# SOME CATEGORIES OF CIVIL LIBERTARIAN THOUGHT

IAN DUNCANSON*

## I. HUMAN RIGHTS

How best institutionally to protect human rights is a question which drifts on to the political agenda and then off again.[1] It may be because 'human rights' is the most accurate translation into the esperanto of vote-catching of the Babel of claims made by groups from the radical left to the dotty new right. Perhaps 'human rights' talk indicates that conventional politics is occasionally "gravelled for lack of matter", as Rosalind put, when faced with alarmingly incompatible demands. "Very good orators", she said "when they are out, they will spit, and for lovers lacking – God warn us – matter, the cleanliest shift is to kiss."[2] In Canberra, and now in Melbourne, too,[3] they speak of bills of rights.

I have written elsewhere of the problems and dangers of saddling courts with what are really political controversies.[4] The object here will be to examine critically some of the assumptions commonly made in lawyers' discussions of human rights. Two preliminary points are worth making. In criticising human rights *talk* as it appears in civil libertarian literature, I am not rejecting as worthless the political accomplishments

*LL.B. (Southampton), B.C.L. (Durham), Solicitor (England), Senior Lecturer in Legal Studies, La Trobe University.
For their comments upon earlier drafts I am grateful to Gus Brannigan, Brendan Cassidy, Judith Grbich, Alan Hunt, Valerie Kerruish, Graeme Lowe, Neil MacCormack, Jeff Minson and Kenneth Warner.

1 J. McMillan, G. Evans and H. Storey, *Australia's Constitution – A Time for Change?* (1983); Evans' replacement by Bowen as Attorney-General seemed to kill the issue off: see *The Age* 17.12.84, "'Goodbye' to Constitutional Reform". But it may not yet be dead: see *The Age*, 13.5.85, "Bowen's Bill of Rights is on the way".

2 *As You Like It* IV: (i).

3 *The Age*, 15.5.85: "Victoria to Consider Human Rights Laws".

4 I. Duncanson, "Balloonists, Bills of Rights and Dinosaurs" (1978) *Pub L* 391; "Legal Needs in England and Wales - A Retrospect" (1982) 5 *UNSWLJ* 113.

of the liberal democracies. Rather, I suggest that if we abandon some of our preconceptions we might envisage means of adding to those accomplishments.[5]

Secondly, in seeking to uncover misconceptions, I am not making the mistake that seems now and then to surface in critical legal studies writing, of believing that the exposure of 'contradictions' in the arguments of one's opponents will bring the opposition crashing down.[6] On the contrary, material forces make fairly opportunistic use of arguments, and contradictions often become an advantage, as a number of commentators and critics have noted.[7]

I have chosen to focus upon the use made of four categories of civil libertarian discourse, namely the individual, community, freedom, and regulation, because their operation as signifiers of common sense states of affairs confers an apparent solidity and utility upon them. After all, individuals exist and form communities, and freedom and regulation seem so palpable that we can quantify them and balance one against the other. I hope to demonstrate that things are not so simple.

## II. THE INDIVIDUAL

The revolution in political thought vividly represented in English by Thomas Hobbes prioritised the individual and set the terms of debate for much later discussion. Hobbesian man is riven by his nature. He has the wild impulses and antisocial instincts of a solitary and self-contained animal, but the physical and intellectual needs of a gregarious and social being. Says Hobbes: "men have no pleasure (but on the contrary a great deal of grief) in keeping company. . ."[8] Alone man cannot prosper, but nor can he, in his Hobbesian form reconcile his proclivities with the necessity for social co-operation.

Hobbes had a solution, one which he considered he had discerned, imperfectly grasped, in the social institutions created thus far, and in man's contradictory nature. Man desired to survive, above all, and was possessed of reason, as well as being lamentably quarrelsome. The desire to survive could be guided by reason into substituting complete subordination for the perpetual insecurity of freedom. Obedience to a sovereign had to be total, he thought, because anything less produced

5 There is an attempt to explore the question of how civil liberty might be expanded by transcending traditional modes of thought about it: V. Kerruish and I. Duncanson, "The Reclamation of Civil Liberty" *Windsor Yearbook of Access to Justice* (forthcoming).

6 See D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 *Buffalo L Rev* 205 for at least an apparent example of this. There are criticisms in Allan Hutchinson and Patrick Monahan, "Law Politics and Critical Legal Studies – The Unfolding Drama of American Legal Thought" (1984) 36 *Stan L Rev* 199; Philip Johnson, "Do You Sincerely Want to be Radical?" (1984) 36 *Stan L Rev* 247. Also, see Alan Hunt, "The Theory Method and Politics of Critical Legal Theory" (1985) 9 *Bull A Socy Legal Phil* 26.

7 Hunt, note 6 *supra;* F. Burton and P. Carlen, *Official Discourse* (1979); J.B. Thompson, *Studies in the Theory of Ideology* (1985).

8 T. Hobbes, *Leviathan* ch.13; see also T. Hobbes *De Cive* (1651) ch.I.

just the chaos and uncertainty that sovereignty exists in order to obviate. The society in which Leviathan commands puts to positivistic death the unstructured relativism[9] and war of all against all of the state of nature, in which everyone and hence no-one is free, supplies a lodestone for the wavering compass of moral science and justice and opens up the only possibility of commodious living. Through obedience comes fulfilment.

Individual fulfilment in the Kantian tradition is somewhat different. The problematic delineated by Hobbes remains throughout the history of liberalism, nevertheless, as the place of the boundary between the individual and the community. Dworkin refers to

> the vague but powerful idea of human dignity. This idea, associated with Kant but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.[10]

In Kant, as in Hobbes, the individual is incomplete alone. A community is required, and the community in turn requires regulation. However it is not, for Kant and the later liberal tradition, just *any* community and *any* regulation which can render the individual a whole being.

> [R]ational beings all stand under the law that each of them should treat himself and all others never merely as a means, but always at the same time an end in himself. But by doing so arises a systematic union of rational beings under common objective laws – there is a kingdom.[11]

A curious problem emerges. We cannot draw appropriate boundaries around an incomplete individual. Yet the individual is always incomplete until he is a member of a community. By the time he/she is completed by membership of a community it is too late to draw boundaries between the two by reference to nature. The individual of the kind we want – that is, driven to, and fulfilled by, association with others, yet at the same time unassociated – can in the nature of the argument, not exist. It is like the schoolboy joke about the luminous sundial.

How is it possible to separate the two conceptually? Since they are important as distinct categories to the kind of argument Kant and his successors wished to entertain, it is obviously of importance to them to try. Kant attempts a definition in terms of "the synthetical unity of consciousness".

> [T]he . . . representations which are given in an intuition would not all of them be my representations, if they did not all belong to one self-consciousness. . .

9 T. Hobbes, *Leviathan* ch.26; T. Hobbes, *Man* ch. XIII.

10 R. Dworkin, *Taking Rights Seriously* (1977) 198.

11 Immanuel Kant, *Critique of Practical Reason and Other Works on the Theory of Ethics*, translated T.K. Abbott, (1873) 52. See H.J. Paton, *The Moral Law, Kant's Groundwork of the Metaphysic of Morals* (1948) 95.

> [F]or the reason alone, that I can comprehend the variety of my representations in one consciousness, do I call them my representations, for otherwise I must have as many-coloured and various a self as the representations of which I am conscious.[12]

Self-consciousness determines being. The substance of the representations which self-consciousness is able to unify do not themselves determine being, however, by virtue of the moral status of Kant's individual, who is free:

> to be independent of determination of causes in the sensible world (and this is what reason must always attribute to itself) is to be free.[13]

Man is free because only the physical part of him belongs to the phenomenal world with its presupposed determining laws. Consciousness, then, in its Kantian unity, partakes of both the physical and the non-physical.

Before briefly addressing the Rawlsian alternative to Kant's metaphysics, it is worth noticing that the idea of the unity of consciousness has been under theoretical investigation since Freud. Just as experiments with perception raised doubts about the reliability of sense-data, undermining strict empiricism from an unexpected angle,[14] so Freud's observations of the lapses and rationalisations of the conscious mind[15] suggest a much more variegated self than Kant's moral epistemology seems to require. The possibility exists, in short, that the individual cannot be straightforwardly identified with a unified consciousness.

Stanislaw Lem suggests that unity of consciousness may be an illusion necessitated by the organism's information-processing and decision-making role. Self-consciousness he characterises as an evolutionary freak.

> It happened, simply, that certain very old evolutionary solutions to problems of control and regulation common to the nervous system, were "carried along" up to the level at which anthropogenesis began.[16]

A biological meta-system, in other words, evolves in order to control and coordinate lower functions. The larger and more complex the array of lower functions the more complicated the meta-system has to be, until it reaches bio-chemical upper limits. What happens then, as investigators of brain damage have discovered, is that the system develops strategies for processing more information than it can cope with. It takes short cuts, and filters and simply censors the input. Stimuli

12 Immanuel Kant, *Critique of Pure Reason,* translated J.M.D. Meiklejohn (1934) 94-95.

13 Kant, note 11 *supra,* 72.

14 B. Barnes, *Scientific Knowledge and Sociological Theory* (1974) 20; R. Gregory, *Mind in Science* (1983).

15 The postulate of the unconscious "... is *necessary* because the data of consciousness have a very large number of gaps in them... physical acts often occur which can be explained only by presupposing other acts, of which... consciousness affords no evidence." S. Freud *On Metapsychology: The Theory of Psychoanalysis* translated J. Strachey, (1984) 168. See 167-210 generally.

16 S. Lem, "Non-Serviam" in Douglas R. Hofstadter and Daniel C. Dennett (eds), *The Mind's I* (1981) 304.

may be ignored and the unfamiliar and unwelcome assimilated to the familiar and comfortable. Communication with other consciousnesses is vital, but only detailed psychoanalysis serves to reveal the process at work. The quest for the individual as an immanent product of consciousness may therefore be fruitless, so unstable is it and so dependent on constant reorientation from 'outside'.[17]

The individual has a vital role in John Rawls' political morality. Rawls seeks to avoid Kant's rationalist metaphysics. Justice, he says, "is the first virtue of social institutions, as truth is of systems of thought".[18] It is as an instrument for arriving at that result that the individual functions. Occupancy of a particular time and place, gender biography and physique, as well as the more conventionally adventitious items such as wealth and power, can all be stripped away in the Rawlsian system, still leaving, he claims, a meaningful individual, capable of making decisions and moral judgements.

The bereft individual, behind its "veil of ignorance" occupies "an initial situation of fairness and [defines] as just those principles that rational parties subject to its conditions would agree to".[19] This is a "procedural interpretation of Kant's conception of autonomy and the categorical imperative".[20] Thus both rationality and the individual are decontextualised. As Sandel puts it, we are left

> with a subject *so* shorn of empirically-identifiable characteristics (so 'purified', in Nozick's words), as to resemble after all the Kantian transcendant or disembodied subject Rawls set out to avoid.[21]

Given the way in which the problem for civil liberterian thought is structured in the beginning – in the beginning there is the individual, chronologically, or conceptually, or politically, and its natural integrity must be defended – it is not surprising that the individual must be specified first: but it is equally unsurprising that an impenetrable metaphysics is the result.

## III. THE COMMUNITY AND THE INDIVIDUAL

Individuals must, the tradition from Hobbes agrees, associate in order to be individually fulfilled. So the community is more than the sum of its unassociated parts . . . It is difficult to assess the achievements of a particular association, and to obtain critical leverage within the terms of the problem confronted by conventional civil liberty because if there is no settled account of that fulfilled or completed individual prior to its association, the appropriate design for a fulfilling community

17 See A. Wilden, *System and Structure: Essays in Communication and Exchange* (1977) esp. ch.V.
18 J. Rawls, *A Theory of Justice* (1972) 3.
19 M. Sandel, *Liberalism and the Limits of Justice* (1982) 24.
20 *Id.*, 25.
21 *Id.*, 79.

cannot be drawn. Without a knowledge of man's destiny, how can any community be criticised for impeding his attainment of it?

The attempts that have been made are not in the end convincing. To Hobbes' argument, reference has already been made. He suggests that rational calculation would first lead every unassociated individual - in the state of nature – into a suspicion of every other.[22] One unidentified malignant casts reasonable suspicion on everyone, as whodunnits and arms limitation talks testify. But equally, he says, rationality, "the peculiar and true ratiocination of every man concerning those actions of his which may either redound to the damage or benefit of his neighbours"[23] draws one to the perception of natural law precepts, the first and most important of which justifies the surrender of every man's rights to everything, and the investment of all rights and complete sovereign power in the city or civil society, represented by the king or a council.

Hobbes' intuitions about the nature of man may or may not be persuasive, but his mode of demonstrating them is not. For the picture he paints of man in the state of nature is an extrapolation backwards from the picture he paints of man in a particular society[24] – a society in transition and some turbulence. Many of the traditional certainties of authority and deference have been challenged: indeed, during the period in which *Leviathan* was being written, the revolutionaries had executed the king. Enclosures, evictions, and the cumulative consequences of the emergence of agrarian capitalism served to remove England yet further from a state of nature.[25] Hobbes' recommendations, or as he would have preferred to see them, deductions, are suspect by virtue of his starting place in the nature of presocial man.

Rationalist accounts[26] of community as they appear in Locke and Dworkin identify fundamental social ends underlying the various institutions of political organisation. Thus Locke takes

> *[p]olitical power* . . . to be *a Right* of making Laws with Penalties of Death, and consequently all less Penalties, for the Regulating and Preserving of Property. . .[27]

However, even if Tully's interpretation of Locke's use of the term "property" were accepted,[28] so as to align Locke with Colonel Rainborough in "proclaim(ing) that men have a natural property in their liberty and hence have an interest in determining the law of the kingdom",[29] even so there remains the problem of assigning appropriate "properties" to individuals. In fact Locke's political society merely

22 T. Hobbes, *De Cive* (1651) Author's preface.
23 *Id.*, ch.II.
24 *Id.*, ch.I.
25 See C.B. MacPherson, *The Political Theory of Possessive Individualism* (1965) ch.II.
26 Rationalist in the sense of basing political obligation and moral truth upon insight into the relationship of transcendental abstract categories.
27 John Locke, *The Second Treatise of Government* (P. Laslett ed.) (1963) ch.I para. 3.
28 J. Tully, *A Discourse on Property: John Locke and his Adversaries* (1982) 174.
29 G.E. Aylmer, *The Levellers in the English Revolution* (1975) ch.8.

amends the threat posed by its absence to men who have already established the boundaries between the individual and the community, and whose trajectory towards what Macpherson terms "possessive individualism" has assumed an inevitability.

Community is evaluated, in the Lockean tradition, in terms of whether the government in whose trust it reposes, carries out the trust in favour of the associated individuals. Whether the community itself is dissolved in the event of a serious breach of trust, or merely the government, is not clear.[30] Hume draws attention to the somewhat donnish nature of the idea:

> Were you to preach in most parts of the world, that political connexions are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you, as seditious, for loosening the ties of obedience; if your friends did not before shut you up as delirious. . .[31]

Ronald Dworkin makes an analytical error against which Marx counsels in the *Grundrisse,* [32] namely that of taking a category which is already of a high level of abstraction as a datum. Marx's example is population. Dworkin's is the community which he assumes is isomorphic with the nation-state. In the Hobbesian tradition he considers the individual-community tension, although, like Locke, coming to vastly different conclusions.

Thus, he argues that individual rights can precede legislative or judicial enunciation of them, and survive denial by those agencies.[33] For the purposes of investigation and exposition he adopts a procedure not unlike the one referred to in some philosophies of science of the deductive-nomological, or 'covering-law' method.[34] Understanding political society involves, he says, studying "enterprise as a whole"[35] and establishing those general principles according to which its institutions, practices and rules might be explained and justified. For example the United States Constitution rests in his view, "on a particular moral theory" which can be used to provide the right answer to any question about the meaning of a statute, or a judicial decision, or in any dispute. The "moral standards of a community" in the lights of which laws should be interpreted or evaluated are "moral principles that underlie the community's institutions and laws."[36]

A standard objection to deduction-nomological procedures is that they yield generalisations rather than explanation. Thus one may subsume the arrival of the 10.15 tram in St. Kilda under a general

30 P. Laslett, "Introduction" in P. Laslett (ed.), J. Locke, *Two Treatises of Government* (1963) 129.

31 David Hume, "Of the Original Contract" in A. MacIntyre (ed.), *Hume's Ethical Writings* (1965) 258-259.

32 Karl Marx, *Grundrisse* (translated M. Nicolaus (1973)) 101.

33 Dworkin note 10 *supra,* chs 7 and 12 in particular.

34 See C.G. Hempel, *Philosophy of Natural Science* (1966) ch.5.

35 Dworkin, note 10 *supra,* 105 and ch.4 generally.

36 *Id.,* 79 and ch.3 generally.

statement about the regularity of the traffic on the rails: in effect, the tram arrives today at that time because it always does. But that is hardly an explanation.[37] The Dworkinian observer subsumes phemonena – and the process of selection is something to which further reference will be made – such as institutions, laws, and moral convictions, under general covering laws. These he calls principles. They can be used to generate "right answers", and to distinguish true from false among putative members of the set of community morals.

A first objection to Dworkin's method, then, is that a 'covering-law' statement of a general kind which entails specific instances is not an explanation. A second objection relates to the means by which he chooses the phenomena from which to generalise. At the most basic level, it is slightly odd to assume that a nation-state, whose boundaries may well result from some long-forgotten historical contingency, and whose population may number tens or even hundreds of millions, forms a community.[38] Nor does the rhetoric of patriotism fit easily with liberalism.

If one were to persist with the search for a set of underlying moral principles, however, despite the oddness of the endeavour, it is by no means obvious that the place to look would be constitutional decisions reached by an elite judicial institution, together with legislation, constitutional documents and the like. Empirical evidence of the effects of the phenomena studied would be vital. In the case of the United States, since it is the source of Dworkin's observations, if "the moral principles which underlie the community's institutions and laws" are as Dworkin believes them to be, one is hard-pressed to understand American foreign policy, Eisenhower's "military-industrial complex" and the antics of such bodies as the F.B.I. and the C.I.A.

More seriously, perhaps, the institutions to which Dworkin pays attention, whilst they could on a generous view reveal the moral principles of an elite among the ruling class, are scarcely sensitive to, or representative of, the priorities, morality or aspirations of all groups in the population unless the United States is a most unusual place. Dworkin seems to allow for this, although without appreciating the significance of making the allowance, when he admits that the task of discovering the community's morality in form of principles to be translated into legal rules is a task for experts in law. There is a similarity here to Coke's account of law as "right reason", but not the

37 See F. Suppe, *The Structure of Scientific Theories* (2nd ed. 1977) 171-2, 619 *ff;* R. Bhaskar, *A Realist Theory of Science* (1978) 141-2; P. Fayerabend, *Science in a Free Society* (1978).

38 See Sandel, note 19 *supra,* 146: "there is no such thing as 'the society as a whole' or ' *the* more general society'... in the abstract, no single ultimate community whose pre-eminence just goes without argument... Each of us moves in an indefinite number of communities, some more inclusive than others."

right reason of the common man, rather that refracted through the experience and learning gained by studying law.[39]

And in fact lawyers are not extra-social oracles, but derive their authority from the social organisation of which they are part. The norm governing judicial decision-making, as MacCormick points out

> is accepted, and its continuing observance is willed, by the substantial majority of at least the most powerful and influential groupings in our society – by the self-same people whose acceptance of the judges ... constitutes and sustains their legitimacy and authority as judges ...[40]

Marx said long ago that the ruling ideas are the ideas of the ruling class. But it is a long way from showing that an idea "rules" to the conclusion that it is "of" the community.[41] It may rule because it is continually mitigated and tempered during the course of its progress through bureaucratic apparatuses, because its form is cynically honored and its substance ignored, because its recipients, whilst not sharing it have no power to alter it, or because it is the subject of negotiation with the populace, as Brewer and Styles[42] demonstrate was the case with central government laws in seventeenth and eighteenth century England. Matrimonial law was governed in England by Hardwick's 1753 Act, and by the christian churches, but recent studies make it clear that among the lower orders marriages and consensual divorces were often conducted according to local usages.[43]

The point may be plainer if we think of organisations other than nation-states. Even when these have been formally created, the explanatory power for the observer, and actual "hold" upon the organisation, of the rules, purposes and priorities stipulated as part of the formal creation, are likely to be loose.[44] A capitalist corporation may have an objects clause in its constitution, some need to secure a profit (which will not be referred to in its constitution), and various managerial goals, some of which may be disavowed should they become public knowledge. The people in the typing pools and the shop floors may see the corporation in purely instrumental terms, as a place to socialise and draw wages. It may be a source of job satisfaction, but possibly for reasons not in line with corporate policy as expressed by the foreman.

---

39 See MacCormick's description, "Dworkin as Pre-Benthamite" in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (1984) 182.

40 Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 56.

41 There is a criticism of the idea that ideology can somehow not merely preempt criticism by the rules, but be one of the primary means by which people are in fact ruled, in N. Abercrombie, S. Hill and B. Turner, *The Domimant Ideology Thesis* (1980).

42 J. Brewer and J. Styles, *An Ungovernable People* (1976).

43 See J.R. Gillis, "Conjugal Settlements: Resort to Clandestine and Common Law Marriage in England and Wales 1650-1850" in J. Bossy (ed.) *Disputes and Settlements: Law and Human Relations in the West* (1983) 261; S.P. Menefee, *Wives for Sale: An Ethnographic Study of British Popular Divorce* (1981). On a more general point about the centrality or lack of it, of legal rules, see G. Rubin and D. Sugarman (ed.), *Law Economy and Society: Essays in History of English Law* (1984) "Introduction".

44 See S. Clegg and D. Dunkerley, *Organisation, Class and Control* (1980).

A factory which makes weapons may exist, for some, to help defend the nation, for others to facilitate an aggressive foreign policy and for still others to make the ultimate holocaust inevitable. It may have been built in order to disguise unemployment, as a favour to a legislator, or as part of a union deal. The point is whose view of the 'enterprise' taken as a whole is to prevail? How can one say that a particular management decison is out of character without a privileged position from which to speak?

There is a connection with the exercise of power. To speak for an enterprise as a whole is undoubtedly to exercise power, and the authority accorded the speaker is a measure of power, as is the process of making one speech more plausible than another. Official discourse, where the state, through its agents, speaks for itself, reveals something about power, but offers analysis of discursive fissures, lacunae and contradictions rather than by a reception of authenticity.[45]

The juristic model of a political community as governed hierarchically by rules, or underpinned by moral principles ignores the connection of meaning and power, or else assumes that power descends in accordance with a typology of organisation constructed within a particular model of 'rationality', and that meaning unproblematically and spontaneously arises from a governed community. Hart's "we" who use the term law, and Dworkin's "organic morality" which leaves its fossilised traces in constitutional arrangements for judicial fossickers to dig out and smelt into right answers, lead to the kinds of conclusions to which Atiyah is currently drawn.[46]

Atiyah believes that the rule of law depended upon a social and political consensus which is rapidly fragmenting in the contemporary United Kingdom. Perhaps without his appreciating the similarity, his argument parallels that of Marxists who see bourgeois liberty as a feature of successful high capitalism, and associate oppression with phases of early accumulation and late crisis. Atiyah's assumption that shared values once made possible the effectiveness of a coherent machinery of law is without any basis in history as it exists outside Whig history books,[47] but has evidently conservative leanings, implying a threat of disorder beyond the boundaries of centralised officially understood and mediated reason. Behind the elaborate outworks of his philosophy,[48] Dworkin seeks to represent America on behalf of an intellectual elite now marginalised by material forces.

45 Burton and Carlen, note 7 *supra.*

46 P.S. Atiyah, *Law in Modern Society* (1983).

47 Efforts to impose a "British" identity were never successful: see Tom Nairn, *The Breakup of Britain* (1977). As to shared values, see J. Foster, *Class Struggle and the Industrial Revolution (1974)* and the critique in G.S.Jones, *Languages of Class 1832-1982* (1983) 25 *ff;* see also G.S. Jones, *Outcast London* (1971).

48 And there are overtones in Dworkin of both Blackstone and Devlin.

## IV. THE FREEDOM OF THE INDIVIDUAL

If the individual is a problematic category, the freedom of the individual must also present difficulties for analysis. This is quite clear since, as MacCormick says:

> Civil liberty is precisely the sphere of freedom to make and pursue one's individual and joint plans in the area of indifference of laws.[49]

In this context freedom is, he points out, negative, an absence of restraint. But for the absence of restraint to be intelligible there must be some prior disposition or tendency with which restraint interferes. Water in a blocked pipe may be freed if the obstruction is below the water, provided the event occurs in this world, where gravity operates in a downward direction and not in a logically possible world in which it does not.

The man in Hart's scheme,[50] who has a right to be free *qua* man although not considered to have existed as a pre-social being, is believed to have a conceptual existence apart from a community. He enters it, conceptually at least, as a projectile might enter a field of observation, from outside, with an autonomously given trajectory, deflections from which might be measured and counted as interference with an original path, in need of justification in those terms.

The individual, to recapitulate the earlier section, is not fully constituted without the community. For civil libertarian thought this is not because, without communities of language, specification of individuality cannot occur. It is because the individual is specified – the "problem" – for civil liberties – as that which by natural necesssity must be social, part of a community. Whatever might be the disposition of beings which are unsocial, and therefore incomplete as individuals, is of no logical relevance to a different and social being which is a member of a community. The "individual" with which civil liberty is concerned is a being which is a member of a community and it is therefore pointless to speak of characteristics or dispositions which are prior to the community and belong to a different kind of being.

Given the way in which it constructs the problem, civil liberty has before it only a social individual, one whose boundaries and aspects are provided within the community rather than in the course of nature. In that case, if there is no naturally-delineated individual, no discrete being whose ontogenesis should suffer no interference from the community, nothing, in short, which is not imbricated in a highly complex social configuration, not only is the idea of a natural right to be free hard to comprehend, but it is difficult to see what the free/unfree dichotomy can contribute to understanding.

---

49 Neil MacCormick, *Legal Right and Social Democracy* (1982) 41.

50. In A. Quinton (ed.) *Political Philosophy* (1967). Hart has subsequently expressed doubts about this essay in H.L.A. Hart, *Essay in Jurisprudence and Philosophy* (1983) "Introduction".

The question of what kind of individuality should be encouraged, in other words, what kind of political organisations should be constructed and maintained, cannot be answered by reference to nature, but is a political question. It always has been, but politics has hitherto focused on the construction of natural inevitability, and sexism, racism, and ideologies of class among others have masqueraded as reactions to regrettable necessity and the caprice of circumstance.[51]

Among liberals who wish to make civil libertarian claims there is resistance to the individual as a product of social organisation for two reasons. In the first place, social construction suggests the possibility that people may be produced like cars in a Toyota factory, identical to one another. This in turn invokes the spectre of determinism. If people are identical, or if they are made by outside forces they can, it is considered, neither claim the credit for their good deeds – in the form, usually, of material rewards – nor take the blame for their misdeeds.[52]

The answers to these objections are partly to be found in current scholarship, and partly in social practices which presently find acceptance among liberals. First, modern accounts of the complex interaction of circumstances within which both the species and the individual develop, stress the role of culture and defy reductionist analogies with mechanical production. Thus Washburn and Lancaster:

> [F]rom the immediate point of view (the) brain makes culture possible. But from the long term, evolutionary point of view, it is culture that created the human brain.[53]

The enlargement of the brain seems to have followed upon the development of tools by early hominids, and the spread of tools, which conferred an evolutionary advantage upon precise motor skills, was a process of learning and communicating which took place within the cooperative networks necessitated by the practice of hunting and gathering.[54] The latter, as re-evaluation of Aboriginal culture has made clear, cannot be an opportunistic or parasitic occupation, but demands learning and the transmission of systematic knowledge.[55]

So large has the brain become that successful births are possible only at a relatively early stage of foetal growth. Nurture and social interaction begin at an earlier stage for humans than for other animals,

51 See S.J. Gould, *The Mismeasure of Man* (1981); S. Rose, L.Kamin and R. Lewortin, *Nor in Our Genes: Biology, Ideology and Human Nature* (1984).

52 Blame as responsibility now occupies an important place in conventional wisdom. But responsibility is no more functional to particular social needs nor any more coherent than punishment or incarceration.

53 S.L. Washburn, "Speculations on the Interrelations of the History of Tools and Biological Evolution" in J.N. Spuhlan (ed.), The Evolution of Man's Capacity for Culture (1959) 31(1) *Human Biology* 29, cited in C. Woolfson, *The Labour Theory of Culture* (1982) 76.

54 See Woolfson, note 53 *supra;* R. Leakey and R. Lewin, *People of the Lake* (1979).

55 On which, see *e.g.* G. Blainey, *The Triumph of the Nomads* (1980).

and continue for longer, reinforcing the importance of culture in the creation of identity.[56]

Of the unborn child, of his time and place, Althusser says

> it is certain in advance that it will bear its Father's Name and will therefore have an identity and be irreplaceable. Before its birth, the child is therefore always – already a subject, appointed as a subject in and by the specific familiar ideological configuration in which it is 'expected' once it has been conceived.[57]

The constitutive forces of gender, religion and physical and social geography, too, among others operate to preclude some experiences and render inappropriate certain reactions to the world before the child has a self-conscious awareness, let alone capacity for critical appraisal.[58]

The process by which an individual recognises him or herself subsequently, through education, religion, nationality or ethnic affiliation is made almost infinitely complex if we add the notion of feedback.[59] Interpellation,[60] moreover, the term Althusser derived from Lacan to designate the individual's being placed (or "hailed") and coming to recognise itself, and understand itself in a particular way, is multidimensional. A human does not belong merely to one community but is hailed, many times over, and not by intersecting or interlocking procedures, but by a vast number of them, many of the demands of which may be logically incompatible with those of others.

Consciousness, insofar as its disorders diagnosed by Freud and by subsequent analysts like Laing, illuminate its character, seems to function much as Lem suggests. It is under constant siege, perpetual revolution, changes of control, and quite without unity.

If the complexity of chess defeats completely accurate prediction, the remarkable sequence of interactions represented by human community ensures that, although many general principles can be suggested, and *ex post facto* explanations offered, prediction can be excluded without resort to mystifications like the free will/determinist dichotomy. Freedom of the individual, the exercise by the individual of its free will, is meaningless insofar as it purports to refer to asocial, precommunity dispositions and attributes of the individual.

There is some degree of recognition of this state of affairs in contemporary criminal law. Whilst defences to a criminal charge admit only some types of obvious coercion and so-called 'automatism', considerations of the kinds of treatment appropriate for a convicted offender may include an examination of the social background of the person, and a plea in mitigation may include an account of the

56 Gould discusses this characteristic of human development in S.J. Gould, *Ever Since Darwin – Reflections in Natural History* (1978) ch.8.

57 L. Althusser, *Lenin and Philosophy and Other Essays* (1971) 164-5.

58 See S. Rowbotham, *Women's Consciousness, Man's World* (1973), *e.g.* the point is not that there is a natural, neutral or value-free alternative: far from it.

59 Wilden note 17 *supra*, chs VIII and XII.

60 There is some discussion of this in A. Lemaire, *Jacques Lacan* (1979) ch.15; see also R. Coward and J. Ellis, *Language and Materialism – Developments in Semiology and the Theory of the Subject* (1977) ch.6.

environment in which the accused came to make his or her decision to commit a criminal act. Moreover, rehabilitation regimes, although very crudely conceived, do proceed from the presumption that the behaviour of a person may be significantly affected by the social situations,and the perspectives they allow.

Just as with the Kantian arguments to which I referred earlier, in which the pre-associated individual is sought in order to postulate limits to fruitful association despite the admission that it is only *in* association that complete individuality emerges, so with the regulation of behaviour. In order to justify blame, the individual has to be deemed capable of 'free choice' but the subsequent treatment of the person admits in part that he or she was not free and aims to create future conditions in which a more socially accepted pattern of behaviour will be adopted.

A more consistent and realistic picture of the person is suggested by Hirst and Woolley:

> The social construct – 'person' – is by no means a unity in the way 'consciousness' is held to be in Cartesian philosophy, for example. It is constructed out of the warp and weft of social relations, with all their inconsistencies and just plain contradictions.[61]

Why the unhelpful metaphysics of freedom and the natural and unified individual became the dominant mode of understanding is a question that can be fully answered only by an examination of the complex material changes that have occurred in western society since the Middle Ages. Ideas become acceptable in determinant material conditions.

At the level of ideas, however, one can trace the rise to predominance of doctrines of responsibility and the unity of the individual to the demise of the "Great Chain of Being".[62] As the unity of the external universe fragments into a confusing and threatening multiplicity of apparently inexplicable phenomena and events, so it gains a new unity as that which is guaranteed by the individual's actions of knowing and perceiving.[63]

In painting, the application of perspective during the Renaissance elevated human perception of the world into an objective conception independent of any particular act of seeing.[64] In philosophy, Descartes founded all knowledge upon the indubitability of the self – albeit not a secular indubitability, but one founded in turn upon God's existence. Political obligation then became explicable in terms of individual

61 P. Hirst and P. Woolley, *Social Relations and Human Attributes* (1982) 43.
62 E.M.W. Tillyard, *The Elizabethan World Picture* (1972); W.H.Greenleaf, *Order, Empiricism and Politics – Two Traditions of English Political Thought, 1500-1700* (1964).
63 A. Koyre, *From the Closed World to the Infinite Universe* (1972).
64 E. Panofsky, *Meaning in the Visual Arts* (1983) chs 1 and 6.

calculation.[65] The self having, as it were, arrived, irreducible and enigmatic, and with a capacity for decision-making, plainly had dispositions, that might be the subject of moral inquiry. It was with this apparatus that much modern political theory began.

## V. FREEDOM AND REGULATION

The existence of laws as distinctive kinds of rules is important in civil libertarian thought, in which legal regulation must hold the line if anything can, between the community and the individual.

If the concept of the natural individual is rejected in favour of a notion of individuality as a field defined by social-political processes, the question for civil liberty is not, how can a presupposed "natural" person be protected from encroachment, but instead: what kinds of individuality are materially possible in a given context; what kinds are desirable and for what reasons; and what are the implications for the political ordering?

These are the questions actually embedded in ordinary civil libertaran discourse anyway, for as I have suggested, the 'natural' individual is presently the product of current political debate. The construction of individuality is not a massive svengalian plot, but the multi-centred process by which a person becomes aware of its many-faceted possibilities, and begins the social business of growing into them, and enhancing them by combining them in unique ways. The politics of what possibilities are desired is what civil liberty can become, once freed of traditional preoccupations.

Some of those preoccupations have been examined. The fourth and final one to be considered now is that of regulation, specifically legal regulation, and whether it may serve the political ends envisaged. I do not believe that it can, because, as I have argued elsewhere,[66] law is a highly idealised category of thought behind which shelters fragmented practices of various kinds.

In its idealised form it is conceived of as rules enunciated at a high level in a functioning political order, usually in general terms, and becoming less general and more specific in accordance with "secondary" rules, towards the points of application to legal persons. It is the framework and the formal dimension of the sociological phenomenon of the state.[67]

65 And the idea of the state as impersonal and distinct, at the service of calculation, emerges. This is not to ignore the contribution of Italian humanism. See J.G.A. Pocock, *The Machiavellian Moment* (1975); Q. Skinner, *The Origins of Modern Political Thought* (1979) 2 vols.

66 I. Duncanson, "Moral Outrage and Technical Questions – Civil Liberties, Law and Politics" (1984) 35 *NILQ* 153.

67 Such is the scheme with which Raz works in *e.g.* J. Raz, *The Authority of Law* (1979).

So long as it is *generally* effective – leave aside corrupt or incompetent officials – law so characterised may sustain a political practice of one sort against another. As MacCormick argues,[68] it will not guarantee a just society but it can provide the basis for one, just as, with a different content it may provide the basis for a dictatorship.

But is law like this? Hart begins his analysis of the concept of law[69] with the suggestion that "how we use the term" be considered. He overlooks the possibility that there may be more than one "we" and more than one usage. When a regulation as a complex of rules emerges in the form of a legal instrument – a statute, an administrative regulation, a judgment or a by-law or a company regulation – its meaning may be unclear at the outset. The motives of those in whose name it is authorised may be mixed and contradictory, as with a multi-judge court, or a legislature with several hundreds of members.

Jurists often give the impression that the judicial 'implementation' of rules to an extent solves the problem of uncertain meaning. The judges, applying rules, exercising discretion, or inferring their answers from community principles, give a privileged meaning to the instrument – in jurisprudential text books. Outside those books meaning is a practical process of negotiation. A legal rule is introduced into a milieu, say, of internal bureaucratic politics, and forms part of the tactical calculations used by opposed groups. It operates within a different context when outsiders and the bureaucracy negotiate, and since they will often have quite opposed goals the practical meaning of the legal rule will vary once again, in accordance with the current relative power of the opponents.

Production of meaning in the course of forensic theatre has been documented by several writers.[70] Its production elsewhere is more diffuse, and takes place not merely through overt contests, but, as Lukes[71] and Benton[72] suggest in their analyses of power, in the construction of the agendas over which contests occur, and of course, in the construction of consensus which precludes contests.

Meaning, then, is a much more complicated and dynamic process than jurisprudential preoccupation with the single-frame judicial moment permits it to understand. Nor is meaning innocent, or detached from even broader movements of social relations, which returns us to the original question, which is whether a particular set of political practices and beliefs may be protected by means of legal regulation.

---

68 Note 49 *supra*, ch.3.

69 In H.L.A. Hart, *The Concept of Law* (1961).

70 P. Carlen, *Magistrates' Justice* (1977); D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981).

71 S. Lukes, *Power – A Radical View* (1972).

72 Ted Benton, "Realism, Power and Objective Interests" in K.Graham (ed.) *Contemporary Political Philosophy* (1982).

The answer has to be extremely qualified. Meanings are generated in courts through the mediation of professionals by reference to what everybody knows, to commonsense, or to the man – always the man – who is reasonable. Plainly there are limits implied by the material and specific organisation of society to the range of meanings: mere homelessness in an urban winter cannot possibly 'necessitate' occupancy of empty housing stock in contemporary London and thus provide a defence in an action of trespass.[73] On the other hand predictability is often easier to establish after the event. There was no doubt, afterwards, that Lord Mansfield had to free the alleged Somersett because slavery is unknown to the common law.[74] And, of course, the juridical equality of persons is, we are told, fundamental to the ideology of liberal capitalism, although it may be necessary to treat that generalisation with as much scepticism as any other.

In the more usual settings for regulatory activity it is tempting to argue that the exigencies of a mode of production translate themselves into priorities which cannot be ignored. In a general way it is true that rules seldom come as single spies, and more often in battalions, and are given meanings in terms of overall planning, budgetary allocations, personnel levels, career structures and ambitions, and particular interorganisational or interpersonal relations. These in turn relate back to a social structure which distributes resources ultimately according to capitalist rather than feudal or social principles.

One might wish to argue from a Marxist perspective, that meaning is constructed so as to be functional to the preservation of the existing relations of production: and indeed to invoke feudalism or capitalism is to point to a complex of discursive politics characterisable in one way rather than another. To separate out rationality, ethics and assorted political – including domestic, religious and educational - practices, and to confer upon them mechanical tasks supportive of a conceptually distinct economic function is misleading. Economics is not about relations among things, or between people and things, but among individuals. We shall not find capitalism in any social formation distinct enough to justify analysis.

Instead we can find a constellation of political discourses, fragmentary, comprehensive, incoherent and self-consistent. It may be possible to disassemble and reaggregate components as ethics, economics, literature and so forth, depending upon the purpose. But if discourses 'hail' or interpellate individuals, and individualities settle

73 *London Borough of Southwark* v. *Williams* [1971] Ch 734.

74 *The Case of James Sommersett* (1772) 20 *State Tr* 1, cited in A. Lester and G. Bindman, *Race and Law* (1972) 31. The English courts were concerned about depriving slaveshippers, slave-owners and others of their property. The law of the southern states of the U.S., Bills of Rights notwithstanding, had no problems with the concept of humans as property. J. Tombs, *Law and Slavery in North America – The Development of a Legal Category* (1982): unpublished Ph.D. Thesis, University of Edinburgh.

upon human beings as the stuff with which consciousness has to grapple, there can be no outside from which to assess a totality, no meta-discourse with the capacity to comprehend all discursive operations.

If it is possible to locate theoretically within a social formation a relation of "capital" and "labor", and to recognise conceptually the scheme of circulation of which Marx wrote, then it would be as a rationality within discursive practices, but not one necessarily unopposed or uncontradicted. To understand the minutiae, or the micropolitics of a situation – domestic violence, for example, mental illness or incarceration – the histories of specific environments must be examined.

The meaning of a legal rule must be sought in the context in which it is discovered, and whether one sees a particular rule as having effects, or as itself an effect, or whether the rule is recognised as both at once, must depend upon the purpose of the investigation in hand, and the reason why one freezes historical events or chooses one chronology instead of another. In any event some substantial, sophisticated and specific investigation must be undertaken. To pin one's hopes for satisfactory political outcomes upon a general, and by and large untheorised and uninvestigated notion of regulation is to substitute faith and dogmatism for social science.

## VI. THE ASSOCIATION OF LEGALITY AND LIBERTY

In the course of its appeal to the natural and the obvious, civil liberty assumes, and produces a policy agenda for, an implausible social world. Its view of regulation, dealt with in the section above, ignores the complex dynamics of individuality and the heterogeneity of nation-state organisations. Both of these make it impossible to suppose the pellucidity of language or the unproblematicity of interpretation necessary to support an approach to legal regulation as realising controversial political goals in uncertain or unspecified circumstances.[75]

In practice a rule originates in one environment and arrives in quite another. The processes by which such environments are constructed therefore deserve some attention in the analysis of ordering, and so does the association which civil libertarian discourse of all hues makes between political freedom on the one hand and law and legality on the other. It is this association which forms the subject of the sixth section of the paper.

How does it come about that questions of politics came to be given legal answers? Locating response in English history one encounters the problem of nineteenth century constitutionalism and Whig historiography, which offers, in Burrow's words, "the complex historical

75 See the comments of Rubin and Sugarman, note 43 *supra*.

experience of seeing one society and culture refracted through another, both of them, in this instance our own and not our own."[76] Legal history is still saturated with Whig teleology – even if its practitioners have lost their predecessors' confidence in progress.[77] Still heavily biased toward the unfolding of the common law, doctrine by doctrine,[78] it is still metropolitan in its outlook: all of which is to say that it traces the apparent fortunes of small groups of people.[79]

Nevertheless, the "rule of law" has commended itself to E.P.Thompson, who is neither an historian of doctrine nor a Whig, and whose work explicitly focuses upon the lower orders[80] and the provinces.[81]

I referred earlier to the construction of individuality, and the changes wrought in the way in which culture presented the experience of individuality. The individual ceased to be a part of a vast purposive cosmos[82] in which he might be open to a variety of influences, some benign, others not, and instead became itself the ordering being, acting upon, observing and choosing – therefore responsible.

Over the same period of time the state too began to be viewed as an ordering, coherent device, exclusive in its political core of external influences. The image of Empire was unconsciously used in the process, although it originally denoted a political formation embracing all human society, or the entire civilised world. Indeed,

> [t]he patterns of the new Europe take their shape under the shadow, or the mirage, of a recrudescence of the idea of the Empire.[83]

These two ideas, as ideas are incompatible. There is a third available which seems to offer a reconciliation, and that is the idea of right. Like Empire it belonged originally to the era prior to the sovereign state, so that good lordship consisted in doing right to tenants, or subordinates.[84] Equally, it predated the sovereign individual because it was part of the process of its definition within the scheme of things rather than, as later, part of its inalienable immanence.

---

76 J.W. Burrow, *A Liberal Descent* (1981) 301.

77 *Ibid.* ; S. Collini, D. Winch and J.W. Burrow, *That Noble Science of Politics* (1983).

78 See *e.g.* J.H. Baker, *An Introduction to the History of Land Law* (1961); A.W.B. Simpson, *A History of the Common Law of Contract* (1975).

79 Things are, of course, changing. See D. Sugarman, "Towards a New History of Law and Material Society in England 1750-1914" in Rubin and Sugarman, note 43 *supra.* In the United States there is the work of the Critical Legal Historians: see R.W. Gordon, "Critical Legal Histories" (1984) 36 *Stan L Rev* 57. In Australia see *e.g.* Sydney Labour History Group, *What Rough Beast? The State and the Social Order in Australian History* (1982); B. Head (ed.) *State and Economy in Australia* (1983).

80 Thus E.P. Thompson, *The Making of the English Working Class* (1963).

81 E.P. Thompson, *Whigs and Hunters* (1975).

82 That there was no consensus about the purpose is neither here nor there. But see generally W.H. Greenleaf, note 62 *supra;* Tillyard, note 62 *supra.*

83 F. Yates, *Astraea: The Imperial Theme in the Sixteenth Century* (1977) 1.

84 D.M. Loades, *Politics and the Nation 1450-1660: Obedience Resistance and the Public Order* (1974).

In terms of available and developing ideas it is possible to talk of ascending or descending government,[85] according to whether power to define right and good lordship is seen originating from above or below. Papal authority, like Roman Imperial authority before it,[86] was for similar reasons, of a descending kind, whilst the principles of feudal government began with Germanic notions of warrior chiefs in whom authority might be vested by their peers.[87]

Right was necessarily pronounced through institutions in which lord and subordinate had duties of participation.[88] It might be the custom of the locality, or divine judgment as revealed through ritual or through canon law in an ecclesiastical court. With the decay of world empire as a political aspiration, and the rise of Imperial and Erastian notions of national kingship, royal institutions for the generation of right became much more significant, at least in England.

How feudal practices around the idea of right became translated into the faith in precedent, exhibited by Coke, Littleton and Selden during the legal skirmishes with Charles I is clearer in the context of the dynamics of medieval and early modern politics. According to Loades,

> [j]ust as Henry VI had made the medieval constitution unworkable by his failure to comprehend the responsibilities of 'good lordship', so Charles I made the Tudor constitution unworkable by refusing to recognise the intangible limitations which it imposed upon him ... Charles came to rely more and more upon a legalistic interpretation of his prerogative ...[89]

Right, in other words, was not something abstract and above the struggle, but that which the protagonists competed to define. Charles was as creative in his use of precedent as Coke and his successors,[90] but right and legality were merely a part of the language in which the seventeenth century battles were fought. From the opposed political viewpoints, different interpretations of current right appeared reasonable, and when empirical research appeared to foreclose certain justifications for those interpretations, new justifications were found. And if some versions of those justifications were too strong - Hobbes,

85 W. Ullmann, *Medieval Political Thought* (1975); W. Ullmann, *Law and Politics in the Middle Ages* (1975).

86 Roman government was innocent of the restraints of the "rule of law" in the modern sense: "in fact that was conspicuously lacking from large areas of the Roman legal system, including particularly what we should call criminal and constitutional law." G.E.M. de Ste Croix, *The Class Struggle in the Ancient Greek World* (1981) 328.

87 R.W. Southern, *The Making of the Middle Ages* (1959). W.L.Warren, *Henry II* (1973) 245, says, of as late a period as Henry's: "kingship was ... what a king was capable of making it, and what his subjects were prepared to accept".

88 Although professionalised earlier than was once believed in England. See R.C. Palmer, *The County Courts of Medieval England* (1982).

89 Note 84 *supra*, 17.

90 And Coke, of course, could embarrass his parliamentary colleagues by his equivocation. Legality is always partisan. See S.D. White, *Sir Edward Coke and the Grievances of the Commonwealth* (1979) esp. ch.7.

Winstanley or Locke, for example – they might nevertheless form a background to argument in suitably muted and diffuse form.[91]

There is no need to suppose that the English civil war was a bourgeois revolution,[92] but sufficient on the other hand to suppose it changed organisation of social relations,[93] surfacing in new attitudes towards property and commerce, with which Charles failed to come to terms.[94] The monarchy was restored only in a certain sense in 1660.

> The state which Thomas Cromwell had reconstructed in the fifteen-thirties was swept away in 1641 . . .: the old state was not restored in 1660, only its trappings. The prerogative courts did not return, and so the sovereignty of Parliament and the common law remained. The Privy Council . . . had no effective control over local government. Taxation and therefore ultimately policy were controlled by Parliament.[95]

What of right elsewhere? It appeared in medieval times in the customs of manors, the regulations of villeinage, and in all the multifarious conditions which lords could place between the peasants and their means of subsistence. Not surprisingly it reflected in each locality, among other things, the power of lords, and the capacity of peasants to resist. Over a very long period of time indeed from long before the Middle Ages from the third century "the steady advance of the peasantry to greater control of the land forms one of the main motifs of European history down to the Industrial Revolution . . ." and "the peasant question mark and the peasant voice, muted though it inevitably had to be for the most part, was a major and menacing medieval theme."[96]

---

91 See Laslett, note 30 *supra;* J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (1957); H.T. Dickinson, *Liberty and Property* (1978).

92 Although European capitalism was then sophisticated and important: see F. Braudel, *Civilisation and Capitalism Vol. 2: The Wheels of Commerce* (1982); I. Wallerstein, *The Modern World System* (1980) vol.2. And the bourgeoisie was undoubtedly present: see Christopher Hill, *Society and Puritanism in Pre-Revolutionary England* (1964) esp. chs 4 and 5.

93 Royd economic policies did not favour new developments in commerce, as is plain from the hostility to monopolies: C.Hill, *The Century of Revolution: 1603-1714* (1961) ch.3. Zagarin's point about the royalism of many towns overlooks the fact that towns were often dominated by the guilds. The new developments took place in the countryside for precisely that reason. See P. Zagarin, *Rebels and Rulers 1500-1660* (1982) "Provincial Rebellion" ch.12, vol.2; D.C.Coleman, *Industry in Tudor and Stuart England* (1975).

94 Insofar as revisionist historiography insists upon the importance of precipitating events, this would seem an unexceptionable insistence that inevitability is generally an *ex post facto* illusion: L.J. Reeve, "Charles I: the Monarch as Outsider" Paper presented to the Conference of the Australian Historical Association, Melbourne 1984.

95 C. Hill, *Reformation to Industrial Revolution* (1967) 135. See also J.R. Jones, *Country and Court: England 1658-1714* (1978) ch.7; also P. Anderson, "The Origins of the Present Crisis" in P. Anderson and R. Blackburn (eds), *Towards Socialism* (1965) 15: "the Revolution shattered the juridical and constitutional obstacles to rationalized capitalist development in town and country . . . [but] left almost the entire social structure intact . . . profoundly transforming the *roles* but not the *personnel* of the ruling class . . . Landed aristocrats, large and small, continued to rule England."

96 John Morall, *The Medieval Imprint: The Founding of the Western European Tradition* (1967) 38; and see Margaret Aston, "Lollardy and Sedition 1381-1431" in R.H. Hilton (ed.), *Peasants Knights and Heretics: Studies in Medieval English Social History* (1976).

John Martin indicates some of the structural constraints upon the outcomes of class struggles betwen peasantry and landlord[97] – demographic changes, for example, and the extent to which in a particular case the manor and the community coincided so that the lord's court would have exclusive jurisdiction. He emphasises

> the contingent nature of agrarian transformation in England ... The contribution made by the expropriation of the land from the peasantry is usually accepted as a *fait accompli*, from which one can then build an explanation of the origins of English capitalism. But ... this transformation was by no means an inevitable process. The disappearance of the peasantry was itself dependent upon the determination of the struggle over the land.[98]

The peasantry's important contribution to later ideas of civil liberty was its disappearance. Villeinage may have been successfully resisted, but, as Hilton points out "the success of the English peasants in the fifteenth century turned out to be a very qualified one,"[99] their landholding became tenure "by copy of the manorial courts' rolls, according to the custom of the manor and at the will of the lord" – recognised, first by equity and then by law, but only in terms of the original customs, which were now fixed, and whose weak points might be exploited through royal courts or through Parliament by the enclosers.

Local courts in which local right might generate local law lost much of their significance, although not as early or as completely as Whig-influenced historiography suggests.[100] In formal terms government appeared to operate in a centralised manner. The regulation of labour shifted from seigneurial jurisdiction to that of the justices appointed by royal commission, and subject ultimately to central government through the Privy Council. Access to subsistence was governed by royal courts with jurisdiction over estates in land and, of course, again by the justices through the developing machinery of vagrancy and poor laws.

Two kinds of distinctions emerge in this process. The first is that between administration, detailed regulation, and right. Instead of hovering ambiguously between and including both, law comes to seem

97 John E. Martin, *Feudalism to Capitalism: Peasant and Landlord in English Agrarian Development* (1983).

98 *Id.*, 215.

99 R.H. Hilton, *The Decline of Serfdom in Medieval England* (1969) 58.

100 C.W. Brooks, "The Common Lawyers in England 1558-1642" in W. Prest (ed.), *Lawyers in Early Modern Europe and America* (1981) 42. He cites Coke's reference to "sixteen different varieties [of law in England] only one of which he called the common law". The preceding essay by Baker talks of the legal profession in terms of the late middle ages and in relation to the royal courts. However, Palmer suggests "that the lower courts were more important than the king's court in the genesis of the profession": R.C. Palmer, *The County Courts of Medieval England 1150-1350* (1982) 136 and that the assumption that the profession was only beginning in 1200 requires radical reassessment.

That historiography was important in establishing the myth of common law supremacy in the social system. J.P. Dawson raises the intriguing possibility that the "common law" which the formative colonists took with them to America may well have owed more to a familiarity with borough and leet courts. See J.P. Dawson, *A History of Lay Judges* (1960).

like neither. It becomes a rule, paradigmatically, with a pedigree rather than a morality, authorising administrative action. The second distinction, associated with the first, is between law and legal regulation, on the one hand, and the accommodation to local circumstances and expectations on the other hand. The latter can now never attain the status of law.

But central government acted locally through those from whom it had acquired its extended juridical capacity. The law, in the form of central directives, was no more "applied" when the central government wished to prevent enclosure[101] than on those occasions when local morality was required to be temporised with.[102] At the same time, as Douglas Hay shows,[103] judicious manipulation of the slack between the terror of the law and the mercy of discretion had enormous potential for the purpose of government of a local level.

The area in which struggles took place had been reconstructed and the official vocabulary of political discourse and its rhetoric were subsumed in part first in the discourse of the courts of common law,[104] and then much later in that of the High Court of Parliament.[105] But if London based central government took on a new significance from the sixteenth century there is no reason for concluding that 'imperial' or national institutions, through attracting to themselves the term public, could operate other than as focii in struggles between dominated and dominant. Moreover, the comprehensive claims made by national institutions tempt the observer to superficial conclusions and misunderstandings. To argue that a particular set of institutions of government – assuming a satisfactory analysis of them – produces a particular set of social and political circumstances may be to reverse and vastly oversimplify the relations of cause and effect.[106]

## VII. CONCLUSION

I have not sought to define liberty, and although I have identified a number of assumptions made in civil libertarian discourse, I do not assume that there is a single political position in which they are articulated. In some ways civil liberty as a term defines the boundaries of the battle rather than locates a consensus.

101 Loades, note 84 *supra;* Martin, note 97 *supra.*

102 J. Brewer and J. Styles, *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (1980); E.P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century" (1971) 50 *Past and Present* 76.

103 D. Hay, "Property, Authority and the Criminal Law" in D. Hay, P. Linebaugh and E.P. Thompson, *Albion's Fatal Tree* (1975).

104 H. Nenner, *By Colour of Law* (1976).

105 G. Stedman Jones, "Rethinking Chartism" in G. Stedman Jones (ed.) *Languages of Class: Studies in English Working Class History 1832-1982* (1983).

106 For an account of the significance of the development of the distinction between civil and political society, see M. Riedel, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy* (1983) ch.6.

It is important to recognise the need for clarity of terms, and thus I criticise what I take to be the incoherence, the imprecision and the hidden premises in civil libertarian thought. At the same time there is no use in pretending that if we all define our terms rigorously and precisely our political differences will disappear: the incoherences and circularities are the effects rather than the cause of political difference.

All that can be hoped for is that some ways of foreclosing debate may be dealt with – for example by pre-empting pseudoscientific or mystical appeals to nature and that new political strategies may become possible once imagination is freed from the tangled circularity of traditional civil libertarian thought.