmental coercion prevents worse coercion by private individuals.

We have, however, to observe that freedom is sometimes attributed to the citizens of a state, not because the governmental coercion applied to them is restricted to the prevention of private coercion, but because it is exercised with the consent of a majority of the citizens in question. Indeed, the notion of "liberty" in this sense—which may be distinguished as "constitutional liberty"—has had a very prominent place in political discussion. I do not wish to discard this use of the term altogether: but I think it is liable to be misleading. It may be fairly affirmed that a *body* of persons is "free"—in the ordinary sense—when the only rules restraining them are in accordance with the corporate will of the body: but it is only in a very peculiar sense—liable to collide markedly with the ordinary meaning of the term—that "freedom" can be therefore affirmed of every *member* of the body. It is obvious that my inclinations may be restrained to any extent, and in the most annoying way, under a government of which the supreme control is vested in the mass of the citizens, if I have the misfortune to belong to the minority of this body: while, again, it is quite conceivable that under a despotic government I may be subject to no further coercion than is necessary to prevent worse coercion by private persons. Accordingly, when I speak without qualification of freedom

as belonging to individuals, I shall not mean constitutional freedom, but civil freedom as above defined—absence of physical and moral coercion.

It is certainly conceivable that the maintenance of "equal freedom" in this sense should be taken as the ultimate and sole end of legislation, and of governmental interference generally. But in fact, as I have said, all governments and most Individualists practically go beyond this, and aim at protecting the governed from pain—and loss or diminution of their means of gratifying their desires—caused by the action of other human beings. In so doing, I maintain, they adopt by implication a utilitarian view of the mutual interference that law ought to prevent,—even while expressly disavowing the utilitarian criterion.

§ 2. Let us proceed to particulars: and take first the class of rights which Blackstone distinguishes as "Personal Rights." We find that under this head all civilised systems of law aim at securing the personal *safety* of individuals no less than their personal *liberty*; *i.e.* they seek to prevent the infliction of physical injury or pain—even serious physical discomfort that can hardly be called pain—as well as the imposition of constraint. No doubt physical injury or pain usually involves a kind of constraint; since the injured man, even if not physically disabled, is prevented from doing what he likes by the fear of the recurrence of the injury. This is an important reason for preventing physical injury, and the main reason for making the mere threat of inflicting such injury a legal offence: but it would be absurd to maintain that assault and battery are prohibited solely on account of their tending to produce subsequent alarm in the person assaulted and battered sufficient to have a coercive effect on his conduct: all would admit that they ought to be prevented, even if such coercive effect did not follow. Hence common sense clearly requires us to understand the non-interference, which such prohibition secures, to include not only non-interference with Freedom but non-interference with Happiness.

This is still more obviously true as regards the interference with physical comfort, prohibited under the head of nuisances; and I think it is also true of the attacks on reputation, which all civilised nations aim at preventing by law. No doubt such attacks may be a form of moral coercion: but it is not thought that my right to be protected against calumny depends on the question whether my action has been or is likely to be modified by the unmerited dislike and contempt which the calumny has caused. Again, the defamation of A by B undoubtedly tends to impair A's ability to gratify his desires, by rendering it difficult for him to obtain the co-operation of others. But it palpably strains the common notion of freedom to say that A is less free merely because other people will not do what he wants them to do. And as B's freedom is directly and palpably diminished if he is prohibited from saying what he thinks of A, the restraints of the law of libel can hardly be justified if freedom—in any ordinary sense—and not happiness, be taken as the ultimate criterion.

Again, Individualists—and legislators generally—agree that where law has not succeeded in preventing injury to person or reputation, it ought generally to enforce on the wrongdoer pecuniary compensation for the mischief, unless the injury is one that does not admit of being repaired;—so as to bring about a condition of things approximating as far as possible to what would have existed had there been no injury. From the point of view of utilitarian individualism this duty is clear; but if freedom be taken as an absolute end, it is difficult to show how the loss of freedom can properly be compensated by money. For if it be said that the richer man, as such, enjoys more freedom than the poorer, the fundamental aim of Individualism—to secure by law equal freedom to all—seems to transform itself into the fundamental aim of extreme Socialism, to secure equal *wealth* to all.

This leads us naturally to consider the application of the individualistic principle in the department of law which

is concerned with the protection of property. The Individualistic minimum of governmental interference is commonly stated to include "protection of property" as well as of "person": and it is obvious that we are bound to prevent any interference by one man with the property of another, if we suppose private property already instituted; since, in fact, the legal institution of private property *means* the prohibition of such interference. But the institution itself can hardly be justified by the general principle of Individualism, if we take freedom—in the ordinary sense—as an ultimate end, without any regard to utility; it would rather seem that the end would be most completely realised by preventing A from thwarting B's actual use of material things, without going so far as to support B in the permanent exclusion of other men from the enjoyment of things that he has once used. The case is different if we interpret the principle in a utilitarian sense. From this point of view the protection of exclusive use is obviously required in order that individuals may have adequate inducement to labour in adapting matter to the satisfaction of their needs and desires. The natural reward of labour is the full enjoyment of the utility resulting from it; without the prospect of this natural reward—or of some adequate substitute for it—we could not expect much of the labour to be performed. Hence, from the point of view of utilitarian Individualism, the law ought clearly to aim at securing each individual from the interference of others with his enjoyment of the results of his labour: and, in fact, the provision of this security is often simply stated as the end by reference to which private property is to be justified.

It ought, however, to be observed that this principle does not directly justify the appropriation of material things in their original or unlaboured condition: and if, on the utilitarian ground above given, A is held to interfere with B by using matter to which B has applied his labour, it cannot be denied that B's claim to exclude A from this matter involves some interference with A, if it appreciably restricts A's power of adapting matter to the satisfaction of his needs

and desires. Still, I conceive that private property may be clearly justified on the individualistic principle—taken in a utilitarian sense—so far as it can be shown either (1) that the thing appropriated would not practically have been available for human use, if the appropriator had not laboured in seeking for it; or (2) that his appropriation does not materially diminish the opportunities open to other persons of obtaining similar things, owing to the natural abundance of such opportunities. On one or other of these grounds it is easy to justify the appropriation of such things as fish caught in the open sea, or wild animals, plants, or even minerals, found in large tracts of uncultivated country. And it has been maintained by Locke and others, that in the "beginning and first peopling of the great common of the world" the appropriation of land was similarly justifiable, "since there was still enough and as good left, and more than the yet unprovided could use." But however true this may have been in a primitive condition of human society, it seems evident that social development has long since deprived this justification of any validity; and now, at any rate, the individuals who have not inherited land do not find "enough and as good" within their reach. Accordingly, in the case of land, the principle of mutual non-interference is, I conceive, only applicable in a limited and qualified manner. And, in fact, when the question of regulating the appropriation of land has been practically presented to modern states in a simple form[1]—for instance, in relation to land as yet unappropriated, in a newly colonised country—it has not commonly been held that individuals desirous of using such land, for agricultural or other purposes, have a right to claim the exclusive use of as much land as they may find it convenient to occupy. The question how such land is to be allotted I shall consider more in detail in the next chapter.

[1] That is, in a form not complicated by the consideration of established rights of private property, which could not justly be abolished without compensation. The general question of compensation for established rights will be considered in Chap. XII.

Here I am chiefly concerned to point out that Absolute Individualism supplies no method of dealing with its difficulties.

So far I have tacitly assumed that the labour necessary to adapt matter to human uses can be sufficiently encouraged by appropriating to the labourer the thing so adapted. There is, however, another case of property, of considerable importance in modern civilised communities, where quite peculiar obligations have to be imposed on non-owners; I mean the case of "patents" and "copyrights," by which the exclusive use of certain products of intellectual labour is secured to the producers or to their grantees. Here, from the nature of the labour, the only way of securing its results to the labourer is by prohibiting other members of the community from imitating them. At the same time, such an interference with the freedom of action of the persons prohibited is difficult to justify from the point of view of absolute individualism; since it cannot be shown that this prohibition of imitation tends to secure the persons concerned from physical or moral coercion. But it certainly tends to secure the greatest possible independent production of utility, assuming that the results that would be attained by imitation are such as the imitators could not possibly have arrived at independently. On this assumption, indeed, property in the results of intellectual labour, protected by patents and copyrights, is *more* simply justifiable on the (utilitarian) principle of mutual non-interference, than property in material things: just because the labour is not "mixed" with matter. To what extent the assumption is in different cases legitimate I shall consider in the next chapter.

That an individual who has been allowed to appropriate anything should be allowed to transfer his rights over it wholly or partially to another is from any individualistic point of view obvious: since such transfer involves no fresh interference with the freedom of others, while its prohibition would involve interference with the transferrer's freedom—provided always that the transfer is really a free act. But

it has to be observed that this proviso, if Freedom is taken in the ordinary sense, is inadequate to justify the generally accepted conditions of the validity of such transfers. For it is commonly understood that such transfers ought not to be valid if obtained by force or fraud; but the proviso only justifies invalidation when the transferrer is coerced or intimidated by illegal violence, since it is surely strained to say that a man's freedom is impaired by false representations on the part of the transferee.[1] On the other hand, from the utilitarian point of view, it is easy to see that the deception of A by B tends to interfere generally with A's pursuit of his ends: and, in particular, that freedom to transfer property is only expedient because the transferrer may be generally presumed to have consulted his own interest in making the transfer. But if he has been deceived by false representations this presumption obviously fails: and it also fails if the transferrer was for any other special reason clearly incapable of forming a sound judgment as to the value of the thing transferred or the considerations that induced him to transfer it. Thus we see the expediency of making the legal validity of such transfers depend on conditions tending to exclude not merely coercion but deception, and also inadequate rationality on the part of the transferrer: and such conditions are in fact imposed in the legal systems of all civilised countries.

So far I have spoken of transfers between living persons: it remains to consider how, on the principle of non-interference, property is to pass from the dead to the living. It is obviously expedient that when a man dies some definite successor or successors to his various rights of property should be determined somehow: but it is less clear how far the will of the dead person should be allowed to determine it. On the one hand, it may be urged that it can hardly be an interference with a man's freedom of action to preclude

[1] If we say generally that freedom is impaired through intellectual error caused by the action of others, we shall have to say that the majority in a democracy is not free when it is misled by demagogues: and this would surely be a paradox—though a suggestive paradox.

him from having any influence on mundane affairs after his death: on the other hand, if he could own property and transfer it up to the moment of death without encroaching on the freedom of other members of the community, it is hard to see how this can be interfered with by a transfer that takes effect after death. Each of these opposing negations is, I think, valid; so that the problem is insoluble if Freedom—in the ordinary sense—be taken as an ultimate end. But from the point of view of Utilitarian Individualism the individual's freedom is valued as a means, not to his own happiness alone, but to the general happiness: and the abrogation of the power of bequest would remove from him an important inducement to the exercise of industry and thrift in advancing years, for the benefit of others whose happiness he desires to promote—whether from affection or regard for posthumous reputation, or any other motive.[1] A restriction of bequest in the interest of children or other near relatives would not be exposed to the same objections; but such a measure is hardly justifiable on the individualistic principle—except in the special case of children unable to provide for their own livelihood. It is a different question whether a man should have full power to determine for an indefinite time after death the manner in which the wealth owned by him is to be used, otherwise than by determining his successors in ownership. There are strong reasons for restricting this power, which I will consider later; here I will only say that if it were not allowed to some extent, persons desirous of posthumously regulating the use of their property would try to effect this by bequeathing it to persons pledged to carry out their regulations, and would probably in a large measure succeed; and it would require strong grounds of social utility to justify us in encouraging

[1] It may be added that the abrogation of the power of bequest would, in the present condition of average human motives, be likely to be largely inoperative, except in cases where death was sudden and incapable of being foreseen; since most men would prefer either to exchange their capital somehow for a life-income or to transfer it in old age—or when the prospect of death was otherwise near—to the objects of their preference, rather than leave it to be absorbed by the State.

such persons by complete legal impunity to violate their pledges to the dead.

In the last argument it has been assumed that the performance of contracts to render future services should in general be made legally binding. This is, indeed, a cardinal tenet of Individualists: I do not, however, see how it can be clearly deduced from the principle that adopts Freedom as an ultimate end; since a man would be more completely free—in the ordinary sense—if his volition at any given time could not be legally restricted by any previous expression of will as regards the future: though his power of attaining his ends would, of course, be diminished by his being less able to rely on the future actions of others. Moreover, if we take the realisation of freedom to include the performance of contracts freely entered into, it would follow that—if freedom be the ultimate end—such contracts ought to be legally enforced in all cases in which they do not tend to impair the freedom of any third party. But no actual system of law attempts anything like this: in England (*e.g.*) no engagement to render personal services—except the marriage vow—gives the promisee a legal claim to more than pecuniary damages; all such contracts, if unfulfilled, turn into mere debts of money so far as their legal force goes. And from a utilitarian point of view this limited and qualified enforcement of contract is justifiable: since, on the one hand, it is necessary for social wellbeing that men should rely generally on the fulfilment of mutual engagements; and, on the other hand, what is primarily important from a utilitarian point of view, is not that A should perform his promise to B, but that B should not be damaged by A's non-performance.[1] From this point of view again there are

[1] It is easy to see that the performance of a promise to render personal services may in certain cases cause loss or inconvenience to the promiser, far outweighing the utility to the promisee: so that—from the point of view of utilitarian individualism—it would be an excessive interference to enforce specific performance, provided that the damage to the promisee through non-performance is of a kind that admits of adequate pecuniary compensation. In other cases, in which pecuniary compensation would be inapplicable or inadequate, there is a different utilitarian reason for not enforcing specific performance of contracts to render personal services, viz. that the utility of the service to the recipient depends on qualities which cannot be secured by legal coercion. *E.g.* a painter can be forced to paint a picture, but he cannot be forced to paint such a picture as his customer, in making the contract, desired to obtain. Still, if the end of Law were not utility but the realisation of Freedom, and this were taken to include the enforcement of contracts freely made, the logical course would be to enforce specific performance, so far as possible, in all cases in which the promisee desired it.

obvious reasons for imposing certain further conditions on the legal validity of engagements for future conduct, even when freely entered into: similar in the main to those already noticed as limiting the legal validity of the transfer of property.

§ 3. We have now examined briefly the chief heads of what may be called the "individualistic minimum" of primary governmental interference so far as sane adults alone are concerned: viz. (1) the Right of personal security, including security to health and reputation, (2) the Right of private property, together with the Right of freely transferring property by gift, sale, or bequest, and (3) the Right to fulfilment of contracts freely entered into. We have found, under each head, that—speaking broadly—the kind of legislation which modern states agree to adopt, and practical persons agree to recommend, is not capable of being justified on the principle of taking Freedom—in any ordinary sense of the term—as an absolute end. It requires for its justification an individualistic maxim definitely understood as a subordinate principle or "middle axiom" of utilitarianism: *i.e.* that individuals are to be protected from deception, breach of engagements, annoyance, coercion, or other conduct tending to impede them in the pursuit of their ends, so far as such protection seems to be conducive to the general happiness. This conclusion will guide our subsequent attempt to work out in more detail the conception of the "individualistic minimum"; and it will also be found fundamentally important when—in Chapters IX. and X.—we come to consider the reasons for going beyond this minimum.

CHAPTER VI

CONTRACT

§ 1. In a summary view of the civil order of society, as constituted in accordance with the individualistic ideal, performance of contract presents itself as the chief *positive* element, protection of life and property being the chief *negative* element. Withdraw contract—suppose that no one can count upon the fulfilment of any engagement—and the members of a human community are atoms that cannot effectively combine; the complex co-operation and division of employments that are the essential characteristics of modern industry cannot be introduced among such beings. Suppose contracts freely made and effectively sanctioned, and the most elaborate social organisation becomes possible, at least in a society of such human beings as the individualistic theory contemplates—gifted with mature reason, and governed by enlightened self-interest. Of such beings it is *prima facie* plausible to say that, when once their respective relations to the surrounding material world have been determined so as to prevent mutual encroachment and secure to each the fruits of his industry, the remainder of their positive mutual rights and obligations ought to depend entirely on that coincidence of their free choices, which we call contract. Thoroughgoing individualists would even include the rights corresponding to governmental services, and the obligations to render services to Government, which we shall have to consider later: only in this latter case the contract is tacit. According to

this view, an enlightened Englishman is a person who resists the

> "Temptations
> To belong to other nations,"

because the Government of his country gives him a fairly good bargain in the way of governmental services, including enjoyment of public property; in return for which advantages he has tacitly undertaken to pay the taxes that Parliament determines, serve on a jury if required, become a special constable if called upon in case of a riot, and otherwise render to Government such services as the law enjoins. This doctrine I do not now examine;[1] I only refer to it to show the far-reaching importance of the notion of contract in the individualistic view of the organisation of society.

What we have now to do is to discuss the chief conditions by which the legal enforcement of ordinary civil contract has to be restricted, in order that the function assigned to it in the individualistic ideal of society may be performed most effectively, and with least attendant mischief. But, before we proceed to this, we must notice an important ambiguity in the meaning of the term contract. In its widest sense the (legal) term contract denotes any act in which "there is a concurrence of two or more wills in producing a modification of the legal rights of the parties concerned."[2] It includes, therefore, those transfers of property by consent which were mentioned in the preceding chapter; which, of course, affect not only the mutual legal relations of the contracting individuals but also their relations to other members of the community. "Thus, if a man goes into a shop and buys a watch for ready money, a contract has taken place. The watchmaker and his customer have united in a concordant expression of will, and the result has affected once for all their legal rights." Previously to the transaction all other members of the community were legally

[1] See Chap. XIV. § 4.

[2] This quotation, and those which follow in this section, are taken from Professor Holland's *Jurisprudence*, chap. xii.

bound to abstain from handling the watch without the watchmaker's consent, and to compensate the latter for any injury that might be caused to the watch through their negligence; henceforward it is the customer whose consent is required, and to whom compensation will be due. In short, the agreement of these two persons has affected what jurists call their "rights *in rem*"; *i.e.* rights corresponding to obligations imposed on other members of the community generally.

But in its narrower and more usual sense the word contract denotes an agreement that only confers what jurists call a "right *in personam*"; *i.e.* a right corresponding to an obligation imposed only on a particular individual. *E.g.* "Suppose that instead of the instantaneous sale of the watch, the agreement has been merely for its purchase at a future day"; in this case there is a contract that does not transfer the ownership of the watch, but merely imposes on the watchmaker an obligation to sell the watch at the time and for the price agreed upon, and gives the customer a corresponding right, capable of being enforced against the watchmaker, but not directly affecting his legal relations with other persons.

Now, from the point of view of formal jurisprudence the difference between the two kinds of agreements is doubtless fundamental. But in a general discussion of the functions of government, the distinction appears to me to have only subordinate and secondary importance. We have already had occasion to notice that if rights *in personam* are valuable and transferable, they come to be regarded for practical purposes as a kind of property: under ordinary circumstances, my control over "money in the bank" being practically as complete as my control over money in my purse, I naturally think of the two "moneys" as property of the same kind though differently situated: it is indifferent to me that in the former case my legal right only consists in an obligation imposed on the banker to pay me coin or bank notes on demand, while in the latter case the world at large is under an obligation to refrain from meddling with my sovereigns. And, speaking more generally, we may say that, from our present point of view, the resemblances between (1) sale or other agreement by which *property* is transferred, and (2) an agreement giving the legal right to a future transfer of property or to some other service, are more important than the differences. In the most important cases of either—and those to which our consideration may conveniently be limited in the first instance—there is a transfer of utility, from A to B, in view of a corresponding transfer of utility on the other side; and not only are the general grounds of expediency for giving legal force to such agreements mainly the same in both cases, but the special conditions under which it is inexpedient to give them such validity are also to a considerable extent similar.

It will therefore, I think, save trouble to direct attention first to the conditions of valid exchanges of utility which are in some degree common to the two cases: and then consider the conditions peculiar, from the nature of the case, to agreements to which the term contract is more ordinarily limited,—*i.e.* in which the utility that one of the parties agrees to transfer is a *future* service.

§ 2. With regard, then, to both kinds of agreements, it may be laid down as a general rule that legal validity should be given to all exchanges of utility (1) made between persons possessing at the time mature reason, if they have been made without (2) coercion, or (3) wilful or careless misrepresentation on either side; and (4) if the effects they were designed to produce involve no violation of law or damage to third parties or to the community at large This rule is based on a general presumption that to carry into effect agreements made under these conditions will promote the interests of the parties agreeing, without causing mischief to others; this presumption being an immediate deduction from the individualistic principle that a sane adult can on the whole be trusted to provide for his own happiness if secured from interference. But if any of these conditions is not fulfilled, the presumption

far fails, and there is a *prima facie* ground for interfering to prevent or modify the agreement, or allowing it to be invalidated in whole or in part; so far as this can be done without disappointing the legitimate expectations of persons other than those who made the agreement. Let us examine more closely the different kinds of conditions.

The first condition, that the agreeing parties should be at the time in possession of mature reason, excludes—or at least sets aside for further consideration—the agreements of the three following classes of persons: (1) those who have not yet come to the full use of reason; (2) those who have lost it for an indefinite period through disease; and (3) those who have transiently lost it through intoxication, or some similar cause. It does not follow that all such agreements should be incapable of being legally enforced:—*e.g.* there is a manifest expediency in the regulation that minors should be legally capable of making contracts of a kind clearly beneficial to them. But there is in all these cases *prima facie* need of some limitation of the general rule of enforcing agreements: since the intellectual condition of one of the parties concerned precludes any general presumption that the agreement will be for the advantage of both.

Our second condition was that exchanges of utility, to be valid, should be made without coercion. Here the term "coercion" requires careful definition. So far as it merely means *illegal* coercion—*i.e.* actual or threatened violation by one party of the other's legal rights—the condition presents no difficulty: it is manifestly inexpedient, generally speaking, that the law should supply inducements to illegal conduct by securing advantages to the law-breaker.[1] But suppose that A induces B to enter into an agreement by threatening some act or omission which is not illegal or in itself immoral, but which will as a matter of fact be seriously annoying to B; while it is not conducive to A's

[1] I do not know why—as is commonly said to be the case in English law—the "duress" that renders a contract voidable is confined to "actual or threatened violence or imprisonment"; and does not include the threat of irreparable injury to property. I can find no justification for this restriction. The rule in the Indian Code is wider and more reasonable.

interests otherwise than by enabling him to obtain B's consent to the agreement, and certainly would not have taken place except for A's desire to obtain this;—is there an adequate reason for invalidating such agreements, or interfering to discourage them? It is not easy to give a decided general answer to this question: on the one hand, it is obviously desirable to prevent pressure of this kind, so far as this can be done without causing mischief in other ways; on the other hand, it seems difficult to prevent it in any complete way, without seriously interfering with the freedom of persons to declare intentions in themselves innocent.[1]

It is another question whether the law should interfere to prevent or discourage a contract in which A gains by the distress of B, even though A is in no way responsible for the distress nor legally bound to relieve it. Such a contract, in popular political discussion, is sometimes said not to be free; but it seems clear that, on the individualistic principle, there is no ground whatever for interfering to prevent it, if it be granted that we have the ordinary reasons for assuming that it places B in a better position than he would have been apart from the contract. If A is not legally bound to help B merely because he is in distress, and if he is free to contract or not as he likes, the law cannot consistently oblige him to make an exchange of utilities—if he makes one at all—more favourable to B than he would make without legal interference: at any rate this cannot be defended on the ground that B is "not really free," in the sense in which individualistic legislation aims generally at securing his freedom. How far any limit should be placed on B's power to bind his future actions under these circumstances, is again a different question which we shall consider later.[2]

[1] The "Undue Influence" which renders a contract voidable, according to English law, seems in some cases to include pressure of this kind, at least according to the dicta of the Judges. But I am informed that these dicta go beyond the decided cases; which do not support the general proposition that an agreement obtained by "pressure" is invalid, if by "pressure" is meant an expressed intention of doing something lawful but injurious to the other party.

[2] See § 5 of this chapter.

CHAPTER VII

INHERITANCE

§ 1. The right of Bequest, and the title to property arising out of it, comes naturally to be considered after the rights arising out of contract. Indeed, a bequest made and accepted under conditions may be regarded as a kind of contract between the dead and the living. It follows that bequests should only be treated as valid under limitations generally similar to those which we have minutely examined in the case of contract; *i.e.* they must be liable to be invalidated, in whole or in part, by the absence of mature reason, or the presence of coercion or deception. It has to be observed, however, that where bequest operates some fresh legal intervention would be necessary even if there had been no bequest; since it would be manifestly opposed to the interest of the community that the wealth left by a dead man should be liable—like things thrown away during life—to become the property of the survivor who seized it first. There must therefore be in any case a Law of Intestate Inheritance: and it might seem simpler to consider first the plan on which such a law should be constructed, before proceeding to discuss the conditions under which bequest should be allowed.[1] But, on the whole, it seems to me better to adopt the opposite order; since, when wills are allowed, any rules deviating widely from normal customs of bequest would be likely to cause painful disappointment of expectation: hence

[1] This is (*e.g.*) the order in which Bentham (*Civil Code*, Part ii. chapters iii. and iv.) deals with the two questions of "Wills" and "Intestate Succession."

the regulation of intestate succession will reasonably be determined to some extent on different grounds, according to the nature of the restrictions placed on the right of bequest.

To many Englishmen at the present day the right not only of *distributing* one's wealth after death, but of ordering the details of its use for all time, seems to be naturally and almost necessarily included in the Right of Property,—that is, unless the wealth has been given or bequeathed to the owner under special limiting conditions. In fact, however, the right of free bequest is of comparatively late growth in the development of society. As Maine has pointed out,[1] "in all indigenous societies a condition of jurisprudence, in which testamentary privileges are not contemplated," precedes that in which free testation is permitted; and even in mediæval law we find that liberty of bequest was at first closely limited by the rights of the testator's widow and children. The power of diverting the whole of a man's property from the family, or of distributing it quite capriciously, is not older than the later portion of the Middle Ages. "When modern jurisprudence first shows itself in the rough," [2] wills are rarely allowed to interfere with the right of the widow to a definite share, and of the children to certain fixed proportions, of the common inheritance. And similar restrictions are actually maintained in the French Civil Code and several other legal systems; partly owing to the remarkable persistence of the older view of family right—when so much of less ancient origin was swept away in the revolutionary era—but partly, no doubt, from the desire to prevent the inequalities resulting from primogeniture.

I have allowed myself this brief historical digression, because it is almost required to explain the peculiar position which this point in the individualistic scheme occupies at the present day.

Freedom of Bequest, on the one hand, has not completely emancipated itself from the old traditional restraints in the

[1] *Ancient Law*, p. 177. [2] *l.c.* p. 224.

interest of the family; and, on the other hand, it is assailed by new limitations, proposed in the interest of the community. Now we have before seen that Bequest occupies a somewhat different position from other rights included in our common conception of the Right of Property, when the question of allowing it is treated on purely individualistic principles: since the consideration of it seems *prima facie* to lead us to an "antinomy"—a pair of irresistible arguments on opposite sides of the question.[1] From a utilitarian point of view, indeed, the encouragement that the right of bequest gives to industry and thrift seemed to be a decisive consideration in favour of allowing it. This consideration, however, though decisive in favour of *some* freedom of bequest, does not clearly negative the imposition of greater restrictions on bequests than we think it expedient to impose on a man's power of transferring property during his life. An individualist, therefore, may admit such restrictions, in the interest either of the testator's family or of the community, without a palpable abandonment of his fundamental principle.

§ 2. Let us then consider first restrictions in the interest of the family, as being the older: and, for the sake of definiteness, let us suppose such a plan of restriction as that adopted in the French code. Suppose that a man's property, if he has three or fewer children, is ideally divided into equal shares exceeding by one the number of his children, only one of which he is free to bequeath away from them: while, if he has more than three children, he is free to bequeath away from them one-fourth of his property, but no more; as regards the rest, he cannot deprive any child of its equal share, except for special causes judicially proved.

The objection to such a measure seems to be that, granting it to be desirable that a man's property in a general way should go to his children, the testator evidently has special means of ascertaining his children's wants and deserts; so that any variations from equality of distribution

[1] See p. 53.

which he may be induced to make, if free bequest is allowed, are likely on the whole to correspond to variations either in their wants or their deserts. On the other side it is urged that the disinheriting of children is liable to give a painful and undeserved shock to reasonable expectations: and no doubt cruel disappointments may thus be caused. But similar mischief may be done in other cases by the tacit encouragement, without any definite and provable promise, of expectations of gift, bequest, or other aid: and in such cases it is generally recognised that the repression of wrong must be left to morality, since law can only protect expectations arising out of definite and demonstrable engagements. And if it be thought that in the present case some special legal interference is needed, owing to the strong support that common opinion gives to the expectations of children to inherit their parents' wealth, it would be easy to prevent the shock of disappointment by requiring a parent who wished to retain his freedom of bequest to notify this to his children before they attained a certain age. The real issue therefore is not whether the disappointment of expectations of inheritance should be prevented, but whether the law should intervene to create such expectations. I know no adequate justification for such interference, so far as it provides that a number of human beings, after being properly educated, shall not have to depend on their own exertions for subsistence: but it is expedient to secure to all children support and proper training until they can provide for themselves, and it appears to me to be in harmony with the individualistic principle to limit the power of bequest so far as is necessary to secure this result.

§ 3. So far I have considered the bequest simply as having the effect of dividing the property among children —or other persons—who receive it in complete ownership. Suppose, however, that a child or grandchild is an infant at the parents' death; it is obvious that the property must be given to some one to hold in trust for it. We thus introduce the notion of *fiduciary* as distinct from *beneficiary* ownership; in which the management of property is separ-

a one-sided restraint of the freedom of action of men with a view to the greatest happiness of the aggregate of sentient beings.[1]

In conclusion, it may be well to remind the reader that the extent to which the kind of interference discussed in the present chapter should be carried in a modern state will partly depend upon a variety of considerations, the force of which cannot here be estimated. Thus, we have to consider the state of moral opinion in the community—since the repression of mischievous conduct by social disapprobation may render legislative repression unnecessary; the diffusion of knowledge; the customs, industrial and social, actually prevalent; and the development of the habit of voluntary combination among the citizens. For example, where a mischievous or dangerous custom prevails, which it is difficult for an individual to avoid conforming to, there is *prima facie* special need for legislative interference: on the other hand, in proportion as the habit of combination is developed, this need is diminished.

[1] The protection of inferior races of men will be considered in a subsequent chapter (XVIII.).

CHAPTER X

SOCIALISTIC INTERFERENCE

§ 1. It is universally recognised that the present drift of opinion and practice is in the direction of increasing the range and volume of the interference of government in the affairs of individuals: and in current discussion the results of this tendency are not uncommonly lumped together under some such term as "State-Socialism" contrasted with "Individualism." It is, I think, important to remove the vagueness of thought that this simple antithesis is liable to involve, by distinguishing the very different issues that tend to be blended and confounded in this opposition of terms.

This has, I hope, been partly effected by the discussion in the preceding chapter. For we have seen that an important part of the increasing interference of Government which alarms old-fashioned advocates of *laisser faire* is not really distinguishable in its principles and aims from the kind of governmental action which the most vigorous Individualism has always regarded as indispensable. That is, its aim is the protection of individuals from harm to person or estate caused, whether intentionally or carelessly, by the action of other men: it merely seeks to make this protection more effectual and complete. Take, for instance, the important department of sanitary interference: it is obvious that the mischief which one private person may cause to others by making his house or business a focus of disease is of a kind which all rational Individualists have

always considered it within the province of Government to prevent. It may happen, in any particular case, that the remedy applied is ineffectual, or even if effectual, on the whole more burdensome than the evil which it is sought to remedy: but this is liable to happen in any human adaptation of means to ends, and does not affect the question of principle. And it is easy to see how new occasions for this kind of interference may continually arise: either because the mischief in question has been increased or newly introduced through the closer massing and more complicated relations of human beings which the development of industry and civilisation brings with it; or because mischiefs of long standing have been unveiled by the increased insight of advancing science, or possible remedies hitherto unknown have been pointed out.

We have now to note further that the principle which limits governmental interference to the prevention of mutual interference among the governed, if maintained on utilitarian grounds, requires for its justification two distinct fundamental assumptions,—one of which belongs rather to psychology, while the other is purely sociological. It is to the first of these that chief attention has been paid; and it is this which is mainly important when the discussion relates to *paternal* interference. When the question is whether Government should coerce individuals in their own interest, it is argument enough on the negative side, if it be granted that, in the matter under discussion, men may be expected in the long run to discover and aim at their own interests better than Government will do this for them—from their better opportunities of learning what conduces to their own welfare, or from their keener and more sustained concern for the attainment of this; while, further, this habit of self-help will give not only knowledge, but also self-reliance, activity, enterprise.

But, granting all this to be true, it by no means follows that an aggregate of persons, seeking each his private interest intelligently, with the least possible restraint, is therefore certain to realise the greatest attainable happiness

for the aggregate. It is, indeed, obvious that if the mode of action on the part of any one such individual which is really most conducive to his own interest diverges from that which is most conducive to the interest of all, then the more completely he is left free to pursue the former end, and the more skill he shows in the pursuit, the more certain it is that he will not promote the latter in the highest attainable degree. Hence, to complete the theoretical argument for *laisser faire*, we require, besides the psychological proposition that every one can best take care of his own interest, to establish the sociological proposition that the common welfare is best attained by each pursuing exclusively his own welfare and that of his family[1] in a thoroughly alert and intelligent manner.

Now this latter proposition has been maintained, in a broad and general way, by the main tradition of what is called "orthodox political economy," since its emergence in France in the middle of the eighteenth century. The argument may be briefly stated thus: Consumers generally—*i.e.* the members of the community generally, in their character as consumers—seeking each his own interest intelligently, will cause an effectual demand for different kinds of products and services, in proportion to their utility to society; while producers generally, seeking each his own interest intelligently, will be led to supply this demand in the most economic way, each one training himself or being trained by his parents for the most useful—and therefore best rewarded—services for which he is adapted. Any excess of any class of products or services will be rapidly corrected by a fall in the price offered for them; and similarly any deficiency will be rapidly made up by the stimulus of a rise. And the more keenly and persistently each individual—whether as consumer or producer—pursues his private interest, the more certain will be the natural punishment of

[1] So far as the interests of children are concerned, we require the further assumption that they can be safely left to the care of parents until the children are able to provide for themselves: but for simplicity I omit this point here.

inertia or misdirected effort anywhere, and the more complete consequently will be the adaptation of social efforts to the satisfaction of social needs.

Now no one who, under the guidance of Adam Smith and his successors, has reflected seriously on the economic side of social life can doubt that the motive of self-interest does work powerfully and continually in the manner above indicated; and the difficulty of finding any substitute for it, either as an impulsive or as a regulating force, constitutes the chief reason for rejecting all large schemes for reconstructing social order on some other than its present individualistic basis. The socialistic interference for which, in the present chapter, I propose to offer a theoretical justification is here only recommended as a supplementary and subordinate element in a system mainly individualistic. At the same time, I think it important to show by general reasoning that—even as applied to a society of "economic men"—the sociological argument above given is palpably inadequate to establish the practical conclusion based on it by the more extreme advocates of the "system of natural liberty."

With a view to methodical clearness, it is convenient to begin by granting the assumption—tacitly made in the general economic argument that I have just given—that the higher market value of products and services consumed by the rich, as compared with those consumed by the poor, represents a correspondingly higher degree of utility to society. I shall presently point out how paradoxical this supposition is: but for formal clearness of discussion it is as well to begin by making it; since even on this supposition it can, I think, be shown that there are several distinct cases in which, under a strictly individualistic system of governmental interference, the individual's interest has no tendency—or no sufficient tendency—to prompt him to the course of action most conducive to the common interest.

§ 2. In the first place, it should be observed that the argument above given, even if fully granted, would only justify appropriation to the labourer, and free exchange

of the utilities produced by labour; it affords no direct justification for the appropriation of natural resources, which private property in material things inevitably involves. Hence, so far as this appropriation of natural resources restricts other men's opportunities of applying labour productively, the appropriation, as we have seen, is of doubtful legitimacy, from the point of view of the strictest individualism. It must, therefore, be regarded as theoretically subject to limitation or regulation, in the interest of the whole aggregate of individuals concerned. How far this limitation and regulation should go must be determined by experience in different departments: but it may be laid down generally that it is the duty of Government as representing the community to prevent the bounties of nature from being wasted by the unrestricted pursuit of private interest. Thus, for instance, Government may properly interfere to protect mines and fisheries from wasteful exhaustion, and save rare and useful species of plants from extermination; and, when necessary, may undertake or control the management of natural watercourses, with a view both to irrigation and to the supply of motive power. And I conceive that measures of a much more sweeping kind in the same direction—including even the complete abolition of private property in land—are theoretically defensible on the basis of individualism; they have, indeed, received the support of thoroughgoing advocates of this doctrine.[1]

[1] The abolition of private ownership of land is not only emphatically advocated in Mr. Herbert Spencer's early treatise on *Social Statics*—which does not altogether represent his later views—it is also suggested as a probable result of industrial development in his later treatise on *Political Institutions*, chap. xv. pp. 540, 541.

I cannot regard as valid the historical reasoning which leads Mr. Spencer to conclude that private ownership of land, having been "established by force" and not by contract, is likely to disappear at a more advanced stage of civilisation. But I quite admit it to be possible that a modern community, while maintaining generally the present merely individualistic character of its laws and institutions, may "resume the communal ownership" of land, giving due compensation to existing owners: though, for reasons which I have elsewhere given (*Political Economy*, Book iii. chap. vi. § 5) I think that the economic disadvantages of such a change would