



The  
Confusion of Language in  
Political Thought

F. A. HAYEK



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# *The Confusion of Language in Political Thought*

WITH SOME SUGGESTIONS  
FOR REMEDYING IT

F. A. HAYEK

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Homo non intelligendo fit omnia  
G. Vico

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The *Occasional Papers* have also been adapted to accommodate pieces of original writing with a topical or theoretical interest for economic specialists. *Occasional Paper 20* was written by Professor F. A. Hayek who needs no introduction to readers in Britain, the USA or Europe. In his academic lifetime he has written original, stimulating and contrafashionable works on economic theory, economic policy and social philosophy. In this *Paper* he appears in all three rôles. The *Paper* incorporates thinking on the nature of society and the terms used to describe alternative forms of society arising out of his work on a major study of the institutional framework for a market economy.

The *Paper* is written for specialists rather than the general reader, but for the convenience of non-specialists we have added a summary, approved by the author, of each of the eight sections into which the text is divided to help them follow Professor Hayek's sometimes abstract and sophisticated analysis. Economists may be especially interested in section VI which suggests that the word 'economy' has been used to describe societies that are spontaneous as well as societies that are directed. He suggests that since 'market economy' describes an order based on spontaneity it should be described as a 'catallaxy', and that the term 'economy' should be reserved for orders that serve specified ends.

The Institute, with its Advisory Council, does not necessarily share the analysis or proposals of its authors, but it offers this *Paper* as a distinguished contribution to a more refined description of economic systems that form the subject of contemporary academic and public debate.

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## Summary

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In his Introduction Professor Hayek argues that political thought is still restricted by the use of outdated terms which reflect subjective explanations of social institutions.

### SECTION I

Order enables us to explain the world about us, but not all social order is the product of deliberate action. Some orders are spontaneous by-products of human activity. Professor Hayek suggests that the term 'cosmos' be adopted to describe them. The term 'taxis' is to be reserved for orders or arrangements intended to serve specific human purposes.

A *cosmos* cannot be claimed to have a purpose because it is not deliberately created by men; it is self-regulating. A *taxis* has an organiser and is therefore more limited than a spontaneous *cosmos* that utilises the knowledge of all its individual elements. For the same reason the outcome of a *cosmos* will always be unpredictable.

A *taxis* is more efficient than a *cosmos* when the purpose to be served reflects a given hierarchy of ends.

### SECTION II

Two types of rules or norms correspond to the two social orders and modern European languages do not conveniently reflect the distinction between them. Professor Hayek proposes adopting 'nomos' to describe the universal rules of just conduct which will regulate a *cosmos*. In contrast he describes a rule applicable to particular people, or serving the ends of the rulers in a *taxis*, as a 'thesis'. A *nomos* has the advantage of not obliging individuals to perform particular actions; they can use for their own purposes knowledge not possessed by the rulers.

The distinction between *nomos* and *thesis* roughly corresponds to that between private and public law. The mistaken belief in the pre-eminence of public law results from its deliberate creation for particular purposes. Private case law is universally applicable and independent of specific ends, but there is no comparable limitation to the norms established by legislation. Public law

is in this way transforming the social order from the *nomos* into a *taxis*.

### SECTION III

Men may know how to act without being able to express the rule governing their conduct. Conclusions derived from artificial rules will therefore not be tolerated by society if they conflict with the conclusions to which unarticulated rules lead.

### SECTION IV

The substitution of the term 'will' for the older term 'opinion' has proved unfortunate. The order of an open society depends largely on opinions which have been effective long before men could explain why they held them. Successful action depends as much on knowing what to do as on understanding consequences. Taboos or inhibitions are therefore a necessary basis for successful life. Civilised order requires the observance of general rules rather than rules prescribing conduct.

All moral problems arise from a conflict between values (i.e. rules which tell us some kinds of actions must be avoided) and knowledge that particular desirable results can be achieved in a given way. It is our ignorance which makes it necessary for us to accept limits. The actions of a person guided only by calculable results would soon prove unsuccessful.

The members of an open society cannot agree on specific ends. They can only hold values in common.

### SECTION V

Professor Michael Oakeshott's *nomocracy* corresponds to Professor Hayek's *cosmos*, and *teleocracy* to his *taxis*.

### SECTION VI

The word 'economy' is unfortunately used to describe both types of order. A market economy ought not to be judged by its ability to serve a hierarchy of ends. It is a spontaneous *cosmos* which can be described as a *catallaxy* in distinction to an *economy* (e.g. household) which serves individual purposes.

Competition tends to minimise the cost of production. In-

dividual incomes are determined partly by skill and partly by luck in order that total output can be as large as possible. A competitive market does not preclude government action from outside the market to help people who cannot earn a given minimum. But attempts to make the market itself serve some ideal of distributive justice will reduce the total wealth in which all can share.

## SECTION VII

Democracy meant that whatever ultimate power there was should be in the hands of the people. But the term implied nothing about the extent of that power, and certainly not that it should be unlimited. An elected legislature that does not confine itself to establishing universal rules of just conduct will soon be driven by vested interests to serve particular private ends.

A court of justice is needed that can say whether the acts of a representative assembly do or do not possess the formal properties necessary for valid law. Though the assembly's power would be supreme it would not be unlimited.

Members of the law-making assembly (as distinguished from the governmental assembly) would be elected for long periods, each generation electing once in their lives, say, in their fortieth year. The law-making assembly would therefore consist of people between 40 and 55. The creation of such a body would make possible the separation of powers which has never existed anywhere in practice.

The word 'democracy' is now indissolubly associated with the conception of the unlimited power of the majority. A new word is needed to stand for what 'democracy' originally expressed. 'Demarchy' describes such a limited government.

# *The Confusion of Language in Political Thought*

## F. A. HAYEK

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### INTRODUCTION

Modern civilisation has given man undreamt of powers largely because, without understanding it, he has developed methods of utilising more knowledge and resources than any one mind is aware of. The fundamental condition from which any intelligent discussion of the order of all social activities should start is the constitutional and irremediable ignorance both of the acting persons and of the scientist studying this order, of the multiplicity of particular, concrete facts which enter this order of human activities because they are known to *some* of its members. As the motto on the title page expresses it, 'man has become all he is without understanding what happened'.<sup>1</sup> This insight should not be a cause of shame but a source of pride in having discovered a method that enables us to overcome the limitations of individual knowledge. And it is an incentive deliberately to cultivate institutions which have opened up those possibilities.

The great achievement of the 18th century social philosophers was to replace the naïve constructivist rationalism of earlier periods,<sup>2</sup> which interpreted all institutions as the products of deliberate design for a foreseeable purpose, by a critical and evolutionary rationalism that examined the conditions and limitations of the effective use of conscious reason.

We are still very far, however, from making full use of the possibilities which those insights open to us, largely because our thinking is governed by language which reflects an earlier mode of thought. The important problems are in large measure obscured by the use of words which imply anthropomorphic or personalised explanations of social institutions. These explana-

<sup>1</sup> The passage from Gianbattista Vico used as a motto is taken from *Opere*, ed. G. Ferrari, 2nd edition, Milan, 1854, Vol. V., p. 183.

<sup>2</sup> Cf. my *Studies in Philosophy, Politics, and Economics*, London and Chicago, 1967, especially Chapters 4, 5 and 6, as well as my lecture 'Dr Bernard Mandeville' (*The Proceedings of the British Academy*, 1966, Vol. LII, London, 1967).

tions interpret the general rules which guide action directed at particular purposes. In practice such institutions are successful adaptations to the irremediable limitations of our knowledge, adaptations which have prevailed over alternative forms of order because they proved more effective methods for dealing with that incomplete, dispersed knowledge which is man's unalterable lot.

The extent to which serious discussion has been vitiated by the ambiguity of some of the key terms, which for lack of more precise ones we have constantly to use, has been vividly brought home to me in the course of a still incomplete investigation of the relations between law, legislation, and liberty on which I have been engaged for some time. In an endeavour to achieve clarity I have been driven to introduce sharp distinctions for which current usage has no accepted or readily intelligible terms. The purpose of the following sketch is to demonstrate the importance of these distinctions which I found essential and to suggest terms which should help us to avoid the prevailing confusion.

## I

### COSMOS AND TAXIS

The achievement of human purposes is possible only because we recognise the world we live in as orderly. This order manifests itself in our ability to learn, from the (spatial or temporal) parts of the world we know, rules which enable us to form expectations about other parts. And we anticipate that these rules stand a good chance of being borne out by events. Without the knowledge of such an order of the world in which we live, purposive action would be impossible.

This applies as much to the social as to the physical environment. But while the order of the physical environment is given to us independently of human will, the order of our social environment is partly, but only partly, the result of human design. The temptation to regard it *all* as the intended product of human action is one of the main sources of error. The insight that *not all order that results from the interplay of human actions is the result of design* is indeed the beginning of social theory. Yet the anthropomorphic connotations of the term

'order' are apt to conceal the fundamental truth that all deliberate efforts to bring about a social order by arrangement or organisation (i.e. by assigning to particular elements specified functions or tasks) take place within a more comprehensive spontaneous order which is not the result of such design.

While we have the terms 'arrangement' or 'organisation' to describe a *made* order, we have no single distinctive word to describe an order which has formed *spontaneously*. The ancient Greeks were more fortunate in this respect. An arrangement produced by man deliberately putting the elements in their place or assigning them distinctive tasks they called *taxis*, while an order which existed or formed itself independent of any human will directed to that end they called *cosmos*. Though they generally confined the latter term to the order of nature, it seems equally appropriate for any spontaneous social order and has often, though never systematically, been used for that purpose.<sup>1</sup> The advantage of possessing an unambiguous term to distinguish this kind of order from a made order should outweigh the hesitation we may feel about endowing a social order which we often do not like with a name which conveys the sense of admiration and awe with which man regards the cosmos of nature.

The same is in some measure true of the term 'order' itself. Though one of the oldest terms of political theory, it has been somewhat out of fashion for some time. But it is an indispensable term which, on the definition we have given it—a condition of affairs in which we can successfully form expectations and hypotheses about the future—refers to objective facts and not to values. Indeed, the first important difference between a spontaneous order or *cosmos* and an organisation (arrangement) or *taxis* is that, not having been deliberately made by men, a *cosmos* has no purpose.<sup>2</sup> This does not mean that its existence may not be exceedingly serviceable in the pursuit of many pur-

<sup>1</sup> For example, J. A. Schumpeter, *History of Economic Analysis*, New York, 1954, p. 67, where he speaks of A. A. Cournot and H. von Thünen as the first two authors 'to visualise the general inter-dependence of all economic quantities and the necessity of representing this cosmos by a system of equations'.

<sup>2</sup> The only passage known to me in which the error, usually only implicit, that 'order supposes an end' is explicitly stated in these words occurs, significantly, in the writings of Jeremy Bentham: 'An Essay on Political Tactics', first published in *Works*, ed. Bowring, Vol. II, p. 399.

poses: the existence of such an order, not only in nature but also in society, is indeed indispensable for the pursuit of any aim. But the order of nature and aspects of the social order not being deliberately created by men, cannot properly be said to have a purpose, though both can be used by men for many different, divergent and even conflicting purposes.

While a *cosmos* or spontaneous order has thus no purpose, every *taxis* (arrangement, organisation) presupposes a particular end, and men forming such an organisation must serve the same purposes. A *cosmos* will result from regularities of the behaviour of the elements which it comprises. It is in this sense endogenous, intrinsic or, as the cyberneticians say, a 'self-regulating' or 'self-organising' system.<sup>1</sup> A *taxis*, on the other hand, is determined by an agency which stands outside the order and is in the same sense exogenous or imposed. Such an external factor may induce the formation of a spontaneous order also by imposing upon the elements such regularities in their responses to the facts of their environment that a spontaneous order will form itself. Such an indirect method of securing the formation of an order possesses important advantages over the direct method: it can be applied in circumstances where what is to affect the order is not known as a whole to anyone. Nor is it necessary that the rules of behaviour within the *cosmos* be deliberately created: they, too, may emerge as the product of spontaneous growth or of evolution.

It is therefore important to distinguish clearly between the spontaneity of the order and the spontaneous origin of regularities in the behaviour of elements determining it. A spontaneous order may rest in part on regularities which are not spontaneous but imposed. For policy purposes there results thus the alternative whether it is preferable to secure the formation of an order by a strategy of indirect approach, or by directly assigning a place for each element and describing its function in detail.

<sup>1</sup> The idea of the formation of spontaneous or self-determining orders, like the connected idea of evolution, has been developed by the social sciences before it was adopted by the natural sciences and here developed as *cybernetics*. This is beginning to be seen by the biologists. For example, G. Hardin, *Nature and Man's Fate* (1959), Mentor edn., New York, 1961, p. 54: 'But long before [Claude Bernard, Clerk Maxwell, Walter B. Cannon or Norbert Wiener] Adam Smith had just as clearly used the idea [of cybernetics]. The "invisible hand" that regulates prices to a nicety is clearly this idea. In a free market, says Smith in effect, prices are regulated by negative feedback.'

Where we are concerned solely with the alternative social orders, the first important corollary of this distinction is that in a *cosmos* knowledge of the facts and purposes which will guide individual action will be those of the acting individuals, while in a *taxis* the knowledge and purposes of the organiser will determine the resulting order. The knowledge that can be utilised in such an organisation will therefore always be more limited than in a spontaneous order where all the knowledge possessed by the elements can be taken into account in forming the order without this knowledge first being transmitted to a central organiser. And while the complexity of activities which can be ordered as a *taxis* is necessarily limited to what can be known to the organiser, there is no similar limit in a spontaneous order.

While the deliberate use of spontaneous ordering forces (that is, of the rules of individual conduct which lead to the formation of a spontaneous general order) thus considerably extends the range and complexity of actions which can be integrated into a single order, it also reduces the power anyone can exercise over it without destroying the order. The regularities in the conduct of the elements in a *cosmos* determine merely its most general and abstract features. The detailed characteristics will be determined by the facts and aims which guide the actions of individual elements, though they are confined by the general rules within a certain permissible range. In consequence, the concrete content of such an order will always be unpredictable, though it may be the only method of achieving an order of wide scope. We must renounce the power of shaping its particular manifestations according to our desires. For example, the position which each individual will occupy in such an order will be largely determined by what to us must appear as accident. Though such a *cosmos* will serve all human purposes to some degree, it will not give anyone the power to determine whom it will favour more and whom less.

In an arrangement or *taxis*, on the other hand, the organiser can, within the restricted range achievable by this method, try to make the results conform to his preferences to any degree he likes. A *taxis* is necessarily designed for the achievement of particular ends or of a particular hierarchy of ends; and to the extent that the organiser can master the information about the available means, and effectively control their use, he may be

able to make the arrangement correspond to his wishes in considerable detail. Since it will be *his* purposes that will govern the arrangement, he can attach any valuation to each element of the order and place it so as to make its position correspond to what he regards as its merits.

Where it is a question of using limited resources known to the organiser in the service of a unitary hierarchy of ends, an arrangement or organisation (*taxis*) will be the more effective method. But where the task involves using knowledge dispersed among and accessible only to thousands or millions of separate individuals, the use of spontaneous ordering forces (*cosmos*) will be superior. More importantly, people who have few or no ends in common, especially people who do not know one another or one another's circumstances, will be able to form a mutually beneficial and peaceful spontaneous order by submitting to the same abstract rules, but they can form an organisation only by submitting to somebody's concrete will. To form a common *cosmos* they need agree only on abstract rules, while to form an organisation they must either agree or be made to submit to a common hierarchy of ends. Only a *cosmos* can thus constitute an open society, while a political order conceived as an organisation must remain closed or tribal.

## II

### NOMOS AND THESIS

Two distinct kinds of rules or norms correspond respectively to *cosmos* or *taxis* which the elements must obey in order that the corresponding kind of order be formed. Since here, too, modern European languages lack terms which express the required distinction clearly and unambiguously, and since we have come to use the word 'law' or its equivalents ambiguously for both, we shall again propose Greek terms which, at least in the classic usage of 5th and 4th century Athens BC, conveyed approximately the required distinction.<sup>1</sup>

<sup>1</sup> *Thesis* must not be confused with *thesmos*, a Greek term for 'law' older than *nomos* but, at least in classical times, meaning rather the law laid down by a ruler than the impersonal rules of conduct. *Thesis*, by contrast, means the particular act of setting up an arrangement. It is significant that the ancient Greeks could never make up their minds whether the proper opposite to what was determined by nature (*physei*) was what was determined *nomō* or what was determined *thesei*. On this problem see Chapter 6 of the volume of essays and the lecture mentioned in footnote 2 on page 9.

By *nomos* we shall describe a universal rule of just conduct applying to an unknown number of future instances and equally to all persons in the objective circumstances described by the rule, irrespective of the effects which observance of the rule will produce in a particular situation. Such rules demarcate protected individual domains by enabling each person or organised group to know which means they may employ in the pursuit of their purposes, and thus to prevent conflict between the actions of the different persons. Such rules are generally described as 'abstract' and are independent of individual ends.<sup>1</sup> They lead to the formation of an equally abstract and end-independent spontaneous order or *cosmos*.

In contrast, we shall use *thesis* to mean any rule which is applicable only to particular people or in the service of the ends of rulers. Though such rules may still be general to various degrees and refer to a multiplicity of particular instances, they will shade imperceptibly from rules in the usual sense to particular commands. They are the necessary instrument of running an organisation or *taxis*.

The reason why an organisation must to some extent rely on rules and not be directed by particular commands only also explains why a spontaneous order can achieve results which organisations cannot. By restricting actions of individuals only by general rules they can use information which the authority does not possess. The agencies to which the head of an organisation delegates functions can adapt to changing circumstances known only to them, and therefore the commands of authority

<sup>1</sup> The end-independent character of rules of just conduct has been demonstrated clearly by David Hume and most systematically developed by Immanuel Kant. Cf. D. Hume, *An Enquiry Concerning the Principles of Morals*, in *Essays, Moral, Political, and Literary*, ed. T. H. Green and T. H. Grose, London, 1875, Vol. II, p. 273: 'the benefit resulting from [the social virtues of justice and fidelity] is not the consequence of every individual single act; but arises from the whole scheme of system concurred in by the whole, or the greater part of society. General peace and order are the attendants of justice or a general abstinence from the possessions of others: But a particular regard to the particular right of one individual citizen may frequently, considered in itself, be productive of pernicious consequences. The result of the individual act is here, in many instances, directly opposite to that of the whole system of actions; and the former may be extremely hurtful, while the latter is, to the highest degree advantageous.' See also his *Treatise on Human Nature* (same edn.), Vol. II, p. 318: 'It is evident, that if men were to regulate their conduct by the view of a particular *interest*, they would involve themselves in endless confusion.' For I. Kant see the excellent exposition in Mary Gregor, *Laws of Freedom*, Oxford, 1963, especially pp. 38-42 and 81.

will generally take the form of general instructions rather than of specific orders.

In two important respects, however, the rules governing the members of an organisation will necessarily differ from rules on which a spontaneous order rests: rules for an organisation presuppose the assignment of particular tasks, targets or functions to individual people by commands; and most of the rules of an organisation will apply only to the persons charged with particular responsibilities. The rules of organisation will therefore never be universal in intent or end-independent, but always subsidiary to the commands by which roles are assigned and tasks or aims prescribed. They do not serve the spontaneous formation of an abstract order in which each individual must find his place and is able to build up a protected domain. The purpose and general outline of the organisation or arrangement must be determined by the organiser.

This distinction between the *nomoi* as universal rules of conduct and the *theseis* as rules of organisation corresponds roughly to the familiar distinction between private (including criminal) and public (constitutional and administrative) law. There exists much confusion between these two kinds of rules of law. This confusion is fostered by the terms employed and by the misleading theories of legal positivism (in turn the consequence of the predominant role of public lawyers in the development of jurisprudence). Both represent the public law as in some sense primary and as alone serving the public interest; while private law is regarded, not only as secondary and derived from the former, but also as serving not general but individual interests. The opposite, however, would be nearer the truth. Public law is the law of organisation, of the superstructure of government originally erected only to ensure the enforcement of private law. It has been truly said that public law passes, but private law persists.<sup>1</sup> Whatever the changing structure of government, the basic structure of society resting on the rules of conduct persists. Government therefore owes its authority and has a claim to the allegiance of the citizens only if it maintains the foundations of that spontaneous order on which the working of society's everyday life rests.

<sup>1</sup> H. Huber, *Recht, Staat, und Gesellschaft*, Bern, 1954, p. 5: 'Staatsrecht vergeht, Privatrecht besteht'.

The belief in the pre-eminence of public law is a result of the fact that it has indeed been deliberately created for particular purposes by acts of will, while private law is the result of an evolutionary process and has never been invented or designed as a whole by anybody. It was in the sphere of public law where law-making emerged while, for millenia, in the sphere of private law development proceeded through a process of law-finding in which judges and jurists endeavoured to articulate the rules which had already for long periods governed action and the 'sense of justice'.

Even though we must turn to public law to discover which rules of conduct an organisation will in practice enforce, it is not necessarily the public law to which the private law owes its authority. Insofar as there is a spontaneously ordered society, public law merely organises the apparatus required for the better functioning of that more comprehensive spontaneous order. It determines a sort of superstructure erected primarily to protect a pre-existing spontaneous order and to enforce the rules on which it rests.

It is instructive to remember that the conception of law in the sense of *nomos* (i.e. of an abstract rule not due to anybody's concrete will, applicable in particular cases irrespective of the consequences, a law which could be 'found' and was not made for particular foreseeable purposes) has existed and been preserved together with the ideal of individual liberty only in countries such as ancient Rome and modern Britain, in which the development of private law was based on case law and not on statute law, that is, was in the hands of judges or jurists and not of legislators. Both the conception of law as *nomos* and the ideal of individual liberty have rapidly disappeared whenever the law came to be conceived as the instrument of a government's own ends.

What is not generally understood in this connection is that, as a necessary consequence of case law procedure, law based on precedent must consist exclusively of end-independent abstract rules of conduct of universal intent which the judges and jurists attempt to distil from earlier decisions. There is no such built-in limitation to the norms established by a legislator; and he is therefore less likely to submit to such limitations as the chief task which occupies him. For a long time before alterations in

the *nomos* were seriously contemplated, legislators were almost exclusively concerned with laying down the rules of organisation which regulate the apparatus of government. The traditional conception of the law as *nomos* underlies ideals like those of the Rule of Law, a Government under the Law, and the Separation of Powers. In consequence, when representative bodies, initially concerned solely with matters of government proper, such as taxation, began to be regarded also as the sources of the *nomos* (the private law, or the universal rules of conduct), this traditional concept was soon replaced by the idea that law was whatever the will of the authorised legislator laid down on particular matters.<sup>1</sup>

Few insights more clearly reveal the governing tendencies of our time than understanding that the progressive permeation and displacement of private by public law is part of the process of transformation of a free, spontaneous order of society into an organisation or *taxis*. This transformation is the result of two factors which have been governing development for more than a century: on the one hand, of the increasing replacement of rules of just individual conduct (guided by 'commutative justice') by conceptions of 'social' or 'distributive' justice, and on the other hand, of the placing of the power to lay down *nomoi* (i.e. rules of just conduct) in the hands of the body charged with the direction of government. It has been largely this fusion of these two essentially different tasks in the same 'legislative' assemblies which has almost wholly destroyed the distinction between law as a universal rule of conduct and law as an instruction to government on what to do in particular instances.

The socialist aim of a just distribution of incomes must lead to such a transformation of the spontaneous order into an organisation; for only in an organisation, directed towards a common hierarchy of ends, and in which the individuals have to perform assigned duties, can the conception of a 'just' reward be given meaning. In a spontaneous order nobody 'allocates', or can even foresee, the results which changes in circumstances

<sup>1</sup> A revealing description of the difference between the law with which the judge is concerned and the law of modern legislation is to be found in an essay by the distinguished American public lawyer P. A. Freund in R. B. Brandt (ed.), *Social Justice*, Spectrum Books, New York, 1962, p. 94: 'The judge addresses himself to standards of consistency, equivalence, predictability, the legislator to fair shares, social utility, and equitable distribution'.

will produce for particular individuals or groups, and it can know justice only as rules of just individual conduct but not in results. Such a society certainly presupposes the belief that justice, in the sense of rules of just conduct, is not an empty word—but 'social justice' must remain an empty concept so long as the spontaneous order is not wholly transformed into a totalitarian organisation in which rewards are given by authority for merit earned in performing duties assigned by that authority. 'Social' or 'distributive' justice is the justice of organisation but meaningless in a spontaneous order.

### III

#### A DIGRESSION ON ARTICULATED AND NON-ARTICULATED RULES

Though the distinction to be considered next is not quite on the same plane with the others examined here, it will be expedient to insert some remarks on the sense in which we are employing the term 'rule'. As we have used it it covers two distinct meanings the difference between which is often confused with or concealed by the more familiar and closely related distinction between written and unwritten, or between customary and statute, law. The point to be emphasised is that a rule may effectively govern action in the sense that from knowing it we can predict how people will act, without it being known as a verbal formula to the actors. Men may 'know how' to act, and the manner of their action may be correctly described by an articulated rule, without their explicitly 'knowing that' the rule is such and such; that is, they need not be able to state the rule in words in order to be able to conform to it in their actions, or to recognise whether others have or have not done so.

There can be no doubt that, both in early society and since, many of the rules which manifest themselves in consistent judicial decisions are not known to anyone as verbal formulae, and that even the rules which are known in articulated form will often be merely imperfect efforts to express in words principles which guide action and are expressed in approval or disapproval of the actions of others. What we call the 'sense of justice' is nothing but that capacity to act in accordance with non-articulated rules, and what is described as finding or discovering

justice consists in trying to express in words the yet unarticulated rules by which a particular decision is judged.

This capacity to act, and to recognise whether others act, in accordance with non-articulated rules probably always exists before attempts are made to articulate such rules; and most articulated rules are merely more or less successful attempts to put into words what has been acted upon before, and will continue to form the basis for judging the results of the application of the articulated rules.

Of course, once particular articulations of rules of conduct have become accepted, they will be one of the chief means of transmitting such rules; and the development of articulated and unarticulated rules will constantly interact. Yet it seems probable that no system of articulated rules can exist or be fully understood without a background of unarticulated rules which will be drawn upon when gaps are discovered in the system of articulated rules.

This governing influence of a background of unarticulated rules explains why the application of general rules to particular instances will rarely take the form of a syllogism, since only articulated rules can serve as explicit premises of such a syllogism. Conclusions derived from the articulated rules only will not be tolerated if they conflict with the conclusions to which yet unarticulated rules lead. Equity develops by the side of the already fully articulated rules of strict law through this familiar process.

There is in this respect much less difference between the unwritten or customary law which is handed down in the form of articulated verbal rules and the written law, than there is between articulated and unarticulated rules. Much of the unwritten or customary law may already be articulated in orally-transmitted verbal formulae. Yet, even when all law that can be said to be explicitly known has been articulated, this need not mean that the process of articulating the rules that in practice guide decisions has already been completed.

#### IV

#### OPINION AND WILL, VALUES AND ENDS

We come now to a pair of important distinctions for which the available terms are particularly inadequate and for which even

classical Greek does not provide us with readily intelligible expressions. Yet the substitution by Rousseau, Hegel, and their followers down to T. H. Green, of the term 'will' for what older authors had described as 'opinion',<sup>1</sup> and still earlier ones contrasted as *ratio* to *voluntas*, was probably the most fateful terminological innovation in the history of political thinking.

This substitution of the term 'will' for 'opinion' was the product of a constructivist rationalism<sup>2</sup> which imagined that all laws were invented for a known purpose rather than the articulation or improved formulation of practices that had prevailed because they produced a more viable order than those current in competing groups. The term 'opinion' at the same time became increasingly suspect because it was contrasted with incontrovertible knowledge of cause and effect and a growing tendency to discard all statements incapable of proof. 'Mere opinion' became one of the chief targets of rationalist critique; 'will' seemed to refer to rational purposive action, while 'opinion' came to be regarded as something typically uncertain and incapable of rational discussion.

Yet the order of an open society and all modern civilisation rests largely on opinions which have been effective in producing such an order long before people knew why they held them; and in a great measure it still rests on such beliefs. Even when people began to ask how the rules of conduct which they observed might be improved, the effects which they produced, and in the light of which they might be revised, were only dimly understood. The difficulty lay in the fact that any attempt to assess an action by its foreseeable results in the particular case

<sup>1</sup> The term 'opinion' has been most consistently used in this sense by David Hume, particularly in *Essays, loc. cit.*, Vol. I, p. 125: 'It may be farther said that, though men be much governed by interest, yet even interest itself, and all human affairs, are entirely governed by *opinion*'; and *ibid.*, p. 110: 'As force is always on the side of the governed, the governors have nothing to support themselves but *opinion*. It is therefore on *opinion* only that government is founded; and this maxim extends to the most despotic military government as well as the most free and popular.' It seems that this use of the term 'opinion' derives from the great political debates of the 17th century; this is at least suggested by the text of a broadside of 1641 with an engraving by Wenceslas Hollar (reproduced as frontispiece to Vol. I of William Haller (ed.), *Tracts on Liberty in the Puritan Revolution 1638-1747*, New York, 1934) which is headed 'The World is Ruled and Governed by Opinion'.

<sup>2</sup> The Cartesian foundations of Rousseau's thinking in these respects are clearly brought out in Robert Derathé, *Le rationalisme de J.-J. Rousseau*, Paris, 1948.

is the very opposite of the function which opinions about the permissibility or non-permissibility of a kind of action play in the formation of an overall order.

Our insight into these circumstances is much obscured by the rationalistic prejudice that intelligent behaviour is governed exclusively by a knowledge of the relations between cause and effect, and by the associated belief that 'reason' manifests itself only in deductions derived from such knowledge. The only kind of rational action constructivist rationalism recognises is action guided by such considerations as 'If I want X then I must do Y'. Human action, however, is in fact as much guided by rules which limit it to permissible kinds of actions—rules which generally preclude certain *kinds* of actions irrespective of their foreseeable particular results. Our capacity to act successfully in our natural and social environment rests as much on such knowledge of what *not* to do (usually without awareness of the consequences which would follow if we did it) as on our knowledge of the particular effects of what we do. In fact, our positive knowledge serves us effectively only thanks to rules which confine our actions to the limited range within which we are able to foresee relevant consequences. It prevents us from overstepping these limits. Fear of the unknown, and avoidance of actions with unforeseeable consequences, has as important a function to perform in making our actions 'rational' in the sense of successful as positive knowledge.<sup>1</sup> If the term 'reason' is confined to knowledge of positive facts and excludes knowledge of the 'ought not', a large part of the rules which guide human action so as to enable the individuals or groups to persist in the environment in which they live is excluded from 'reason'. Much of the accumulated experience of the human race would fall outside what is described as 'reason' if this concept is arbitrarily confined to positive knowledge of the rules of cause and effect which govern particular events in our environment.

Before the rationalist revolution of the 16th and 17th centuries, however, the term 'reason' included and even gave first place to the knowledge of appropriate rules of conduct. When *ratio* was contrasted with *voluntas*, the former referred

<sup>1</sup> The extension of knowledge is largely due to persons who transcended these limits, but of those who did many more probably perished or endangered their fellows than added to the common stock of positive knowledge.

pre-eminently to opinion about the permissibility or non-permissibility of the kinds of conduct which *voluntas* indicated as the most obvious means of achieving a particular result.<sup>1</sup> What was described as reason was thus not so much knowledge that in particular circumstances particular actions would produce particular results, but a capacity to avoid actions of a kind whose foreseeable results seemed desirable, but which were likely to lead to the destruction of the order on which the achievements of the human race rested.

We are familiar with the crucial point that the general order of society into which individual actions are integrated results not from the concrete purposes which individuals pursue but from their observing rules which limit the range of their actions. It does not really matter for the formation of this order what are the concrete purposes pursued by the individuals; they may in many instances be wholly absurd, yet so long as the individuals pursue their purposes within the limits of those rules, they may in doing so contribute to the needs of others. It is not the purposive but the rule-governed aspect of individual actions which integrates them into the order on which civilisation rests.<sup>2</sup>

To describe the content of a rule, or of a law defining just conduct, as the expression of a *will*<sup>3</sup> (popular or other) is thus wholly misleading. Legislators approving the text of a statute articulating a rule of conduct, or legal draftsmen deciding the wording of such a bill, will be guided by a will aiming at a

<sup>1</sup> John Locke, *Essays on the Law of Nature* (1676), ed. W. von Leyden, Oxford, 1954, p. 111: 'By reason... I do not think is meant here that faculty of the understanding which forms trains of thought and deduces proofs, but certain definite principles of action from which spring all virtues and whatever is necessary for the proper moulding of morals... reason does not so much establish and pronounce this law of nature as search for it and discover it... Neither is reason so much the maker of that law as its interpreter'.

<sup>2</sup> The distinction between what we call here the 'purposive' and the 'rule-governed' aspects of action is probably the same as Max Weber's distinction between what he calls *zweckrational* and *wertrational*. If this is so it should, however, be clear that hardly any action could be guided by only either the one or the other kind of consideration, but that considerations of the effectiveness of the means according to the rules of cause and effect will normally be combined with considerations of their appropriateness according to the normative rules about the permissibility of the means.

<sup>3</sup> This is a confusion against which the ancient Greeks were protected by their language, since the only word they had to express what we describe as willing, *bouleuomai*, clearly referred only to particular concrete actions. (M. Pohlenz, *Der Hellenische Mensch*, Göttingen, 1946, p. 210.)

particular result; but the particular form of words is not the content of such a law. *Will* always refers to particular actions serving particular ends, and the will ceases when the action is taken and the end (*terminus*) reached. But nobody can have a *will* in this sense concerning what shall happen in an unknown number of future instances.

*Opinions*, on the other hand, have no purpose known to those who hold them—indeed, we should rightly suspect an opinion on matters of right and wrong if we found that it was held for a purpose. Most of the beneficial opinions held by individuals are held by them without their having any known reasons for them except that they are the traditions of the society in which they have grown up. *Opinion* about what is right and wrong has therefore nothing to do with *will* in the precise sense in which it is necessary to use the term if confusion is to be avoided. We all know only too well that our will may often be in conflict with what we think is right, and this applies no less to a group of people aiming at a common concrete purpose than to any individual.

While an act of will is always determined by a particular concrete *end* (*terminus*) and the state of willing ceases when the end is achieved, the manner in which the end is pursued does also depend on *dispositions* which are more or less permanent properties of the acting person.<sup>1</sup> These dispositions are complexes of built-in rules which say either which kinds of actions will lead to a certain kind of result or which are generally to be avoided. This is not the place to enter into a discussion of the highly complex hierarchic structure of those systems of dispositions which govern our thinking and which include dispositions to change dispositions, etc., as well as those which govern all actions of a particular organism and others which are only evoked in particular circumstances.<sup>2</sup>

<sup>1</sup> Cf. Chapter 3 of my *Studies in Philosophy, Politics, and Economics*, *op. cit.*

<sup>2</sup> It is the basic mistake of particularistic utilitarianism to assume that rules of just conduct aim at particular concrete ends and must be judged by them. I know of no clearer expression of this fundamental error of constructivist rationalism than the statement by Hastings Rashdall (*The Theory of Good and Evil*, London, 1948, Vol. I, p. 148) that 'all moral judgements are ultimately judgements as to the value of ends'. This is precisely what they are *not*. They do not refer to concrete ends but to kinds of action or, in other words, they are judgements about means based on a presumed probability that a kind of action will produce undesirable effects but are applicable in spite of our factual ignorance in most particular instances of whether they will do so or not.

What is of importance is that among the dispositions which will govern the manner of action of a particular organism there will always be, in addition to dispositions to the kind of actions likely to produce particular results, many negative dispositions which rule out some kinds of action. These inhibitions against types of actions likely to be harmful to the individual or the group are probably among the most important adaptations which all organisms, and especially all individuals living in groups, must possess to make life possible. 'Taboos' are as much a necessary basis of successful existence of a social animal as positive knowledge of what kind of action will produce a given result.

If we are systematically to distinguish the *will* directed to a particular *end* (terminus) and disappearing when that particular end has been reached, from the *opinion* in the sense of a lasting or permanent disposition towards (or against) *kinds* of conduct, it will be expedient to adopt also a distinct name for the generalised aims towards which *opinions* are directed. It is suggested that among the available terms the one which corresponds to *opinion* in the same way in which *end* corresponds to *will* is the term *value*.<sup>1</sup> It is of course not used currently only in this narrow sense; and we are all apt to describe the importance of a particular concrete end as its value. Nevertheless, at least in its plural form *values*, the term seems as closely to approach the needed meaning as any other term available.

It is therefore expedient to describe as values what may guide a person's actions throughout most of his life as distinct from the concrete ends which determine his actions at particular moments. Values in this sense, moreover, are largely culturally transmitted and will guide the action even of persons who are not consciously aware of them, while the end which will most of the time be the focus of conscious attention will normally be the result of the particular circumstances in which he finds himself at any moment. In the sense in which the term 'value' is most generally used it certainly does not refer to particular objects, persons, or events, but to attributes which many different objects, persons, or events may possess at different

<sup>1</sup> Cf. W. Shakespeare, *Troilus and Cressida*, II, 2, 52:  
'But value dwells not in particular will;  
It holds its estimate and dignity  
As well wherein 'tis precious of itself  
As in the prizer.'

times and different places and which, if we endeavour to describe them, we will usually describe by stating a rule to which these objects, persons or actions conform. The importance of a value is related to the urgency of a need or of a particular end in the same manner in which the universal or abstract is related to the particular or concrete.

It should be noted that these more or less permanent dispositions which we describe as *opinions about values* are something very different from the emotions with which they are sometimes connected. Emotions, like needs, are evoked by and directed towards particular concrete objects and rapidly disappear with their disappearance. They are, unlike opinions and values, *temporary* dispositions which will guide actions with regard to particular things but not a framework which controls all actions. Like a particular end an emotion may overpower the restraints of opinion which refer not to the particular but to the abstract and general features of the situation. In this respect opinion, being abstract, is much more akin to knowledge of cause and effect and therefore deserves to be included with the latter as part of reason.

All moral problems, in the widest sense of the term, arise from a conflict between a knowledge that particular desirable results can be achieved in a given way and the rules which tell us that some *kinds* of actions are to be avoided. It is the extent of our ignorance which makes it necessary that in the use of knowledge we should be limited and refrain from many actions whose unpredictable consequences might place us outside the order within which alone the world is tolerably safe for us. It is only thanks to such restraints that our limited knowledge of positive facts serves us as a reliable guide in the sea of ignorance in which we move. The actions of a person who insisted on being guided only by calculable results and refused to respect opinions about what is prudent or permissible would soon prove unsuccessful and in this sense irrational to the highest degree.

The understanding of this distinction has been badly blurred by the words at our disposal. But it is of fundamental importance because the possibility of the required agreement, and therefore of a peaceful existence of the order of an Open Society, rests on it. Our thinking and our vocabulary are still determined largely by the problems and needs of the small group concerned

with specific ends known to all its members. The confusion and harm caused by the application of these conceptions to the problems of the Open Society are immense. They have been preserved particularly through the dominance in moral philosophy of a Platonic tribalism which in modern times has received strong support from the preference of people engaged in empirical research for the problems of the observable and tangible small groups and from their distaste for the intangible, more comprehensive order of the social cosmos—an order which can be only mentally reconstructed but never intuitively perceived or observed as a whole.

The possibility of an Open Society rests on its members possessing common opinions, rules and values, and its existence becomes impossible if we insist that it must possess a common will issuing commands directing its members to particular ends. The larger the groups within which we hope to live in peace, the more the common values which are enforced must be confined to abstract and general rules of conduct. The members of an Open Society have and can have in common only *opinions* on values but *not a will* on concrete ends. In consequence the possibility of an order of peace based on agreement, especially in a democracy, rests on coercion being confined to the enforcement of abstract rules of just conduct.

## V

### NOMOCRACY AND TELEOCRACY

The first two of the distinctions we have drawn (in Sections I and II) have been conveniently combined by Professor Michael Oakeshott into the two concepts of *nomocracy* and *teleocracy*,<sup>1</sup> which need now hardly any further explanation. A *nomocracy* corresponds to our *cosmos* resting entirely on general rules or *nomoi*, while a *teleocracy* corresponds to a *taxis* (arrangement or organisation) directed towards particular ends or *teloi*. For the former the 'public good' or 'general welfare' consists solely in the preservation of that abstract and end-independent order which is secured by obedience to abstract rules of just conduct: that

<sup>1</sup> So far as I know these terms have been used by Professor Oakeshott only in his oral teaching but not in any published work. For reasons which will become clear in Section VII, I should have preferred to employ the term *nomarchy* rather than *nomocracy*, if the former were not too easily confused with 'monarchy'.

'public interest which is no other than common right and justice excluding all partiality or private interest [which may be] called the empire of laws and not of men'.<sup>1</sup>

For a teleocracy, on the other hand, the common good consists of the sum of the particular interests, that is, the sum of the concrete foreseeable results affecting particular people or groups. It was this latter conception which seemed more acceptable to the naïve constructivist rationalism whose criterium of rationality is a recognisable concrete order serving known particular purposes. Such a teleocratic order, however, is incompatible with the development of an Open Society comprising numerous people having no known concrete purposes in common; and the attempt to impose it on the grown order of a nomocracy leads back from the Open Society to the Tribal Society of the small group. And since all conceptions of the 'merit' according to which individuals should be 'rewarded' must derive from concrete and particular ends towards which the common efforts of a group are directed, all efforts towards a 'distributive' or 'social' justice must lead to the replacement of the nomocracy by a teleocracy, and thus to a return from the Open to the Tribal Society.

## VI

### CATALLAXY AND ECONOMY

The instance in which the use of the same term for two different kinds of order has caused most confusion, and is still constantly misleading serious thinkers, is probably that of the use of the word 'economy' for both the deliberate arrangement or organisation of resources in the service of a unitary hierarchy of ends, such as a household, an enterprise, or any other organisation including government, and the structure of many inter-related economies of this kind which we call a social, or national, or world 'economy' and often also simply an 'economy'. The ordered structure which the market produces is, however, not an organisation but a spontaneous order or cosmos, and is for this reason in many respects fundamentally different from that

<sup>1</sup> James Harrington, *The Prerogative of Popular Government* (1658), in: *The Oceana and His Other Works*, ed. J. Toland, London, 1771, p. 224.

arrangement or organisation originally and properly called an economy.<sup>1</sup>

The belief, largely due to this use of the same term for both, that the market order ought to be made to behave as if it were an economy proper, and that its performance can and ought to be judged by the same criteria, has become the source of so many errors and fallacies that it seems necessary to adopt a new technical term to describe the order of the market which spontaneously forms itself. By analogy with the term *catalactics* which has often been proposed as a replacement for the term 'economics' as the name for the theory of the market order, we could describe that order itself as a *catalaxy*. Both expressions are derived from the Greek verb *katalallein* (or *katalassein*) which significantly means not only 'to exchange' but also 'to receive into the community' and 'to turn from enemy into friend'.<sup>2</sup>

The chief aim of this neologism is to emphasise that a *catalaxy* neither ought nor can be made to serve a particular hierarchy of concrete ends, and that therefore its performance cannot be judged in terms of a sum of particular results. Yet all the aims of socialism, all attempts to enforce 'social' or 'distributive' justice, and the whole of so-called 'welfare economics', are directed towards turning the *cosmos* of the spontaneous order of the market into an arrangement or *taxis*, or the *catalaxy* into an economy proper. Apparently the belief that the *catalaxy* ought to be made to behave as if it were an economy seems so obvious and unquestionable to many economists that they never examine its validity. They treat it as the indisputable presupposition for rational examination of the desirability of

<sup>1</sup> I now find somewhat misleading the definition of the science of economics as 'the study of the disposal of scarce means towards the realisation of given ends', which has been so effectively expounded by Lord Robbins and which I should long have defended. It seems to me appropriate only to that preliminary part of *catalactics* which consists in the study of what has sometimes been called 'simple economies' and to which also Aristotle's *Oeconomica* is exclusively devoted: the study of the dispositions of a single household or firm, sometimes described as the economic calculus or the pure logic of choice. (What is now called economics but had better be described as *catalactics* Aristotle described as *chrematistike* or the science of wealth.) The reason why Robbins' widely accepted definition now seems to me to be misleading is that the ends which a *catalaxy* serve are not given in their totality to anyone, that is, are not known either to any individual participant in the process or to the scientist studying it.

<sup>2</sup> See H. G. Liddell and R. Scott, *A Greek-English Lexicon*, new edition, Oxford, 1940, s.v. *Katalláso*.

any order, an assumption without which no judgement of the expediency or worth of alternative institutions is possible.

The belief that the efficiency of the market order can be judged only in terms of the degree of the achievement of a known hierarchy of particular ends is, however, wholly erroneous. Indeed, since these ends are in their totality not known to anybody, any discussion in such terms is necessarily empty. The discovery procedure which we call competition aims at the closest approach we can achieve by any means known to us to a somewhat more modest aim which is nevertheless highly important: namely a state of affairs in which all that is in fact produced is produced at the lowest possible costs. This means that of that particular combination of commodities and services which will be produced more will be made available than could be done by any other known means; and that in consequence, though the share in that product which the different individuals will get is left to be determined by circumstances nobody can foresee and in this sense to 'accident', each will get for the share he wins in the game (which is partly a game of skill and partly a game of chance) as large a real equivalent as can be secured. We allow the individual share to be determined partly by luck in order to make the total to be shared as large as possible.

The utilisation of the spontaneous ordering forces of the market to achieve this kind of optimum, and leaving the determination of the relative shares of the different individuals to what must appear as accident, are inseparable. Only because the market induces every individual to use his unique knowledge of particular opportunities and possibilities for his purposes can an overall order be achieved that uses in its totality the dispersed knowledge which is not accessible as a whole to anyone. The 'maximisation' of the total product in the above sense, and its distribution by the market, cannot be separated because it is through the determination of the prices of the factors of production that the overall order of the market is brought about. If incomes are not determined by factor pricing within the output, then output cannot be maximised relative to individual preferences.

This does not preclude, of course, that *outside* the market government may use distinct means placed at its disposal for

the purpose of assisting people who, for one reason or another, cannot through the market earn a minimum income. A society relying on the market order for the efficient use of its resources is likely fairly soon to reach an overall level of wealth which makes it possible for this minimum to be at an adequate level. But it should not be achieved by manipulating the spontaneous order in such a manner as to make the income earned on the market conform to some ideal of 'distributive justice'. Such efforts will reduce the total in which all can share.

## VII

### DEMARCHY AND DEMOCRACY

This, unfortunately, does not exhaust the neologisms which seem necessary to escape the confusion which dominates current political thought. Another instance of the prevailing confusion of language is the almost universal use of the term 'democracy' for a special kind of democracy which is by no means a necessary consequence of the basic ideal originally described by that name. Indeed Aristotle questioned whether this form should even be called 'democracy'.<sup>1</sup> The appeal of the original ideal has been transferred to the particular form of democracy which now prevails everywhere, although this is very far from corresponding to what the original conception aimed at.

Initially the term 'democracy' meant no more than that whatever ultimate power there is should be in the hands of the majority of the people or their representatives. *But it said nothing about the extent of that power.* It is often mistakenly suggested that any ultimate power must be unlimited. From the demand that the *opinion* of the majority should prevail it by no means follows that their *will* on particular matters should be unlimited. Indeed the classical theory of the separation of powers presupposes that the 'legislation' which was to be in the hands of

<sup>1</sup> Aristotle, *Politics*, Iv IV 4, 1,292a, Loeb, ed. Rackham, Cambridge, Mass., and London, 1950, p. 303: 'And it would seem a reasonable criticism to say that such a democracy is not a constitution at all; for where the laws do not govern there is no constitution, as the law ought to govern all things while the magistrates control particulars, and we ought to judge this to be constitutional government; if then democracy really is one of the forms of constitution, it is manifest that an organisation of this kind, in which all things are administered by resolutions of the assembly, is not even a democracy in the proper sense, for it is impossible for a voted resolution to be a universal rule'.

a representative assembly should be concerned only with the passing of 'laws' (which were presumed to be distinguishable from particular commands by some intrinsic property), and that particular decisions did not become laws (in the sense of *nomoi*) merely because they emanated from the 'legislature'. Without this distinction the idea that a separation of powers involved the attribution of particular functions to distinct bodies would have been meaningless and indeed circular.<sup>1</sup>

If the legislature only can make new law and can do nothing else but make law, whether a particular resolution of that body is valid law must be determinable by a recognisable property of that resolution. Its source alone does not constitute a sufficient criterion of validity.

There can be no doubt that what the great theorists of representative government and of liberal constitutionalism meant by law when they demanded a separation of powers was what we have called *nomos*. That they spoiled their aim by entrusting to the same representative assemblies also the task of making laws in another sense, namely that of the rules of organisation determining the structure and conduct of government, is another story which we cannot further pursue here. Nor can we further consider the inevitable consequence of an institutional arrangement under which a legislature which is not confined to laying down universal rules of just conduct must be driven by organised interests to use its power of 'legislation' to serve particular private ends. All we are here concerned with is that it is not necessary that the supreme authority possesses this sort of power. To limit power does *not* require that there be another power to limit it. If all power rests on *opinion*, and opinion recognises no other ultimate power than one that proves its belief in the justice of its actions *by committing itself to universal rules* (the application of which to particular cases it cannot control), the supreme power loses its authority as soon as it oversteps these limits.

The supreme power thus need not be an unlimited power—it may be a power which loses the indispensable support of opinion as soon as it pronounces anything which does not

<sup>1</sup> Cp. above what is said under 'Nomos and Thesis' on the difference between private and public law; and on what follows now also the important work by M. J. C. Vile, *Constitutionalism and the Separation of Powers*, Clarendon Press, Oxford, 1967.

possess the substantive character of *nomos* in the sense of a universal rule of just conduct. Just as the Pope is deemed to be infallible only *dum ex cathedra loquitur*, that is, so long as he lays down dogma and not in his decision of particular matters, so a legislature may be supreme only when it exercises the capacity of legislating in the strict sense of stating the valid *nomos*. And it can be so limited because there exist objective tests (however difficult they may be to apply in particular instances) by which independent and impartial courts, not concerned with any particular aims of government, can decide whether what the legislature resolves has the character of a *nomos* or not, and therefore also whether it is binding law. All that is needed is a court of justice which can say whether the acts of the legislature do or do not possess certain formal properties which every valid law must possess. But this court need possess no positive power to issue any commands.

The majority of a representative assembly may thus well be the *supreme* power and yet not possess *unlimited* power. If its power is limited to acting as (to revive another Greek term which appealed both to the 17th century English theorists of democracy and to John Stuart Mill)<sup>1</sup> *nomothetae*, or as the setters of the *nomos*, without power to issue particular commands, no privilege or discrimination in favour of particular groups which it attempted to make law would have the force of law. This sort of power would simply not exist because whoever exercised supreme power would have to prove the legitimacy of its acts by committing itself to universal rules.

If we want democratic determination not only of the coercive rules which bind the private citizen as well as the government, but also of the administration of the government apparatus, we need some representative body to do the latter. But this body need not and should not be the *same* as that which lays down the *nomos*. It should itself be *under* the *nomos* laid down by another representative body, which would determine the limits of the power which this body could not alter. Such a governmental or directive (but in the strict sense *not* legislative) representative body would then indeed be concerned with matters of the *will*

<sup>1</sup> Cf. Philip Hunton, *A Treatise on Monarchy*, London, 1643, p. 5, and John Stuart Mill, *On Liberty and Considerations of Representative Government*, ed. R. B. McCallum, Oxford, 1946, p. 171.

of the majority (i.e. with the achievement of a particular concrete purpose) for the pursuit of which it would employ governmental powers. It would not be concerned with questions of *opinion* about what was right and wrong. It would be devoted to the satisfaction of concrete foreseeable needs by the use of separate resources set aside for the purpose.

The fathers of liberal constitutionalism were surely right when they thought that in the supreme assemblies concerned with what they regarded as legislation proper, that is, with laying down the *nomos*, those coalitions of organised interests which they called factions and which we call parties should have no place. Parties are indeed concerned with matters of concrete *will*, the satisfaction of the particular interest of the people who combine to form them, but legislation proper should express *opinion* and therefore not be placed in the hands of representatives of particular interests but in the hands of a representative sample of the prevailing opinion, persons who should be secured against all pressure of particular interests.

I have elsewhere suggested<sup>1</sup> a method of electing such a representative body that would make it independent of the organised parties though they would still remain necessary for the effective democratic conduct of government proper. It requires the election of members for long periods after which they would not be re-eligible. To make them nevertheless representative of current opinion a representation by age groups might be used: each generation electing once in their lives, say, in their fortieth year, representatives to serve for 15 years and thereafter assured of continued occupation as lay judges. The law-making assembly would then be composed of men and women between 40 and 55 (and thus probably of an average age somewhat lower than the existing representative assemblies!), elected by their contemporaries after they had opportunity to prove themselves in ordinary life, and required on election to abandon their private occupations for an honorific position for the rest of their active life.

Such a system of election by the contemporaries (who usually are the best judges of a person's ability) would come nearer to producing that ideal of the political theorists, a senate of wise and honourable men, than any system yet tried. The restriction

<sup>1</sup> Most recently in 'The Constitution of a Liberal State', *Il Politico*, 1967.

of the power of such a body to legislation proper would for the first time make possible that real separation of powers which has never yet existed, and with it a true government under the law and an effective rule of law. The governmental or directive assembly, on the other hand, subject to the law laid down by the former, and concerned with the provision of particular services, might well continue to be elected on established party lines.

Such a basic change in existing constitutional arrangements pre-supposes that we finally shed the illusion that the safeguards men once painfully devised to prevent abuse of government power are all unnecessary once that power is placed in the hands of the majority of the people. There is no reason whatever to expect that an omnipotent democratic government will always serve the general rather than particular interests. Democratic government free to benefit particular groups is bound to be dominated by coalitions of organised interests, rather than serve the general interest in the classical sense of 'common right and justice, excluding all partial or private interests'.

It is greatly to be regretted that the word democracy should have become indissolubly connected with the conception of the unlimited power of the majority on particular matters.<sup>1</sup> But if this is so we need a new word to denote the ideal which democracy originally expressed, the ideal of a rule of the popular *opinion* on what is just, but not of a popular *will* concerning whatever concrete measures seem desirable to the coalition of organised interests governing at the moment. If democracy and limited government have become irreconcilable conceptions, we must find a new word for what once might have been called limited democracy. We want the *opinion* of the *demos* to be the ultimate authority, but not allow the naked power of the majority, its *kratos*, to do rule-less violence to individuals. The majority should then *rule (archein)* by 'established *standing laws*, promulgated and known to the people, and not by extemporary decrees'.<sup>2</sup> We might perhaps describe

<sup>1</sup> Cf. R. Wollheim, 'A Paradox in the Theory of Democracy', in P. Laslett and W. G. Runciman (eds.), *Philosophy, Politics, and Society*, 2nd series, London, 1962, p. 72: 'the modern conception of democracy is of a form of government in which no restriction is placed on the governing body'.

<sup>2</sup> John Locke, *Second Treatise on Government*, sect. 131, ed. P. Laslett, Cambridge, 1960, p. 371.

such a political order by linking *demos* with *archein* and call *demarchy* such a limited government in which the opinion but not the particular will of the people is the highest authority. The particular scheme considered above was meant to suggest one possible way to secure such a *demarchy*.

If it is insisted upon that democracy must be unlimited government, I do indeed *not* believe in democracy, but I am and shall remain a profoundly convinced demarchist in the sense indicated. If we can by such a change of the name free ourselves from the errors that have unfortunately come to be so closely associated with the conception of democracy, we might thereby succeed in avoiding the dangers which have plagued democracy from its very beginning and have again and again led to its destruction. It is the problem which arose in the memorable episode of which Xenophon tells us, when the Athenian Assembly wanted to vote the punishment of particular individuals and

‘the great numbers cried out that it was monstrous if the people were to be prevented from doing whatever they wished . . . Then the Prytanes, stricken with fear, agreed to put the question—all of them except Socrates, the son of Sophroniskus; and he said that in no case would he act except in accordance with the law’.<sup>1</sup>

<sup>1</sup> Xenophon, *Hellenica*, I, Vii, 15, Loeb ed. by C. L. Brownson, Cambridge, Mass., and London, 1918, p. 73.

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