Chapter - II

DEVELOPMENT OF THE CONCEPT OF STATE SOVEREIGNTY.

The over-riding position which the state has acquired in internal and international relations has given it a central place in any study of an effective international order based on rule of law. In fact the national state to-day appears to be at the height of its power. In the name of an exalted and savage nationalism, the Fascist States had launched their disciplined peoples upon conquest. In the name of national independence, the attacked, oppressed and subjugated nations defend their liberty. All over the world the power and authority of the state has risen to undreamed heights. The twin forces of State power and national unity seem to propel the peoples in their titanic struggle.

But all these developments cannot be viewed in a detached and isolated way completely divorced from its social milieu. Our ideas and institutions are living things; they bear the unmistakable impress of the environment they have inherited, of the temper of the climate in which they flourish. The genesis and development of any institution cannot be perfectly intelligible unless understood within its
own time-limit and space-limit. Such a view might be misinterpreted to mean that we should confine our effort and imagination to the prison-wall of local and short-lived history of a particular time or epoch, but a true appreciation of such a theory would rather inspire us to take a synoptic view of the history of such an institution as a whole. This relativity of political, social and economic thought insisted so strongly by modern thinkers is but inherent in the eternal flux of ideas and conditions ever since the dawn of human civilisation. In fact "theories of sovereignty have been more often apologies for a cause than the expression of a disinterested love for truth." Viewed in this light the state is the offspring of a special set of historic circumstances and in the revolution of values and conditions, from which no institution of society is immune, its future presents one of the baffling problems of our time because of the profound and fundamental changes which have taken place not only in the ideological plane but also in the social and political life of our time.

What distinguishes the modern post-Reformation from the medieval state is the enormously greater strength and concentration of power in the former. Their history is a long and chequered one intimately woven into the texture of the
The new European Civilisation which followed the dark and long period between the collapse of ancient civilisation and the emergence of the medieval order was built on the dual foundations of Feudalism and the Christian church.

The medieval world knew nothing of national sovereignty. Politically and socially Europe was not yet divided into national states: it was a hierarchical and international society in which the social scales were determined by the conditions of land tenure. Sovereignty, in the sense of an ultimate territorial organ which knows no superior was to the middle ages an unthinkable thing. "Throughout the Middle Ages the growth of strong centralised governments was impeded by many obstacles, of which difficulties of communication, scarcity of population, primitive economic conditions are obvious illustrations." In fact the basis of mediaeval organisation was radically different and centrifugal based as it was on a system of functional groups and contractual relationship between overlord and tenant which surpassed the limits of geography. The sentiment of nationality was not yet born. France, Germany, Italy and Spain were merely
geographical descriptions.

Thus throughout the Middle Ages, the state was not generally the predominant organisation within the community and relatively few writers claimed any such position for it. Organised control over the individuals within any region was shared generally by several authorities - Roman Church, Holy Roman emperor, king, feudal lord, chartered town, guild - the several authorities often competing with one another in their efforts to extend their spheres of control. What laws there were of a "civic" - secular and territorial - character were for the most part customary, varying often according to the boundaries of fiefs and towns rather than larger political lines.

Such a feudal organisation of society was a substitute of organisation in a state and a perfectly feudal condition of society would not merely be a weak state, but the negation of the state as understood in political terminology. Hence the expression 'feudal state' applied to such a condition of society is very often loosely used without understanding its full significance and real import.
In such a society, the conception of sovereignty, if any, had a restricted meaning and was stripped of the awe-inspiring majesty with which the modern absolutist state has been invested. Any body could claim to be sovereign when there was no appeal from him to any higher authority. The medieval courts such as 'Parlement de Paris' or the 'Cour des Aides' are termed sovereign in this limited sense. Law in such a relational society was conceived of as an objective phenomenon capable of being grasped and perceived. The twin heads of Pope and Emperor at the summit of this pyramidal social structure were not above the law nor were they considered "legibus absolutes", but were responsible under natural law to God and their own conscience. In fact, as Bernard Shaw has pointed out society was divided horizontally rather than vertically and the Middle Ages were a period of limited authority, with a system of checks and balances as the basis of the social organisation. The secular authority of the feudal courts was limited firstly by a similar rival organisation of ecclesiastical courts touching the ordinary citizen at many important points and secondly by mercantile courts whose authority was derived from charters secured from secular rulers. Again, the existence of a large body of customary law, which required the consent of the tenants to whom it applied before it could be changed considerably.
curtailed and limited the authority and power of the king to levy fresh taxes.

The other influence which retarded the growth of modern states in the Middle ages was the church which preached the majestic notion of the inclusive-All which somehow transcends the inconvenient variety of a shifting universe. The state could not claim absolute and unqualified allegiance from its people; their loyalty to the state was divided and the church claimed and revived obedience in matters far beyond the purely spiritual sphere.

Yet the conflict between the two swords, between the church and state, the eternal and temporal power was no easy task for the medieval thinker to reconcile. Universal sovereignty of the church. The notion of a unity seemed likely to break down under the stress and strain of a variety of legal systems prevalent among the increasingly separate kingdoms. Yet right down to the conciliar movement, the papal prerogative held its sway, and the imperial power was regarded as but the expression of papal convenience. Thus the "middle ages had a clear conception of sovereignty, even if its territorial aspects failed of development." Jus Divinum implied universal sovereignty of the Church; if Christ was king above, so it was urged, must the Pope, as his vicar,
rule below. Above the chaos and violence of the temporal world, his was the final oracle calling rulers and subjects alike to practise justice, to ensure peace and to abide by the truths of revealed religion. 11

Yet feudalism, inspite of its static relationally organised character of society, left a large legacy of ideas which were pressed into the service of its victorious rival, the absolute state which was steadily coming into prominence after the disintegration and collapse of the feudal order. "The duty of personal loyalty of vassal to lord which feudalism made so prominent was capable of being transmuted into the duty of unquestioning allegiance of subject to monarch in the national state; the intimate association of this personal relationship with the tenure of land made the transition to territorial monarchy easy and natural." 12 The idea of rights of property paved the way for the notion of absolute character of government, of the realm as the 'dominion' or property of the monarch, and of the people of its 'subjects' rather than its citizens.

Although the middle ages preached consistently the unity of allegiance as a guarantee against the diversified
allegiance implicit in the feudal social system, the medieval world has a genuine conception of popular sovereignty. Every medieval thinker in some fashion or other regarded the community as a whole as the master of his own house. Popular will, we are told, is the source of power. The prince's will may have the force of law but equally emphatic reference can be made from the Twelve Tables that the highest law derives from the welfare of the people. Marsiglio of Padua could say in the manner of Rousseau, that there is no genuine right to sovereignty unless it is exercised by an assembly of the people as a whole. Lord Acton in his "History of Freedom" has thus summarised the achievements of Western State development: "Looking back over the space of a thousand years, which we call the Middle Ages, to get an estimate of the work they had done, if not towards perfection in their institutions, at least towards attaining the knowledge of political truth, this is what we find: Representative government which was unknown to the ancients was almost universal. The political produce of the Middle Ages was a system of states in which authority was restricted by the representation of powerful classes, by privileged associations, and by the acknowledgement of duties superior to those which are imposed by man." But these doctrines are vague and inchoate, mere wan ghosts as they lacked the substance of institutional form. They simply represent an effort towards a philosophy which, could it secure effective mechanism,
might well have challenged many of the medieval notions at its very source.

The spiritual, social and political revolution which is marked by the Renaissance, the Reformation and the rise of the national state brought with them new problems and postulates for which the older theory had no adequate explanation to offer. The Renaissance broke down the relationally organised medieval order where the individual found himself placed in his appointed orbit as a part of universal organism and from the meshes of the old order it emancipated the individual as an end unto himself, critical, sceptical and conscious of power. The social and economic trends unleashed by these two forces contributed powerfully to the emergence of the modern state, absolute and sovereign, unfettered by any tie of allegiance to either Church or Emperor. Indeed history is more often a capricious muse than an exact scientist, and one of its outstanding paradoxes can be found in the fact that a movement which sought ecclesiastical purification through the medium of the individual conscience should result in a greater concentration of state-power. Yet such an explanation is writ large in the temper of the time, in the social and political forces of that epoch.

It should be borne in mind at the very outset that there can be no single date which can sharply divide the
medieval from the modern world. The change was gradual, uneven and never so complete as to leave behind it medieval patches. Yet despite the inevitable gradualness of such a change, the broad contrast between the medieval and the modern could be felt without any strain or effort. The sixteenth century however witnessed deep and profound changes. The aftermath of Crusades and the discovery of the New World gave a final death-blow to the economic basis of the medieval order, and laid the foundation for the era of commercial expansion. Society splintered into minute particles and out of this welter of lawlessness nations emerged centred round the hereditary dynasties of kings.

The disintegration of the Holy Roman Empire and the emergence of the independent kingdoms of England, France and Spain destroyed the last unifying element among the peoples of Western Europe. The territorial and omnipotent state is thus the offspring of the religious struggles of the sixteenth century. With the evanescence of medieval institutions and ideas, the need for a strong centralised national monarchy was keenly felt to dispel the idea of papal supremacy on the one hand and the restraining influence of the feudal lords, self-governing towns or industrially autonomous guilds on the other. While princes felt the need of financial support, the merchant class on the other hand wanted a strong state under an absolute ruler who could
uphold their privileges and protect them from interference by feudal lords. The agglomeration of power resulting from such alliance between the royal authority and the merchant class formed the basis of the absolutist state which found its appropriate symbol in Leviathan. During the transitional period from the Middle Ages to the Renaissance, sovereignty in its external aspects came to mean the right to independence from any earthly power.

Thus towards the close of the Middle Ages, various economic and social changes tended, in their combined effect, to increase the practical power and theoretical prestige of the state. On the one hand, the changes created a need for relief from the confusion of overlapping and conflicting demands upon the individuals' allegiance, and on the other they considerably weakened the authority of the church as an agency of unity. The state came to be regarded as the most competent association for the maintenance of order and tranquility and the furtherance of progress. In several countries of Europe strong national monarchies were evolving concurrently with the decline of mediaeval institutions and ideas and the doctrine of the state as a unique authority in determining the form and content of civil law served as a useful theory to explain the claims made in behalf of the monarchs. To uphold the supreme authority of the monarch, it was necessary to deny limits either by an imperial or papal authority outside the state or by rights of feudal bonds, self-governing towns and autonomous guilds within
the state. The idea of a supreme national monarchy was implicit in the actual situation in France in the fifteenth century under Louis XI; it had already been made explicit in several brief theoretical discussions, notably by Pierre Dubois, and Bartolus of Sassoferrato.

In a dynamic society, facts move faster than the theories which seek to rationalise and idealise them and ultimately become the vital source of intellectual nourishment and inspiration. Machiavelli sought to express the spirit of his times by claiming that the prince can be subject to no legal restraint and whatever moral restraints there are, are of his own making and are based on expediency and must give way in times of grave emergency. Such a philosophy might gravely prejudice the cause of a true international community by its tacit recognition of the doctrine of state sovereignty and its logical corollary "necessity knows no law." Judged by our modern standard it may be said of Machiavelli that of all writers he perhaps has done most harm to the cause of internationalism. But if it is true, as Gierke states, that his typical doctrine came with a shock to an age that remembered a grander dream, it is equally true that he brought us back closely to the realities of his days and his principles were followed by the leaders of many nations even at times unconsciously to exalt the power of
the ruler and to vindicate the absolute supremacy of the state. His principles found warm response amongst a generation kindled by new knowledge and new horizons and charged with the spirit of national pride and independence, and it was given international recognition in the Peace of Augsburg which ended the first phase of the religious wars in Germany.

It was however left for Jean Bodin to give a formal shape to the modern doctrine of sovereignty in his "Les six Livres de la République" published in 1576. Bodin defines state as "an association of families and their common possessions, governed by a supreme power (summa potestate) and by reason and sovereignty (majestas) as "supreme power over citizens and subjects, unrestrained by laws." Thus according to Bodin, it is the essence of every state that there must be a supreme authority within the state which will be the source of all laws, but not itself subject to any human restraint. "majestas est summa in cives ac subditos legibusque soluta potestas." But Bodin's Sovereign though not bound by the law of the land, was bound by divine law, by the law of nature and also by the law of nations. Further the rigour of his notion of sovereignty was mitigated to an extent by his recognition of some laws of the State e.g. the Salic Law which are so fundamental that
even the sovereign could not abrogate or modify them. The distinctive service of Bodin's theory lies not so much in that he originated a modern theory of sovereignty, but in that he gave a clear and concise expression of the unique and comprehensive authority of the state at a time which has seen the turmoil of the Huguenot wars and longed for stability and maintenance of order. Once this was obtained sovereignty within this social nexus became equivalent to supremacy, if not omnipotence.

We must not forget the atmosphere, not merely in which the theory of sovereignty was born, but also in which, at the hands of each of its great exponents, it received new emphasis. That has been always from Bodin to Hegel, a period of crisis in which the State seemed likely to perish unless it could claim unified and unflinching allegiance from its members. Against a similar back-ground of chaos and anarchy caused by the Civil War, in England, Hobbes in his 'Leviathan' was convinced of the overwhelming importance of state authority. Hobbes, more than any of his predecessors, shakes himself free from the medieval conceptions of authority and law. His sovereign worked under no superior sanction whether of Divine Right or of Natural Law or of anything else. "The Multitude so united in one person, "wrote
Hobbes in 1651, is called a Common-Wealth, in Latin 'Civitas.' This is the generation of that great Leviathan or rather (to speak more reverently) of that Mortall God, to which we owe under the Immortall God, our peace and defence. And in him consisteth the Essence of the Common-Wealth; which (to define it) is One Person, of whose Acts a great Multitude, by mutuall covenants one with another, have made themselves everyone the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common defence. And he that carryeth this person, is called Sovereign, and said to have Sovereigne Powers, and every one besides, his subject." Hobbes' theory though roughly coincided with the realities of his times, it never expressed the whole truth and the truth that it expressed was not an eternal one. The state came to be the final goal of unity and the relations between different states was left not only uncontrolled but uninspired by any unifying ideal.

It is only with the rise of modern Nationalism that European civilisation enters upon a new era, rich and lively in developments in every sphere of life. If we unwind the scroll of human history, we find how civilizations break down and go to pieces if and when a challenged confronts them which they fail to meet. There may be brief periods of harmony between
these long periods of tension and conflict.

It will be interesting to note that when the national state replaced the absolutist state the claim of the sovereign remained the same, only the bearer of sovereignty within the state changed. The original meaning of the term 'sovereign' is derived from the Latin word 'Superanus' meaning 'superior'. Hence the state was not conceived as sovereign, but a person or persons within a 'state' were sovereign over the rest. Although the original theory of sovereignty with its division of the state into persons who rule and persons who are ruled could hardly represent a rational account of the changed facts with the advent of constitutional government, the hold of sovereignty upon men's minds was so strong, that they began to attribute the sovereignty to the people as a whole, instead of inventing a new theory to fit the altered circumstances in the political life of the time. This adaptation is but one of the many illustrations of what Wüzel calls juristic 'projection'; i.e. application of a juristic concept of the legal proposition as it has been formulated, without any change, to phenomena which were not within the contemplation of the proposition or at any rate were not demonstrably so. Such a process of projection being in its essence merely the immediate effect of the inner changes in the life of society upon the norms of society, may involve
confusion of thought, when it tries, as in this case, to combine two contradictory ideas, that of absolute power residing in the state and that of responsibility of the wielder of such power for the use to which he puts it.

In order to appreciate the revolutionary character of modern nationalism, an understanding of the central theme around which it revolves would be interesting and helpful. A survey of the growth and development of modern nations will show how the sentiment of nationalism is woven of many and diverse strands. The unifying factor may be race, language, territory, religion, economic interests or a common tradition, although all the elements of national unity can hardly be discerned in a single modern state. Renan in his classic definition in his essay "Qu'est ce qu'une nation?" (1862), has made a penetrating analysis. "A nation", says he, "is a soul, a spiritual principle. Two things, which are really only one, go to make up this soul or spiritual principle.....The one is the possession in common of a rich heritage of memories. And the other is actual agreement, desire to live together, and the will to continue to make the most of the joint inheritance. The existence of a nation is a daily plebiscite, just as that of the individual is a continual affirmation of life." Its essential characteristics are exclusiveness and
emotionalism. "The state becomes or seeks to become, the body of nationality, and from this perilous but inevitable incarnation, a new order of conflict and adjustment springs." Two factors, the ideology of nationalism, which is much older than the national state (though some publicists like G.D.H. Cole think that the Nation State arose first and the sentiment of nationality thereafter became attached to it) and the organising and coercive power of the modern state, contributed largely to consolidate the national state which dominated Europe in the nineteenth century, and radiated its influence even to-day over the other parts of the world, particularly in the Middle and the Far East. Although the national state attained a degree of cohesion and an explosive power which is of greater significance and potentiality than the college-like medieval state or the all-inclusive absolutist Leviathan, it will be doing a great service to the cause of internationalism if we do not forget that the unity of a nation is not a static factor, and the modern national state is not the ultimate finality in the evolution of human institutions, but the expression of a certain phase in human history, shaped and conditioned largely by certain ideological, social, economic and political factors which may lose their validity and justification by
the onrush of newer forces.

Austin inaugurated an era of legal positivism and self-sufficiency which enabled the rising national state to assert its authority untrammelled by juristic doubts. The social reality within and outside the nation state demanded unlimited sovereignty of the state over individual, whether he is called a subject or citizen. Thus Austin obviously inspired by the description of sovereignty in Bentham's "Fragment on Government" (1775) wrote in 1869 in his "Lectures on Jurisprudence", "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent".

The pre-eminent position which the state had thus reached, left its influence even on conduct of states in their mutual relations. The states came to be regarded as the natural and ultimate channels of diplomatic intercourse. International law derived its validity and sanction solely from the assent of the states and their withdrawal was as free as the original assent. The individual was left at the mercy of the Leviathan
The Nation State, from its emergence right up to its full development throughout the nineteenth century was a liberating influence in the economic field and corresponded closely to the economic needs of an important period in human history.

The rise of modern nation state was marked by the emergence of a new commercial and industrial middle class who became the strong upholder of the Nation State. But its disadvantages became increasingly manifest when the markets of the world became increasingly international and the various countries began to depend largely upon one another in economic matters. Thus only towards the close of the nineteenth century, the possibilities of a serious clash between the limits of Nation States and the requirements of the new economic order came to be felt. This development synchronized with the growth of economic imperialism - the exploitation of the less advanced countries by the stronger states in their bid for national wealth and glory. Thus the implications of such a national state which extols the sovereign right of self determination are full of portents and far different from those envisaged by men like Mazzini and Mill.
The conception of the sovereign state made a strong appeal to the totalitarian and fascist states. Thus Alfred Rocco writes in his "Transformazione dello Stato," "The fascist state is the only truly sovereign state, dominating all the forces existing in the country and subjecting all to its discipline."

Such a theory teaches that sovereignty is not of the people, but of the state which is extolled to its mystical height. Thus "The State", wrote Hegel "is the self-certain absolute mind which recognises no authority but its own, which acknowledges no abstract rules of good and bad, shameful and mean, cunning and deceit." Many of the jurists, taking their inspiration from Ihering, in the latter half of the 19th century, parallel with the powerful expansion of a new nationalist German state, developed the doctrine of absolute state sovereignty, though mitigated to an extent by the doctrine of Rechtsstaat which advocated individual rights and restraint in international relations.

Dr. Toynbee whose encyclopedic erudition is presented with the skill of a literary artist who stimulates while he informs, with his characteristic insight into the processes of history has pointed out how the spirit of Nationality is a sour ferment of the new wine of democracy in the old bottles of Tribalism.
While the ideal of modern Western Democracy preached Christian intuition of universal fraternity, in reality Western politics was shaped by tribal and militant ideals. No doubt social philosophers like Henry Bergson justified this parochialism as not merely normal but natural feature of human social groups and not peculiar to Western politics only, yet it cannot be ignored that the modern Western democratic ideal seeks to reconcile two spirits and to resolve two forces which are diametrically opposed to each other. Thus the combined forces of Industrialism and Nationalism, rather than Industrialism and Democracy moulded and shaped the European Society and built up Great Powers during the century that ended about A.D. 1875.

After successful working together of the two dominant institutions of industrialism and nationalism, they began to pull in opposite directions — two conflicting tendencies — industrialism by its increased scale of operations tending towards a world-wide range while nationalism percolating downwards, implanted separate consciousness among peoples thus forming minor states claiming full political and economic independence.

Mr. G. D. H. Cole however thinks that the emergence of the Nation-state did not necessarily synchronise with the widespread growth of the sentiment of nationality. National
sentiment if it existed at all, was mainly aristocratic in its incipient stage, rather than a popular passion. It is only with the growth of democracy, that the people began to associate their collective sentiment for democracy with the nation state and out of this marriage the sentiment of national partiotism as a popular passion was born. But the sentiment of nationality was given a different direction by pressing it into the service of the nation state in its undemocratic form.

From that time nationalism and imperialism were involved in a curiously complicated relationship. Among the ruling people nationalism and imperialism tended to become allies and even at times, to fuse, up to an extent, into a mixed sentiment. But among the subject peoples it worked as a liberating influence and became the enemy of imperialism. Although the idea of a national state had been an accepted creed and postulate throughout the nineteenth century and became the guiding principle in the Peace treaties of 1919 and 1920, the rapid advance of modern industrial technique and the character of present warfare with its massive weapons of destruction and intensive mechanisation have rudely exposed the futility and hollowness of a state system based on the idea of national sovereignty. In the altered circumstances
of to-day, the only nation-state which can in truth possess
the attributes of sovereign independence is the Great State.

In the political reality of our present rise of
super-state time when great states are surrounded
by smaller neighbours, state sovereignty
in its traditional purity, becomes a myth, and it is inevitable
that the great states should seek to engulf their neighbours,
and the small states be kept alive, if at all, only when they
are in the position of satellites or buffers between the
great. Nationalism as a working basis for the states can
survive only in its perverted imperialist form, i.e. by
ruthless exploitation of domination over its weaker members.

Thus our enquiry into the process of the growth of the
sovereign state as the product of the peculiar transient
social environment in which it flourished has helped us to
realise how useless it is to gaze any
survey of
the analysis longer at the moving film of social and
political forces in order to discern in
them the lineaments of some abiding form. In fact the
character of the sovereign state is not an absolutely static
concept, but varying with the shifting demand of a changing
and dynamic society. The concept of sovereignty had served
as a convenient tool for the exercise of coercive power and
authority so essential for the maintenance and stability of
any social organisation. In the Middle Ages, when the social
structure was pyramidal and depended largely upon the contractual relations of men, sovereignty in its absolutist sense could hardly serve the needs of such a society based on diffusion of power. It is only with the Renaissance and the growth of modern nationalism that the sovereign state reached its exalted and mystical height. In such a society which valued stability and cohesion as its primary concern, the concept of absolute sovereignty contributed largely to the concentration of power in the hands of the monarch or Parliament i.e. one single ultimate unchallengeable source through which power should originate. From the notion of such an absolute state, it was an easy step to conceive of the people as the ultimate repository of sovereign power, with the rising tide of democratic sentiment all over Europe.

Thus the modern national state with its exalted pre-eminence has not escaped the categories of time, and has become so what it is now by a process of historical evolution. That development both explains the character of its present power and at the same time offers hints as to its possible future.

An enquiry into the history of the concept of allegiance, inspite of its narrow legal meaning, will be of
great significance for our present purpose. The word "allegiance" is commonly related to the Latin "ligius" (French "lige") and its derivatives "ligeantia", "legititas" etc. These terms denote feudal relationship; the adjective "ligius" therefore also occurs in connection with "homagium" when it characterises unconditional homage. The English kings succeeded at an early period, certainly in the twelfth century, in establishing their exclusive right to unconditional feudal superiority. But on the continent of Europe kings were not successful in advancing similar claims, and it was only in the fifteenth century that the French kings definitely established this right. In Germany, on the other hand, the "ligium homagium" as well as the feudal tenancy to which it belonged gradually disappeared after the efforts of the Hohenstaufen emperors, particularly Frederick I, to secure "ligium homagium" for themselves had been balked. The general development of feudal institutions in central Europe was unfavourable to such a doctrine, for the principle "nulle terre sans seigneur", which came to prevail in England even more widely than in France, never gained peculiar to English law ascendancy in many parts of Central Europe. As a result the concept of allegiance is peculiar to English law and has no real equivalent in French, German, Italian and other continental jurisdictions.
But the concept of allegiance underwent a rapid transformation when the people, politically organised came to inherit the exercise of the power which the kings had consolidated. While allegiance was formally still due to the king, it was in fact owed to the body politic of which the king was but the formal representative. This classical common law notion of perpetual allegiance as it prevailed in England of the seventeenth and early eighteenth centuries was ultimately utilised as the most powerful expression of the national state in its rigid seclusion and insular self-sufficiency.

Such a rigid concept came to be subjected to numerous alterations as modern trade began to develop and the classical doctrine of allegiance as enunciated in Calvin's case (1603) was slowly weakened by many minor exceptions. This process eventually led to the Naturalization Act of 1870 (33 Vict C 14) which adapted the status of subjects to modern conditions, accepted the principle of free interchange of citizenship and thereby deprived the concept of allegiance of most of its significance.

The significant fact is that those relations of political loyalty which were formerly the result of allegiance are now the result of nationality. For the most part the only
relations for which the term allegiance is really needed in modern law are those which exist between a resident alien and the state under whose jurisdiction he lives, due perhaps to the fact that in its territorial aspect the modern constitutional state resembles its feudal predecessor.

While the legal significance of allegiance is not great at present, its broader philosophical implications have entered into the pluralistic attack upon the classical theory of the state and sovereignty. For the philosophical implications emotional ties which bind the individual to his state and his country of birth cannot be separated clearly from the emotional ties which bind the same individual to other groups or communities and the symbols which represent them. The view of allegiance taken by monistic theories of the state varies with the reason advanced for the necessity of a supreme authority. The theory which emphasises the natural necessity of a unitary authority sanctioning the body of legal rules upon which all other groups depend for their existence treats allegiance as a phenomenon of nature, expressive, as Blackstone says, of a debt of gratitude. To the theorist, however, who emphasises the purposive co-operation of free-willing citizens sanctioning the legal rules upon which other groups depend, the duties of citizenship express the binding force of the actions implied.
therein much more adequately than does allegiance. 42

Before we proceed to analyse the impact of state sovereignty on the growth and development of international law and society, it will be of some interest here, to examine the various expert opinions supporting different views on the problem of state, law and sovereignty.

In political science the sociological points of view and those of legal theory meet. The Czecho-Slovakian expert opinion, which deals exhaustively with the "nature of the State" applies in consequence a double point of view to the State: "the causal (sociological) and the norm (juridical)" and considers the "reciprocal relations between these two conceptions". The Japanese expert opinion reveals the same trend, guided by the endeavour to represent the State as reality and to see just in the State a combination of the social with the legal organization. The starting point is always the State as a given quantity, whose character may be determined by the connection between actual and legal component parts.

In opposition to this conception National-Socialist theory does not regard the State but the people as the
decisive quantity. Seen from this point of view, the contrast between State and law loses much of the sharp distinction which has been so often stressed. The people as a community is the starting point for political science as well as jurisprudence. This becomes obvious above all in analysing the conception of the State as a body corporate. In the 19th century the conception of the State as an invisible, corporate body lay the foundation of the whole State law. This idea presented the possibility of subjecting the State to legal norms and the problem of State and law was solved according to the constitutional system of the 19th century.

Most of the expert opinions put the question of precedence between state and law very much in the foreground. On the other hand the extreme view of the precedence between state and law — equality of the State and a norm system based on the pure jurisprudence of Kelsen, is scarcely upheld. The Japanese opinion expressly denies a Kelsen's pure theory "purely juridical theory of the identity of law and State". The fundamental problem is rather: "What is the relationship between the legal system
of the State and its political pursuit of power?" The nature of the state thus lies in its capacity "to stand the strain of the contrast between law and politics" and it is just this aspect which, in the Japanese opinion, shows, the "admirable vitality of the State". Of course the State is regarded here as a legal subject (Rechtssubjekt) but not as a body corporate, because, in contrast to other corporate bodies, "it is not only bound and regulated by social norms, but also quite peculiarly by compulsory norms". Campbell's opinion, which is based on Kelsen's teaching and fundamentally recognizes the latter's sharp distinction between what is in fact and what should be in law, shows how markedly here the order of State and law coincides. The conception of the State as a body corporate does not, however, appear to be applicable to English law. Campbell points out that the United Kingdom is a part of the British Empire, "it is, therefore, difficult to speak of the State as an absolute supreme being, forming its own object". Altogether English conditions do not allow the State to be regarded as such a fundamental conception. The English system does not recognise "any action by the State", "it only recognizes actions on behalf of the crown or by the jurisdiction of an administrative district or venue, that is, by an organ of the State." For
the rest Campbell warns against the personification of legal conceptions.

For the German political science of to-day, however, this analysis of the conception of the person of the State is of primary importance. It is the necessary German theory result of the denial of the individualistic system of law. In a system of law, which is only based on the single individual and their interests, the state as a personage state must be regarded as a personage in order to have any legal standing at all. But as it is no visible personage, it had to be raised to an invisible body corporate, operating through various organs. It was in opposition to this attitude that the whole discussion of the conception of the State in Germany arose. The fundamental problem of the new German constitutional law is: "The State as a corporate body or the community, which is to, form the basis of the new constitutional dogmatics?" This explains the various detailed discussions by means of which endeavours are being made to refashion the relationship between State and people. The National-Socialist conception of the people is fundamentally distinct from that of the 19th century. At that time it was considered that the people were subject to the State because they were as a whole in the legal sense merely the sum total of all those who, as individuals, on
the one hand owed obedience to the State as a body corporate, and, on the other hand as members of the State had legal claims towards it. This idea of the people arose from the idea of an absolute state and remained in the constitutional law of the 19th century as well as in the 20th century through the Constitution of Weimar. It was only extended in so far as the individual as a person an active bearer of rights towards the State.

The opposing endeavours to raise the people to a participating element in German constitutional law led to the most varied experiments. It is demonstrated on the one hand in the attempt to draw the people more closely within the State, and in this connection there is a certain tendency to go back to the organic State doctrine of Gierke. The difference is characteristic, too, between the narrower and wider conception of the State, whereby the latter shows a notional comprehension of state and people. The logical solution of these endeavours lies of course in a clear distinction between people and state, whereby the people as a community are the dependent basis and centre of jurisprudence and constitutional law, in whose service the State functions by means of its civil servants and officials. Thus the German attitude places the political unit in the people and not in the State.
Jurisprudence and constitutional law to-day attribute particular importance to the conception of sovereignty, which is always associated with the idea of supreme worldly power and the irresistible authority inherent therein. As it is always of fundamental importance for the social system as well as for jurisprudence to whom this sovereignty is attributed, it is natural that this problem of sovereignty should deal with the right location and proper tasks of the "supreme power" within the state. Certainly there is little agreement in the points of view from which the problem of right location and proper task of supreme power question is approached. There is first of all the question whether sovereignty lies with the State or a concrete person in power. On the other hand there is the tendency to transfer the idea of sovereignty to the law itself and only to regard the ordered arrangement of law as sovereign. Finally, the idea of sovereignty for internal State law is refuted altogether.

According to classical Greek political theory the state was not sovereign in the sense of being above law. The authority of customary or unwritten laws, embodying the dictates of God or of a universal reason, ranked higher than that of the decrees of even the highest governors of a state.
The Vedic Rishis conceive of law as existing without the sovereign and above the sovereign. Rishi Vaiyasva places law above the sovereign.

Hindu theory

"They true to law exceeding strong, have set them down for sovereign rule.

Princes whose laws stand fast, they have obtained their sway."

The author of the Upanishad declares law to be the, more powerful than the power itself. Thus "even a weak man rules a stronger with the help of the law, as with the help of a king."

He does not believe the doctrine that "there is no law without..."
a sovereign, above the sovereign, or besides the sovereign; law exists only through the sovereign."

These ancient philosophers thus seem to be opposed to the absolutist doctrine of the unlimited power of the state. May, they even seem to oppose the doctrine of its self-limitation advocated by Jellinek and others. The power of the sovereign, the power of the state, is limited not by itself, but by some inherent force of law. According to them, there is a rule of law above the individual and the state, above the ruler and the ruled; a rule which is compulsory on one and on the other; and if there is such a thing as sovereignty it is juridically limited by this rule of law.

Gautama

Rishi Gautama has been credited with supplying the basic principles behind the dominant law-creating and law-maintaining sovereign.

The Rishi sings:

लक्ष्मणु \ यादायमस्रीमुँ \ की वेदाग्रवः ।
वैक्षिण्डुः स्मुत कः देव कीर्तिसंक्रमणे च सङ्क्रमसः ||

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Gautam's supreme deity, Indra, is one who is not passed by anyone else in strength; "there is not one who passeth Indra in his strength". This Indra derived his strength from the deities "who have stored manliness, insight, power and might in him". This Indra is the dominating power 'par excellence'.

Still as of old, whatever rite
Aiharvan, Manus, Sire of all,
Dadhyach performed, their prayer
and praise united in that
Indra meet, lauding his
own imperial sway.

There is not, in our knowledge, one
who passeth Indra in his strength,
In him the Deities have stored
manliness, insight, power
and might, lauding his
imperial sway.
Herein perhaps lies Gautama's conception of state - state as a unique and permanent organism which, guided by the collective will, sustains and puts in operation the general state as a unique force.

This Vedic Rishi may indeed be taken as looking upon this whole universe as one big state with a sovereign power as its head deriving authority from the noble class, the deities who "store their manliness, insight, power and might in the sovereign". According to him, the sovereign power would be the sum total of the forces and capacities of the society.

It may however be pointed out that the States of the Middle East stand on an entirely different ground and has been controlled and regulated by a fundamentally different structural principle. The State respected the status which the individual had acquired by membership of a given religious or national community, regardless of the frequently far-reaching political or social consequences deriving therefrom. As a result, there was maintained until the present time that remarkable form of plurality of constitution which, whether de facto or de jure, permitted various national groups and correspondingly varied systems to live a national life of their own within the framework of the state association. Personal status was stronger than the edict of the State.
The Western State which derives its claims from the concept of sovereignty has abrogated the right of groups within it to realise their separate aims and demands; or has at least opposed and restricted those rights with decided success. But the political theorists of the Middle East had no such conception or theory of the State in the modern sense. They knew nothing of the concept of the State as an independent political institution as developed in Europe. But as contact with the West grew closer, countries with this flaccid political structure could not withstand the superior power of the expansive European national states and by the middle of the nineteenth century new and weighty principles for the reorganisation of state structure came to be evolved.

The Japanese expert opinion presupposes the idea of sovereignty as a matter of course. Here, as in the well known doctrine of Carl Schmitt, sovereignty appears as: "the ability or the power of the state to give a final decision, even in exceptional circumstances." Sovereignty is thereby clearly attributed to the State. The essential character of the State consists juridically in the "monopoly of executive sovereign power."

The Jugo-Slavian expert opinion solves the problem of sovereignty in a similar way. Here, in drawing a sharp contrast between state and society, sovereignty is attributed to the State legislator, because peace and order are expressed by the law which is necessary to balance the conflicting interests
of society. Law is the expression of the idea of State, its application means the preservation of the State. As the expression of the sovereign power of the State it means considerable restriction on the interpretation of the judge. If he wishes to interpret it freely, it would be an "incontrovertible example of injuring the principle of State sovereignty". The attitude expressed in French opinion shows a slightly stronger shifting of the problem of sovereignty to the character of law as ordered arrangement.

French theory

Sovereignty here lies in "public order, which stands above private and corporative interests".

The State is therefore regarded as sovereign by virtue of public order.

In English law, in keeping with the whole jurisprudence and political science, sovereignty in its real sense is rejected. Also the King and Parliament together only enjoy sovereignty if they act according to the constitution. Thus the English opinion can, in assimilating the well-known doctrines of Kelsen, apply the maxim to the English conception of law that "the norm is supreme".

On the other hand the German expert opinion gives an exhaustive analysis of the idea of sovereignty. Herein are clearly apparent the new methods gained from a knowledge of
history, by which a new German jurisprudence is attempting to explore the fundamental conceptions of law. The German opinion presents a detailed account of the development of the idea of sovereignty and shows the spiritual and social forces which have had a decisive influence on the foundation of this idea. It reveals the development of the idea of sovereignty of absolutism and of the constitutional monarchy. But above all it shows that here it is always the question of the expression of individualistic ideas of law and that the nature of the conception of sovereignty in constitutional law owes its origin to internal State polemics. It is always a question of upholding the political power between two rival forces, it can be the absolute prince or monarch at variance with the estates of his realm, or the modern State at war with society.

Here the conclusions reached from a study of history provide an argument for the present day. The German expert opinion rejects the application of the idea of sovereignty to internal constitutional law, because the idea of the community of the people does away with the social basis for the development of such a polemical idea. It therefore rejects the constitutional
importance of the idea of sovereignty and limits its effect to the sphere of international law. Within this sphere sovereignty shall express the independence and political ability to act of the whole national community.

Our present discussion would perhaps remain incomplete if we do not make a short analysis of the Soviet theory of state and sovereignty which has influenced much of the Soviet attitude towards international law. The Soviet theory has developed a concept of the state of its own which is substantially different from the traditional ones. Lenin himself had undertaken the task of formulating the theory in accordance with his interpretation of Engel's book "The Origin of Family, Private Property and state." In his famous pamphlet, "State and Revolution", he explains the "historic role and significance of the state." "The state," he says, "is the product of irreconcilability of class antagonism. The state arises then and there, when and where class antagonism cannot be objectively reconciled."

Lenin speaks of the proletarian state as of the "transitional form of its disappearance". "Under capitalism," he writes, "we have a state in the proper sense of the word, that is, special machinery for the suppression of one class.
by another ........... During the transition from capitalism to communism suppression is still necessary, but it is the suppression of the minority of exploiters by the majority of exploited. A special apparatus, special machinery for suppression, the "state" is still necessary, but this is now a transitional state, no longer a state in the usual sense.49

The Soviet theorists in consistence with their conception of state profess to be the champions of the principle of State-sovereignty. Sovereignty is defined as the legal and actual independence of the state in carrying out its functions and its economic independence as the basis of a real independence is particularly stressed.50

As regards the reasons, Korovin states, "In a world where there are rich and poor, exploiters and exploited, weak states and strong ones, and independent countries and colonies, to reject the conception of sovereignty or the other legal guarantees of national independence and freedom would always help those who are strong and would never benefit those who are weak." Another aspect of the Soviet concept of sovereignty was stressed by Korovin in a lecture delivered before the Social Science Academy of the Russian Communist Party in 1947: "Sovereignty, as conceived by Soviets is a weapon in the
struggle of the progressive democratic forces against the reactionary-imperialistic ones. Under contemporary conditions sovereignty is destined to act as a legal barrier protecting against imperialistic encroachment and securing the existence of the most advanced social and state forms - socialist and that of a people's democracy; it is a guarantee of the liberation of the oppressed peoples in colonies and dependent territories from the imperialistic yoke."

Professor Levin, another Soviet jurist thinks, Levin's "One should always remember the distinction explanation. between the contents, the essence of sovereignty on the one hand, and its form, on the other. The supremacy of the power of the state as the political organization of the ruling class is the essence of sovereignty...... In the bourgeois state the proclaimed form of "the sovereignty of the people" conceals class dictatorship of the bourgeoisie...... Sovereignty is full power and independence of the state as the political organization of the class which possess the tools and means of production and dominates economically. One cannot speak of sovereignty without these conditions. That is why "the sovereignty of the people" in conditions of the bourgeois state ......is ......a fallacy ...... For the first time in history the Soviet state has realized the real sovereignty of the people."
In so far as the doctrine of sovereignty expresses only the view that the state - or what amounts to the same, the legal order constituting the state is presupposed as the supreme legal authority, it has a theoretical and not a political character. But Korovin uses the sovereignty doctrine also as a purely political principle, that is to say, as the postulate that the legal power of the state should not be restricted. Thus he does not favour the idea of the establishment of a world state as it would imply the abolition of the sovereignty of states. Although Korovin insists upon the maintenance of the sovereignty of the states, he admits that under certain circumstances restrictions upon sovereignty are justifiable, "in the interests of the preservation and consolidation of sovereignty, as a factor of universal progress."

With the outbreak of the war, the traditional concepts of the early twentieth century began to exhibit signs of disintegration. With the emergence of the "politics of power" which began to manifest itself with increasing frequency the position of the state as a moral entity considerably weakened. As an incarnation of force the state might be expected to vary in form and function with the resources at its command.
The older concept of sovereignty came to be severely criticised at the hands of jurists who were revolting from the standard of Austin. Thus Jellinek pointed out the limitations to which state power was subject because of its legal (rechtlich) character, though he still thought of constitutional guarantees as the self-imposed limitations of the state. The Dutch writer Krabbe went even further. He set the old idea of the state as a power system, with sovereignty inherent in it, over against what he regards as the modern idea, according to which government is viewed as an organ of society for law-making. According to the latter conception, government is but an agent, subject to the law which it enacts or administers, the real sovereignty being that which is inherent in law itself, an impersonal spiritual (geistig) power whose regulations express the social valuations of the community.

The followers of Maitland and Gierke applied the juristic doctrine in another direction. The state, according to them, was regarded as a corporate personality. These theorists do not identify the state with the community of which the state is but an organ. According to them, the other corporate groups in the community have likewise a function and a sphere which
in some ways limit the function and the sphere of the state. In fact the relation between the state and these various corporate groups has created special problems for present-day political and juristic theories. Writers like Dicey would be willing to recognise limitations on sovereignty in practice, but they would not go to the extent of giving up the classical theory altogether.

The very principle that the state is a source and sanction of social order has been called in question by many theorists. Thus Duguit found the ground of unity in the "social solidarity" of men, a diffused sense of interdependence which supported the various forms of rights and obligations accepted in a community. Law, according to Duguit, is independent of, superior and anterior to, political organisation, and that law is objective and not subjective. "The concept of the rule of law, understood as a social rule invested with a social sanction, is completely independent of the state ....... is above and more comprehensive than the state." There are others who extended the federalist idea from territorial to associational groups and sought for a working equilibrium of powers in which no one could be called supreme in all things over the rest.

The attack upon the doctrine of the omnipotent state was launched with great critical energy by the pluralists led
by Harold Laski. The pluralists regard the state as simply one out of a number of associations to which the individual belongs and as such has no exceptional moral claim to be obeyed. The superiority of the state to other associations rests on its power to use coercion. As a theory, pluralistic approach is what Prof Dewey calls 'consistently experimentalist in form and content. It denies the inherent claim of the state to obedience. It insists that the state, like every other association, shall prove itself by what it achieves. It sets group competing against group in a ceaseless striving of progressive expansion. The controversy over pluralistic doctrine created a flood of literature which sought to reiterate the distinctions between various meanings of the term sovereignty. It led to an ethical defense of the superiority of the state by Elliott, who interpreted sovereignty as the assurance of the community of purpose that is the essence of the state. MacIver approached the problem in a different way. His historical analysis led him to the conclusion that the proper sphere of activity of the contemporary state is the dictation of such actions necessary for the good life of society as can be enforced, if necessary by physical forces.

Before we conclude this chapter it will be pertinent to observe that these recent theories of sovereignty differ
widely largely because different theorists have been concerned, consciously or unconsciously, with supplying justifications for differing political views or programmes, and have been affected by different "scientific and ideological tendencies" in modern thought. The future theories on sovereignty are likely to be affected by "two apparently contradictory tendencies" in modern thought, one the "isolation of the sciences" making for a persistence of "the theory of sovereignty ....... as a term defining power or the status of that power or as a term defining a legal order or the status of parts within that order or the totality of that order", the other, the trend toward amalgamation of the social sciences in consequence of which "the concept of sovereignty loses its very life."

While theories of sovereignty may disappear with changes in terminology, the substance of sovereignty may remain so long as the problems of social control will be troubling us in our communal life. We are thus told that there is no point in human history in which man's social life is freed of natural necessity. But we should also equally remember that there is no point at which it cannot transcend the given circumstances to imagine a more ultimate possibility.