

## Chapter 9

### The State

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#### Abstract

The State and its demands are often thought of as an entirely external constraint on business activity, but this is only a partial view. In providing the legal framework for business transactions the State shows that it shares many values with business enterprises, and in time of national crisis businessmen experience a strong sense of identification with the State. But the identification is not complete, and questions arise of why and how far the State's demands ought to be obeyed, and are not answered automatically in the State's favour. The rationale of laws, regulations and taxation impose limits on what may be legitimately demanded by the State, which neither should, nor can, redistribute the national wealth in accordance with its own predilections.

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**§9.1 Politics and Economics**

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We find it difficult to think clearly about the State. At times it seems an alien, even a hostile, power, which makes us obey its laws, pay its taxes, and fight its wars: but then, especially at times of national crisis, we—the businessmen among us very prominently—identify strongly with our country, and reckon its failures our failures, its successes our successes, and its values constitutive of our own individual identities.

Businessmen are usually unenthusiastic about politics, and like to keep out of politics as much as they can: and politicians are uncomfortably aware that though they can say what is to happen, it very often does not happen as they say, whereas businessmen have a knack of actually making things happen as intended. But no divorce of politics and economics is possible. Quite apart from macro-economic questions, which have to be decided politically, micro-economic transactions can take place only within a framework of rules, and it is a political decision what these rules shall be. Whatever decisions are reached, they affect business. Businessmen not only have an interest in being able to participate in making those decisions, but need to consider the demands of the State—for taxes, for compliance with regulations and legislative enactment—in taking their own decisions.<sup>1</sup>

<sup>1</sup> MRG suggests, instead of last sentence: But political decisions have to be seen to be legitimate, and it is to a discussion of legitimacy, to which we must now turn.

**§9.2 Legitimacy**

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Although often we identify with the State, and accept its demands as entirely legitimate, we do not regard every demand of every State as one that ought unquestioningly to be obeyed. Even in Britain and the United States where it is taken for granted that the law of the land should be obeyed without question, businessmen try to find “tax-efficient” ways of paying their employees so as to avoid paying to the State the taxes it is seeking to raise. Many other regimes are much less respected, or worthy of respect. In determining what our responsibilities to the State are, we need to have a clearer idea of what the rationale of the State is, and why its edicts should be obeyed.

There are many different reasons, some purely external, some internal, no single one by itself sufficient. For many people, and for many thinkers in the Anglo-Saxon tradition, the obvious and conclusive reason is that one will be punished if not. The State has a monopoly of coercive power, and can enforce its edicts on the recalcitrant. Since there are recalcitrant men around, it is necessary that the State should be able to enforce its laws, since otherwise they would be flouted by some, and soon ignored by all. The coercive power of the State gives us an assurance that our obedience to its edicts will not be in vain, but that others will obey too; I am not being a mug if I refrain from stealing, because if anyone else were to steal, he would not get away with it.<sup>2</sup> And if any authority is possessed of coercive power, it must have a monopoly in its area if there is not to be a state of war there. From this necessary aspect of State power it has been inferred that the State is to be understood in terms of coercive power alone. Laws are the commands of the sovereign backed by force, and that is all there is to it.

But it is difficult to sit on bayonets. The sovereign needs to be strong enough to coerce the evil-doer, but neither needs to be nor can be all-powerful. It needs the help of auxiliaries to man the police force, administer justice, staff the gaols, and some of them at least must be giving their help uncoerced. They at least must

<sup>2</sup> (possibly pick this up in Appendix I on PD.) See further below, §7.7(Taxation: CHECK)

be cooperating freely, acting morally,<sup>3</sup> to some extent identifying with the State, sharing its values and accepting its ideals. And some lesser degree of cooperation is needed even outside the ranks of the *apparatchiks*: the sovereign is not omniscient, and cannot know things unless people tell, and people will not tell the truth if they cannot trust the State to respect their integrity. It was the need for *glasnost* that led Gorbachev to dismantle the Soviet system. Without witnesses and plaintiffs the administration of justice cannot take place. A regime need not be liked or loved, but unless it is trusted to deal fairly with those who offer it testimony or seek its aid they will not bring their disputes to it at all, and will have some other system of their own, leaving the regime to exercise a distant suzerainty, but not real government.

The big stick theory of the State is inadequate. Government is not just imposed on the populace by force, but is a function of society, and hence under pressure to conform to the requirements of its social function. These requirements are many and various, and have changed with the changes brought about in society by modern conditions. Although we still look to the government to defend the realm against external enemies, to maintain law and order, and to dispense justice, we also expect it now to promote public health, to provide communications, to foster research, to disseminate knowledge, to encourage education, and to facilitate business activity. Many governments perform these functions ill, and may yet survive, but they are judged on these criteria none the less, and their support depends largely on how well they perform: and support is in the long term crucial for survival. It follows that the sovereign is neither free nor able to do exactly as it pleases. There are norms built into the concept of government as a social function which indicate the things governments should, and hence also the things they should not, do; and though some of these norms are often breached, they are not breached with impunity, and the effective power of governments to transgress them is in some cases severely constrained by the unwillingness of people to go along with their edicts. In thinking about the State's economic activities, we are not faced with a wide open field of alternatives, but one already configured by the rationale of the State: many options still are open, but many are not, including some much in vogue in the present age.

<sup>3</sup> See above, ch.4, §4.7 [Legalism—may be relocated, so CHECK]

The arguments against a purely external view of the State tell also against the purely internal one that holds that we are totally identified with the State, which can therefore command our total allegiance in doing whatever it sees fit. By a curious quirk of history the fight against the totalitarian regimes in the Second World War led to an intellectual acceptance of totalitarianism on the part of the victors. The total mobilisation of Britain in order to defeat Hitler encouraged people to think that a similar all-out drive should be continued in peace-time in order to achieve democratically approved objectives. The difference between the Axis powers and the West was seen to reside in the fact that the governments in the West were democratically elected rather than in the limitation of the powers of government by the rule of law. The rhetoric of the twentieth century has proclaimed that democracy is a good thing, but without any clear idea of what democracy is. Not that the Western powers abandoned their constitutions or seriously compromised fundamental liberties—when in 1945<sup>4</sup> the Labour Government promulgated its Control of Engagements Order, there were great protests by the Trade Unions, and it was soon scrapped. But there was a background assumption that We, the People, were entitled to choose how we were governed, and it was up to us to decide whether to direct people into suitable jobs or leave them free to choose for themselves. The last resort of legitimacy has been seen as the sovereign voice of the people, taken to the extreme in the idea that the voice of the people is the voice of God—the ultimate authority to which all must give way.

But the voice of the people is not the voice of God. The issue came to a head in ancient Athens, when after the battle of Arginusae, those in command were accused of not exerting themselves enough to pick up the survivors of the ships sunk by the Spartans. Rather than bring them to trial, where they would have been able to answer the accusation and bring forward evidence in their defence, the demagogues proposed an Act of Attainder, that is, a decree, *ψηφισμα*<sup>5</sup> (*psephisma*), of the Assembly, *ἐκκλησία* (*ekklesia*), that they be executed forthwith. It so happened that Socrates was the chairman of the Assembly that day, and he refused to put the motion to the vote, as being illegal; whereupon there was a great uproar with people saying that it was a terrible thing not to let the

<sup>4</sup> CHECK date

<sup>5</sup> accent needed

demos do what it wanted. But Socrates was right. And if, perhaps under the influence of some future Committee for Public Safety, an Act of Parliament were validly enacted in Britain decreeing that all Marquesses—or all Marxists—were to be hanged, we might, reluctantly, be forced to concede that this really was the people's will, but would still insist that it was wrong, not only immoral but legally wrong as well. Not everything is lawful for a government, not even if it is what the people want. Since the Treaty of Versailles the right of national self-determination has been thought to override all other considerations, and as the British Empire was dissolved, it was often said that self-government was more important than good government. Fifty years and many millions of deaths later, we are beginning to have doubts.

Democracy does not of itself confer legitimacy, but it can enhance it. Democratic regimes can fail to be legitimate—often do, when there are minorities whose rights the majority is not sensitive to—and many benevolent monarchs have enjoyed the well merited esteem of their subjects without the trappings of modern representational government. Nevertheless, a democratic element in the political system of a State enhances its authority and legitimacy, giving dissenters an opportunity to state their case and have it heard, and assuring everyone that the decisions of the government enjoy a considerable measure of popular support.

Legitimacy is a complicated concept. The mere fact that a government exists and is able to maintain itself confers on it some right to be obeyed, but many governments that exist *de facto*, and are recognised internationally as the *de jure* governments of their territories, none the less lack full recognition on the part of their subjects. Legitimacy is conditional—this is not to say that it is up to each individual to decide whether or not to obey the government (that would be to deny the need for political obedience altogether, and would entirely subvert all forms of government)—and cannot be claimed independently of what the regime does. It needs to be earned, and it takes a long time to earn it. Historical memories are potent, and the successful violence of yester-century is still remembered, and not acquiesced in, by the vanquished. The scars of the French Revolution still leave the French psyche divided; Italians still think of their government as alien, imposed by the outsider, whether Spaniard, Austrian, the monarch of Piedmont and Savoy, or even, after the advent of the Italian Republic in

1948, by a party system taken over by the party boss rather than the party leader.

The governments of Britain and the United States are exceptional in enjoying largely unquestioned legitimacy,<sup>6</sup> largely on account of their having continued uninterruptedly for many centuries—few Saxons now resent the alien Norman yoke; few Jacobites still drink to the King Over The Water; and even fewer Yorkists still lament the outcome of the battle of Bosworth field. Legitimacy has been reinforced by a political system which allows change and avoids the dangers of a permanent *status quo*, even at the risk of the ultimate political cynicism expressed by Gieseppe de Lampedusa in his book *The Leopard*—“things have to change so that they can stay for ever as they are”.

### §9.3 The Law and Morals

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The fact that the law is not the irresistible command of an unfettered State has important consequences. In the first place it gives a much more internal, rational and moral aspect to the law, and in the second it sets limits to the State’s right to legislate and tax.

The *rationale* of law derives from the unselective nature of the State, which does not choose its citizens, but has to deal with all those who happen—typically by accident of birth—to live within a certain area. Since they are unselected, some may be—almost always are—recalcitrant, not minded to abide by the customs and practices of their society. In the absence of sure-fire sanctions they would flout the law, and if they got away with it, others would follow suit, since sometimes it is burdensome to keep the law, and the law would fall into desuetude. The law must, therefore, be enforced, if necessary by force, or it will cease to be in force; and the State must be able to muster irresistible coercive power against actual or would-be law-breakers. But because coercion *is* irresistible, great caution is needed in its exercise. There have to be many safeguards against the full force of the law being exercised improperly. Although we often feel, and sometimes rightly, of some misdoing, that there “ought to be a law against it”, there are often sound prudential arguments against actually enacting such a law: it may be difficult to detect breaches, costly to enforce, give rise to blackmail.

<sup>6</sup> (CHECK: how far Southerners in the US do not repine at the failure of secession)

And even if there is a law, we need due process and a high standard of proof before transgressors can be punished. We cannot enshrine the whole of morality in law, but only a somewhat minimal standard of conduct, conduct we cannot allow to continue uncorrected. Similarly in the civil law we need elaborate procedures to ensure that both sides of the case are heard and heeded. The criminal law is often an inadequate guide to reasonable practice; and, as we have seen,<sup>7</sup> often legal contracts do not, on account of the cumbersome nature of legal procedures, state the real understanding between the parties. Law provides only the skeleton, not the living flesh, of social life. Although it needs to be internalised by some members of the community, it is viewed by others entirely externally, and has to be reasonably predictable and hence relatively rigid. Often it is formulated in a code, and has the demerits—as well as the merits—of codes generally.<sup>8</sup>

Although the law needs to be enforceable, it cannot be enforced by force alone, but needs the uncoerced support of some. It must therefore commend itself to them as being reasonable and even-handed. Because of the indeterminacy of justice<sup>9</sup> there is some latitude in choosing where to draw the line, but not an indefinitely wide one. We cannot engineer society as we would wish, even if our ideals be excellent. Law is a function of society itself, growing up as a means whereby different members of society can coordinate their actions and adjust their behaviour the one towards the other; it is essentially two-sided, one man's rights being correlative with another's duties, and therefore subject to the constraints of justice in much the same way as economic transactions, and if justice is not observed, people will take steps not to put themselves in a position where they will be unjustly treated. As the consumer movement grew more powerful, there were calls for further legislation to give consumers an even better deal. In some cases this was reasonable—the extension of the Sale of Goods Act to cover services as well as goods. But it became clear that putting the consumer in too favourable a position would not be to his advantage; for if the contract were so weighted in his favour as to be unfair to the vendor, vendors would cease to sell. This has happened with medical services in the USA, where patients sue their doctors if anything

<sup>7</sup> In ch.4, §4.8. (duties).

<sup>8</sup> See above, ch.4, §4.\*.[New location of old §5.1]

<sup>9</sup> See above, ch.2, §2.5

goes wrong. In some cases, sadly, there has been negligence, but in the nature of the case doctors cannot, however great their care and skill, make their patients better. In order, therefore, to avoid malpractice suits, American doctors regularly subject their patients to a whole battery of expensive and sometimes painful tests, and in some fields refuse to take patients altogether. Although current practice or explicit convention can up to a point determine what is the just apportionment of rights and responsibilities, costs, and rewards, it can do so only within limits; and attempts to go beyond these limits are counter-productive.

Much modern legislation is flawed on this count. The Protection of Employment Act<sup>10</sup> makes it very difficult to sack employees once they have been in a job for more than a short time. It is right that employers should be required to act justly, and not use the power they have over other men's livelihoods arbitrarily and capriciously. But it is difficult for outsiders to have a proper appreciation of what a particular job demands and how well a particular employee is doing. Tribunals tend to be soft. Unless an employer has fulfilled all the requirements of the Act to the letter, and can prove to their satisfaction that the employee was drunk, disobedient, or inattentive, they award large sums in compensation. But the right to a job is not inherently like the right to life, liberty and property, and it is nobody's interest that engine drivers should retain their jobs because the proof that they were drunk was not beyond all reasonable doubt.

It may be a good thing that mothers should have maternity leave. It stems from a vision of society that rejects the traditional picture of home life and the family, and sees the work-place as the centre of value, and the single mother as the standard breadwinner. If this be our vision of society, then maternity leave with pay and the right to return to her previous job is a good thing, but in that case it is incumbent on society as a whole to pay for it, and to provide replacements who will not themselves have acquired a right to permanent employment. If the employer has to pay for it, or if, every time a female employee has a baby he is obliged to take on a new permanent employee, then he will tend to avoid employing potential mothers. Firms which in the normal course of events would be large employers, install labour-saving machinery,

<sup>10</sup> Date required (Oxford)

or contract out work to smaller firms or single operators,<sup>11</sup> in order to avoid falling foul of complicated legislation and expensive litigation.

These arguments do not show that legislation in economic matters is always wrong. Although there is a presumption against legislating, because codes are rigid and laws are heavy-handed, the presumption can be rebutted. Sometimes we need to lay down the law in order to clarify it, and to enable people to know where they stand: sometimes legislation is needed to escape from the Prisoners' Dilemma, as it was in the last century when it enabled employers not to be pressured into sending women down mines or boys up chimneys.<sup>12</sup> But the pendulum has swung too far. Employees, like customers, are one side of a two-sided transaction, and the other side needs to be taken into consideration too, on grounds not only of justice but of expediency also. There is a parallel with the Rent Acts. The Rent Acts were intended to protect tenants and help the homeless; and had the effect of making it impossible to obtain tenancies and greatly increasing the number of homeless. Since the passing of the Acts to protect employment and improve the lot of employees, unemployment in Britain has increased.

[In modern times enthusiastic social engineers, unable to persuade people at large of the rightness of their ideals, have resorted to legislation to bend society to the shape they think it ought to have. Where the legislation is promulgating some convention to fill out and make determinate our mutual rights and obligations, there are inherent limits on how the balance may be struck, since if it is too adverse to manufacturers, doctors, employers, or landlords, people will cease to occupy those roles, and we shall be left without goods, doctors, employment, or rented accommodation. In other cases legislation is intended to provide an escape from the Prisoners' Dilemma, or to forbid, or to insist upon, some pattern of behaviour. But again, there are stringent limits, not sufficiently observed, to what may be accomplished by legislation. The law is a blunt instrument. Like all codes, it is general, and fails to discriminate finely between relevantly different cases; and just because it involves the potential use of coercion, it has to be subject to careful safeguards. Reformers are often impatient, seeking to by-pass the courts and to put the burden of proof on the accused rather than

<sup>11</sup> ? e.g. Beneton? Check

<sup>12</sup> See above, §1, p.2 of codes4.=old 63[Now relocated in ch.4]

the prosecution. It is a dangerous expedient; it only needs one or two people to be condemned who are evidently guiltless for the law to be brought into profound disrepute.<sup>13</sup> But if we take steps to avoid condemning the innocent, we let many of the guilty get away. The law, with all its proper safeguards, cannot discriminate finely enough to delimit exactly the boundary between what is acceptable and what is not. It is essentially a long-stop—necessary to provide other sanctions with purchase, and to prevent the brazen from being able to flout all sanctions with impunity, but unable by itself to draw the line precisely where it should be draw, or to prevent some buccaneers from sailing close to the wind.<sup>14</sup> Nevertheless the whole question of contract law is an example of the necessity to have business agreements backed up by a code of law or legal precedent. The nature of business activity and its inherent uncertainty in changing economic conditions, make it necessary for clear agreements to be set down in writing. “My word is my bond” is a valid moral concept, but in the world of business transactions the old Latin adage is true: *“verba volent, scripta manent”*.

#### §9.4 Regulations

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Sometimes we issue regulations for the same reason as we enact laws, in order to enable us to escape from the Prisoners’ Dilemma—parking regulations, for example—and sometimes only regulation by the public authority can establish standards and maintain quality control. But many regulations are made without any adequate justification, sometimes for quite improper reasons; and there are costs in implementing, costs in complying with, costs in enforcing, regulations, which need to be set against the supposed benefits. Where the legitimacy of the government is unquestioned, the regulations are obeyed, though complainingly. In many countries, however, regulations are seen as obstacles to be circumvented as much as taxes are impositions to be evaded. Even where they are obeyed, there is a strain. Just as legitimacy can be earned, so it can be

<sup>13</sup> ?reference to Lord Mountbatten convicted of watering milk?

<sup>14</sup> [Is this last paragraph earning its keep? It repeats the earlier argument. Do we need a summary here?][Also I have not fully checked pp. 75-77 of 1994 to see if MRC’s suggestions have been incorporated in the transferred text]

lost, and the more unreasonable the demands of government, the less ready are we to conform.

Many regulations err in not taking account of particular circumstances. It may be sensible to lay down standards for new buildings to ensure that they have adequate light, ventilation, damp-proofing, *etc.*<sup>15</sup> But sometimes people have special requirements—do I really need a window in a dark room?—or are adapting old buildings, and cannot apply the regulations in any sensible way. They are being prevented from satisfying perfectly reasonable wants for no good reason. We need procedures for adapting regulations to particular circumstances not foreseen by the regulators. Equally we need common sense in interpreting them. In 197\* the University of Oxford was fined for breach of the fire regulations in the St Cross Library. The St Cross Library had been built of highly incombustible brick a few years earlier with the advice and approval of the then fire officer. After his retirement his successor deemed the building unsatisfactory because there was not, as required by the fire regulations, a separate exit for the staff to leave by in case of fire. The staff occupied an open chamber situated between two large doors, so that they could see everyone coming in and out, and make sure that nobody took library books out. But it was true that both doors were available for readers to use, and so did not count as being separate. Useless to protest that the point of the regulations was to ensure that the staff could escape in case of fire, and that with two large doors at hand they were as well placed as anyone could be. The fire officer was adamant: ‘separate’ meant ‘separate’. The University was taken to court, and has complied with the fire regulations by blocking access for readers to one of the doors, so that it can be used only by the staff. In the unlikely event of the stone catching fire, it will be marginally more difficult for the readers to escape. But the regulations will have been complied with.

Fire regulations are difficult to criticize because they are intended to protect against unlikely events, and fire officers have a better appreciation of the hazards than arm-chair critics. But there are dangers and there are costs. Just as doctors are wooed by pharmaceutical companies, so it is worth bringing to the attention of those who enforce regulations the latest state-of- the-art

<sup>15</sup> ?Insert account of Oxfordshire requiring bidet to be plumbed to foul sewer (SKL).

products that could be said to enhance safety. Compliance with the regulations has clearly brought a lot of business to the manufacturers of fire doors and sprinkler valves, and it is difficult not to wonder sometimes, wandering down corridors through fire-doors propped open with fire extinguishers, whether the increased degree of safety is worth the great cost involved. In some cases it is not. It was quite common for women widowed while still in vigorous middle age to think of keeping the family house and having some old people as residents, but after the fire officer had told them what would be necessary to bring their house into conformity with the regulations, to think of it no longer. Old people are a fire hazard. They smoke in bed and fall asleep. There is a real risk of fire, and of being burnt alive. But old age is dangerous anyhow, and commonly fatal. Hypothermia is a bad way to go. Many old people have died in Britain in recent years, cold, alone, unfed, unwashed, uncared for. Against the real risk of being burnt alive must be set other risks, equally real, equally unpleasant. We needed to strike a balance and the right balance was not struck.

The difficulty is that the costs imposed by regulations are not borne by those who make them. The fire officer is not held responsible for deaths caused by hypothermia: he would have to carry the can if some resident of an old people's home he had passed died in a fire. So he plays safe. To be absolutely above criticism he specifies the most modern equipment. Great costs are borne by others, but they are concealed from him. And so with other regulators too. Unless determined action is taken, costs will not be properly borne in mind. And unless costs are reasonable, the temptation to evade the regulations will be great, just as it is when the regulations themselves are not reasonable.

Regulations make room for corruption. There is a public interest in hygiene, and we need to have inspectors going round the kitchens of hotels and restaurants looking out for cockroaches, mouse droppings and general slovenliness. But considerable power is placed in their hands, and power tends to corrupt. It would be easy to overlook the tell-tale dropping of the restaurateur who had provided a superlative Christmas dinner, or to come down heavily on one who had not evinced sufficient friendliness. These dangers can be overcome, by judicial appeal, by rotation of inspectors, double-checking, and the like. But in many countries the dangers are great, and in all we need to be on our guard.

There can be impropriety in the making of regulations as well as in their enforcement. Soon after the collapse of communism a Polish factory secured an order for 7,000 shovels. But the European Union banned their import on the grounds that they were strategic implements. Once there is reasonable suspicion that a regulation has been promulgated at the behest of some lobby with clout in Brussels, it ceases to command respect. Just as legitimacy can be earned, so it can be also lost. In countries like Italy, where the government is known to be corrupt, regulations are seen as a challenge, to see how best to evade them, not as an obligation to the wider community which ought to be carried out even though awkward or costly. Regulations have to be seen to be legitimate; it is when they are formulated and imposed by bureaucracies, unanswerable to the people whom they seek to regulate, that they may come to be seen as illegitimate interference.

### §9.5 Fiscal Justice

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Taxes are burdensome. We do not naturally want to pay taxes, though we may be prepared to, in order that the State may realise certain values we share or provide us with services we want. But if it were possible to realise those values and provide those services without our having to pay we should not object.<sup>16</sup> It follows that, contrary to our usual way of speaking, the apportionment of burdens raises issues of justice very different from those relevant to the allocation of benefits. We do not naturally wish to miss out on benefits, but we are not naturally inclined to shoulder burdens, and there is a problem in ensuring that we do not shirk them. Instead, therefore of talking of the distribution of benefits and burdens in a single breath as one single aspect of justice, we should distinguish from the aspect of justice concerned with the distribution of benefits the markedly different aspect concerned with the contributions that may be fairly demanded.

The dominant problem in contributive, or fiscal, justice, as we may call it, is the Prisoners' Dilemma, that it is the interests of each one of us to avoid contributing, but if we all do, we shall all be worse off. The Americans call it the "Free-rider" problem. If I can dodge paying my fare, I can ride free on the train, and be better off

<sup>16</sup> But see the Bishop of Oxford, *The Times*, October 15th, 1994, p.13, 'Praise be to taxes, the sign of a truly civilised society'

in consequence. And as long as I alone am free riding, the revenue will be diminished by an insignificant amount, and the trains will continue to run. So it would seem like a good idea for me to dodge paying the fare whenever I can. But that line of reasoning appeals to other people too. If we all adopt it, the trains won't run. But even if I decide to pay my way, I can see the attractiveness of the reasoning to other people, and am rationally afraid that I may be paying to no avail, since others are dodging their fares, and my paying will not secure for me a future train service.

It becomes rational for me to pay if I can be sure that others will pay too: in this respect the case is the same as with obedience to the law.<sup>17</sup> I will pay my share if I can be sure that others will pay their share too. But what is my share? I can think of all sorts of reasons why it should not be as much as might at first be supposed: I have a blind relative to look after, a mortgage to pay, a daughter to marry off. But while I am making these points, with some show of justice, others are looking over their shoulders to see what is being demanded of me, each ready to ask 'Why should I be so heavily taxed when he is getting off so lightly?'. Although justice always addresses itself to the individual, seeking to justify to him the adverse decision being reached, contributive justice has to take seriously the assurance problem, and the fact that others too are needing to be addressed and assured that the individual in question is not getting away with an unduly light burden. It follows that contributive justice has to be rough justice. It cannot be as individualised as the individual might reasonably expect, but must be based on crude categorizations whose relevance is evident to all. It is for this reason that a poll tax is often adopted as the fairest available. It is manifestly simple, and any other would raise more problems than it would solve. But though a flat subscription is acceptable for many clubs and voluntary associations, yet where the tax levied is heavy, as it usually is with modern States, a poll tax seems disproportionately more burdensome for the poor to pay than the rich.

It is difficult to measure equality of burden. Each is conscious of the burdensomeness of his own tax, but tends to make light of the taxes others have to pay. The poor man observes that the rich is richer than he, and concludes that the marginal £ (Pound Sterling) extracted from the rich is less of a sacrifice than if it were

<sup>17</sup> See above, §2 (fn.1) CHECK

extracted from him. The rich observes that he is paying more, and is being left with proportionately less. It did not seem fair to him in Britain after the Second World War that out of an extra £ he should be left with only 2p, when the standard rate is leaving most of his fellow countrymen with 67p in the £. Many people agree. Although there is an argument for progressive taxation, steeply progressive taxation is unjust.

Steeply progressive taxation is often defended on the principle "From Each According To His Ability". But that is a communist principle, which denies altogether individual rights. Once we acknowledge the individuality of individuals, we need to consider not only the community's point of view, looking round to see who can bear the marginal increment of taxation best, but from the taxpayer's point of view, who may feel he is being unjustly mulcted.<sup>18</sup> If we consider only the question of ability, then it will always be the case that however much has already been taken, the shoulders of the rich are broader than those of the poor: even after he has paid 98p in the £ the rich man has more left than the poor, and so, if ability to pay be the only criterion, he should pay a further impost. Only when he has paid 100p in the £ are the rich man's shoulders no longer broader, and no longer to be singled out as worthy to bear a further burden. But that is to discount his point of view altogether. When more is called for, he can legitimately argue that he has already paid more, and that this should be counted unto him for righteousness. To ignore the past, and the contribution he has already made, is to ignore him. It cost him a lot, in choices foreclosed and pleasures forgone, to write the previous cheque to the Inland Revenue. If that is not taken into account, justice is not being done. And quite apart from tax already paid, the State ought not to ignore the antecedent position. If the rich man was rich before the tax was levied, that too was part of his situation which ought not to be obliterated by the activities of the tax man. He may have earned his riches, he may have been given them by the choice of other men. In either case, the State should show some respect for his efforts or other men's choices. Once we abandon the totalitarian view that the State has a *carte blanche* to do what it likes with its subjects' possessions, it takes on a duty to have some regard for what they do and who they are independently of its own plans and dispositions.

<sup>18</sup> [Dick queries word: ask]

These counter-considerations are pertinent. They are too often disregarded in the modern world. An unfortunate practice has grown up whereby the Chancellor of the Exchequer in presenting his budget talks of "giving away" tax concessions. But when he reduces the standard rate of income tax from 27 to 25p in the £, he is not giving anything away, but merely refraining from taking other people's money. If he were giving money away, very different principles of distributive justice would come into play, and it might well be right to give a bonanza to the poorest in the land. But when contributions are being asked for, the antecedent situation of, and contributions already made by, the contributors become relevant. Not that they rule out progressive taxation altogether. Ability to pay is relevant; also—a point insufficiently attended to—the fact that those who pay more to the State are typically those who gain more from it.

We need to distinguish two different bases on which a tax may be demanded. It may be a contribution as a member of an association for the furtherance of its shared values: or it may be a *quid pro quo*, a payment in return for the benefits made available. I pay a subscription to the National Trust, and might do so even if I was living abroad or bed-ridden, because I wanted to preserve England from speculative builders. But I might pay because I was in the habit of entertaining Americans by taking them to view stately homes, and it was cheaper to be a member and go in free. Similarly with the State: Americans wanted America to be the first country to put a man on the moon, and could be asked accordingly to contribute to NASA's costs.<sup>19</sup> The State provides many services—protection from external enemies, the maintenance of law and order, the fire brigade and National Health Service—and can ask each of us to fork out. In the former case the relation is internal: it is as members of a community, and sharing its common values that we are being called on to contribute: in the latter case the relation is more external, with each being asked to consider his own interest, and recognise that the tax asked for is a reasonable bargain from his point of view.

Historically it was the latter view that predominated. The king bargained with parliament, asking for money so that he could do things they wanted. Vestiges of this view still remain, in the formula used to give the royal assent to fiscal measure, and, more

<sup>19</sup> Should we spell out NASA?

importantly, in the wrong-headed doctrine that there is no equity in taxation; if I, through my representatives, have struck a bargain with the crown in return for things being done that I want, then I am committed to the letter of the contract, and cannot appeal to equity to soften its hard edges. But that is not how things really are. All that we can say is some of the services rendered by the State can be assigned to individuals as benefiting them, and consideration of the sort of bargain it would have been reasonable for them to strike in order to obtain these services may be relevant to justifying the tax actually levied. Thus the State provides consular services, and tries to protect its nationals in foreign lands; this is a benefit to those who travel abroad, and those who travel abroad tend to be rather rich—the very poor cannot afford the fare. So the rather rich can be asked to foot the bill, and are thus justly called on to pay more in taxes than the poor. In the same way, although we all benefit from there being prisons in which thieves can be incarcerated and prevented from thieving, the rich have more goods at risk than the poor, and thus, in this sense, benefit more and should contribute more.

These arguments carry weight, but need careful handling. Hypothecated taxes may be more acceptable to tax-payers, but make little sense economically, because, among other things, of the difficulty of allocating costs clearly.<sup>20</sup> Moreover, imagined bargains are indeterminate as to their terms, and do not commit the parties in the way real ones do. In order to make the argument stick, two things need to be shown: that no alternative provision was available at anything like the same cost, and that the State was exercising due care and economy in giving good value for money. State-run services tend to be inefficient; "If you want a thing done badly, get the government to do it", as the saying goes. In many countries State-employees are appointed on grounds other than competence or merit—because they voted the right way in an election, or because they are members of some group it is desired to favour. The tax-payer then has reason to be resentful, and to wonder whether he could not do better on the open market. Sometimes he can. In recent years public opinion has swung round in favour of private provision. But private provision has its drawbacks. It necessitates charging, which is itself costly, and does not provide universal access, often excluding the poor. Public provision, free at the point of

<sup>20</sup> See the pamphlet produced by DEMOS. (Dick)

delivery, can be more cost-effective. It depends. In Britain it is being questioned whether the National Health Service is efficient: in America it is being realised that private provision is not. In Britain the Royal Mail has given, since it was instituted in Victorian times, with its employees appointed without political interference, good service: in America the post office has not.

Where taxes are being justified on account of the benefits given in return, there is need for consultation, to bring out into the open whether the benefits are really wanted and whether they are commensurate with the tax. This was more recognised in time past than now, when democratic theory has militated against particular groups having a special say in how they are taxed. But it remains important, particularly for businesses which, as such, have no vote. Businesses do benefit from consular services and from the incarceration of criminals, and often much more so than individual persons. They should pay. But in so far as the grounds on which they are being asked to pay is the supposedly greater benefits they are receiving, some attempt should be made to evaluate these benefits, and to compare those that the businesses receive with those given to others. Precision is impossible, but discussion is not. Although each firm separately has an interest in paying as little as possible, letting others bear the burden, collectively a more reasonable approach is natural, and the wisdom of paying to ensure that the work-force is properly educated may be apparent.

The *quid pro quo* argument goes some way to answering the tax-payer's question, but only some way. Much more weight is put on the internal argument that as a member of the community he should share the burden of promoting its values. Where the shared values are many, the argument will go a considerable way, and when sufficiently strong, will quell almost all objection; in the Second World War extremely high tax rates were not objected to, because however burdensome, they were better than Hitler. Even if I do not share some particular value, I may be carried along by the others I do share. I am not much of a sportsman, and it does not make me happy if a fellow-countryman wins a bronze medal at the Olympics; but it makes others feel proud, and so I do not grudge a corporate decision to devote public money to training our Olympic team. Much individual dissent is overridden by the communal decision-procedure, itself grounded in the large number of values we do share. But though individual protests may be overridden, the argument remains, and it does not follow from the fact

that a particular tax has been levied, that it is therefore fair. If a poll tax can be criticized on the grounds that it is unduly burdensome to the poor, other taxes can be criticized on the grounds that they bear too heavily on others. Why should tobacco, alcohol and petrol be taxed, and not sweets, milk and coal?

Exact arguments cannot be given. Fiscal justice is rough justice. Revenue has to be raised, and considerations of expediency very largely, and quite properly, determine how it is done. Taxes need to be simple—a point on which British Income Tax fails badly—easy to collect, difficult to evade. Tobacco and petrol, being mostly imported, are suitable under this head; with alcohol there is always the consideration that if the tax be too high, people will start making their own hooch. Arguments of public policy are pertinent: tobacco is bad for health, and so is alcohol if taken too freely; petrol-users damage the environment and make life more difficult and dangerous and much less pleasant for others. Indirect taxes have the merit of simplicity, and being to a large extent voluntary—I do not have to buy tobacco (the salt tax, levied in many countries was properly criticized for being charged on a necessity, and one consumed as much by the poor as the rich). But though grounds of public policy afford some reason for choosing one form of tax rather than another, we need to be wary of social engineering. The function of taxes is to raise revenue, not to reshape society according to the predilections of those possessed of political power. They need always to remember, in this century perhaps more than in any previous one, that political power can do much damage but little good.

**§9.6 Multinationals**

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Big business operates in many countries, and is no longer subject to any one sovereign State. It can choose where to conduct business, and if a regime is unreasonable, it can move elsewhere.<sup>21</sup> This greatly increases its bargaining power. Multinational firms are like barons in middle ages, and able to stand up to the crown. In part this is good. Just as the crown needed curbing in the middle ages, so the State needs to be stood up to. It is a salutary experience for a finance minister to find that if he decides to appropriate all the golden eggs, the goose flies away. But multinationals may abuse their power, and not pay their fair share of the costs of running the societies they operate in. Companies registered in the Cayman Islands, like tankers registered in Liberia, do not inspire confidence that they will be mindful of their obligations generally.

Much further thought is needed about the rights and obligations of firms and States, but for the present we end with the affirmation that although multinational enterprises, like other business enterprises, have obligations to the State both to pay taxes and to comply with its laws and regulations, the State must be seen to be legitimate in the way those taxes, laws and regulations are decided. To earn that legitimacy, the State must ensure that the bureaucracy through which it operates is seen to be receptive to the needs and wants of those it would regulate. Finally, the State has an obligation to legitimise business activity in recognising it as a creator of wealth, and in ensuring that fiscal justice strikes the right balance between business as tax contributor, and business as investor in the future structure of the economy in which it operates.

<sup>21</sup> Not that tax should be the chief factor. Many multinational firms reckon that if they let tax dominate their commercial decisions, their business would deteriorate. (Dick)