COURSE GUIDE

POL 701
ELEMENTS OF POLITICS

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CONTENTS

Introduction……. iv
Course Description…… iv
Course Aim and Objectives…… iv
Working Through the Course …… iv
The course material ……. v
Study Units…… v
Textbooks and References …… vi
Course Overview Presentation Scheme……. vi
What you will need in the Course …… vi
Tutors and Tutorials …….. vi
Assessment Exercises ……. vii
Tutor-Marked Assignments (TMAS) ……. vii
Final Examination and Grading …….. vii
How to Get the most From this Course……. vii
Conclusion ……. ix
Summary …… x
References/Further Readings……. x

INTRODUCTION

POL 701: Elements of politics is a one-semester course in the first year of Post Graduate Diploma (PGD) degree in political science. It is a three-unit credit course designed to introduce students to the basic elements of politics. The course prepares students for the basic understanding of the principles of politics.

This Course Guide provides students with the necessary information about the contents of the course and the materials they will need for a proper understanding of the subject matter. This includes theories of the state, power, sovereignty, law, citizenship and political obligation. Students need to understand these to be able to appreciate the specific issues they will follow in subsequent units. It also provides some guidance on the way to approach your tutor-marked assignments (TMA).

COURSE DESCRIPTION

This course is designed to give students an in-depth understanding of the principal aspects of politics, especially the nature and scope of politics. The course will also discuss the basic concepts and language of political discourse with particular emphasis on politics, state and nationalism, citizenship and the state, law and its accoutrements, power, sovereignty, law, citizenship and political obligation.

COURSE AIM AND OBJECTIVES

The general objective of this course is to provide an in-depth analysis of knowledge of the basic elements of politics.

At the end of this course, students should be able to:

a) Explain the conceptual basic elements of politics.
b) Identify and analyze such key concepts as power, sovereignty, law, citizenship etc
c) Discuss the various theories of the state.

WORKING THROUGH THE COURSE

To complete the course, you are required to read the study units and other related materials. You will also need to undertake practical exercises for which you need a pen, a note-book, and other materials that will be listed in this guide. The exercises are to aid you in understanding the concepts being presented. At the end of each unit, you will be required to submit written assignment for assessment purposes.

At the end of the course, you will be expected to write a final examination.

THE COURSE MATERIAL

In all of the courses, you will find the major components thus:
1) Course Guide
2) Study Units
3) Textbooks
4) Assignments

STUDY UNITS

There are 16 study units in this course. They are:

Module 1 State and Nationalism

Unit 1 What is Politics?
Unit 2 Defining the State
Unit 3 Differentiating Government from the State
Unit 4 Sociological Theories

Module 2 Citizenship and The State

Unit 1 What is citizenship?
Unit 2 Why is being able to Vote so Crucial
Unit 3 Theories of Citizenship and their History
Unit 4 Citizenship as equal Legal Status: from Imperial Rome to Human Rights

Module 3 Law and its Accoutrements

Unit 1 What is law?
Unit 2 The functions of law
Unit 3 Courts
Unit 4 Lawyers

Module 4 Power and Sovereignty

Unit 1 What is Power?
Unit 2 Types of Power
Unit 3 What is Sovereignty of the State?
Unit 4 Legal aspects of Sovereignty and Philosophical Definition of Sovereignty

As you can observe, the course begins with the basics and expands into a more elaborate, complex and detailed form. All you need to do is to follow the instructions as provided in each unit. In addition, some self-assessment exercises have been provided with which you can test your progress with the text and determine if your study is fulfilling the stated objectives.

TEXTBOOKS AND REFERENCES

At the end of each unit, you will find a list of relevant reference materials which you may yourself wish to consult as the need arises, even though I have made efforts to provide you with the most important information you need to pass this course. However, I would encourage you, as a fourth year student to cultivate the habit of consulting as many relevant materials as you are able to within the time available to you. In particular, be sure to consult whatever material you are advised to consult before attempting any exercise.

COURSE OVERVIEW PRESENTATION SCHEME

There are 16 units in this course. You are to spend one week on each unit. One of the advantages of Open and Distance Learning (ODL) is that you can read and work through the designed course materials at your own pace, and at your own convenience. The course material replaces the lecturer that stands before you physically in the classroom.

All the units have similar features. Each unit begins with the introduction and ends with reference/suggestions for further readings.

WHAT YOU WILL NEED IN THE COURSE

There will be some recommended texts at the end of each module that you are expected to purchase. Some of these texts will be available to you in libraries across the country. In addition, your computer proficiency skill will be useful to you in accessing internet materials that pertain to this course. It is crucial that you create time to study these texts diligently and religiously.

TUTORS AND TUTORIALS

The course provides fifteen (15) hours of tutorials in support of the course. You will be notified of the dates and locations of these tutorials, together with the name and phone number of your tutor as soon as you are allocated a tutorial group. Your tutor will mark and comment on your assignments, and watch you as you progress in the course. Send in your tutor-marked assignments promptly, and ensure you contact your tutor on any difficulty

with your self-assessment exercise, tutor-marked assignment, and the grading of an assignment. Kindly note that your attendance and contributions to discussions as well as sample questions are to be taken seriously by you as they will aid your overall performance in the course.

ASSESSMENT EXERCISES

There are two aspects to the assessment of this course. First is the Tutor-Marked Assignments; second is a written examination. In handling these assignments, you are expected to apply the information, knowledge and experience acquired during the course. The tutor-marked assignments are now being done online. Ensure that you register all your courses so that you can have easy access to the online assignments. Your score in the online assignments will account for 30 per cent of your total coursework. At the end of the course, you will need to sit for a final examination. This examination will account for the other 70 per cent of your total course mark.

TUTOR-MARKED ASSIGNMENTS (TMAs)

Usually, there are four online tutor-marked assignments in this course. Each assignment will be marked over ten percent. The best three (that is the highest three of the 10 marks) will be counted. This implies that the total mark for the best three assignments will constitute 30% of your total course work. You will be able to complete your online assignments successfully from the information and materials contained in your references, reading and study units.

FINAL EXAMINATION AND GRADING

The final examination for INR 409 United Nations and World Affairs will be of two hours duration and have a value of 70% of the total course grade. The examination will consist of multiple choice and fill-in-the-gaps questions which will reflect the practice exercises and tutor-marked assignments you have previously encountered. All areas of the course will be assessed. It is important that you use adequate time to revise the entire course. You may find it useful to review your tutor-marked assignments before the examination. The final examination covers information from all aspects of the course.

HOW TO GET THE MOST FROM THIS COURSE

1. There are 16 units in this course. You are to spend one week in each unit. In distance learning, the study units replace the university lecture. This is one of the great advantages of distance learning; you can read and work through specially designed study

materials at your own pace, and at a time and place that suites you best. Think of it as reading the lecture instead of listening to the lecturer. In the same way a lecturer might give you some reading to do. The study units tell you when to read and which are your text materials or recommended books. You are provided exercises to do at appropriate points, just as a lecturer might give you in a class exercise.

2. Each of the study units follows a common format. The first item is an introduction to the subject matter of the unit, and how a particular unit is integrated with other units and the course as a whole. Next to this is a set of learning objectives. These objectives let you know what you should be able to do, by the time you have completed the unit. These learning objectives are meant to guide your study. The moment a unit is finished, you must go back and check whether you have achieved the objectives. If this is made a habit, then you will significantly improve your chance of passing the course.

3. The main body of the unit guides you through the required reading from other sources. This will usually be either from your reference or from a reading section.

4. The following is a practical strategy for working through the course. If you run into any trouble, telephone your tutor or visit the study centre nearest to you. Remember that your tutor's job is to help you. When you need assistance, do not hesitate to call and ask your tutor to provide it.

5. Read this course guide thoroughly. It is your first assignment.

6. Organise a study schedule - Design a 'Course Overview' to guide you through the course. Note the time you are expected to spend on each unit and how the assignments relate to the units.

7. Important information; e.g. details of your tutorials and the date of the first day of the semester is available at the study centre.

8. You need to gather all the information into one place, such as your diary or a wall calendar. Whatever method you choose to use, you should decide on and write in your own dates and schedule of work for each unit.

9. Once you have created your own study schedule, do everything to stay faithful to it.

10. The major reason that students fail is that they get behind in their coursework. If you get into difficulties with your schedule, please let your tutor or course coordinator know before it is too late for help.

11. Turn to Unit 1, and read the introduction and the objectives for the unit.

12. Assemble the study materials. You will need your references for the unit you are studying at any point in time.

13. As you work through the unit, you will know what sources to consult for further information.

14. Visit your study centre whenever you need up-to-date information.

15. Well before the relevant online TMA due dates, visit your study centre for relevant information and updates. Keep in mind that you will learn a lot by doing the assignment carefully. They have been designed to help you meet the objectives of the course and, therefore, will help you pass the examination.

16. Review the objectives for each study unit to confirm that you have achieved them. If you feel unsure about any of the objectives, review the study materials or consult your tutor. When you are confident that you have achieved a unit's objectives, you can start on the next unit. Proceed unit by unit through the course and try to space your study so that you can keep yourself on schedule.

17. After completing the last unit, review the course and prepare yourself for the final examination. Check that you have achieved the unit objectives (listed at the beginning of each unit) and the course objectives (listed in the course guide).

CONCLUSION

This is a theoretical as well as empirical course and so, you will get the best out of it if you can read wide, listen to as well as examine UN peace and humanitarian efforts in countries in wars and get familiar with international news and reports across the globe on United Nations and world Affairs.

SUMMARY

This Course Guide has been designed to furnish you with the information you need for a fruitful experience in the course. In the final analysis, how much you get from it depends on how much you put into it in terms of learning time, effort and planning.

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MAIN COURSE

CONTENTS **PAGE**

Module 1	**State and Nationalism……**	**1**
Unit 1	What is Politics?.....	1
Unit 2	Defining the State……..	22
Unit 3	Differentiating Government from the State……..	36
Unit 4	Sociological Theories……	45
Module 2	**Citizenship and The State……**	**62**
Unit 1	What is citizenship?.....	62
Unit 2	Why is being able to Vote so Crucial…….	67
Unit 3	Theories of Citizenship and their History……	81
Unit 4	Citizenship as equal Legal Status: from Imperial Rome to Human Rights……	85
Module 3	**Law and its Accoutrements……**	**102**
Unit 1	What is law?.....	102
Unit 2	The functions of law……..	115
Unit 3	Courts……..	136
Unit 4	Lawyers……	148
Module 4	**Power and Sovereignty…….**	**155**
Unit 1	What is Power?.....	155
Unit 2	Types of Power…….	161
Unit 3	What is Sovereignty of the State?.....	175
Unit 4	Legal aspects of Sovereignty and Philosophical Definition of Sovereignty……184	

MODULE 1 ELEMENTS OF POLITICS

Primarily, this module provides you with comprehensive background knowledge about the concepts of politics. Specifically, this module would give you sound knowledge on the state of each of the concepts discussed.

You are advised to study each of the unit carefully as you are expected to answer some questions to evaluate your understanding on the various issues as discussed. Possible answers to the questions are provided under each of the unit accordingly.

Unit 1 What is politics?
Unit 2 Defining the State
Unit 3 Differentiating government from the state
Unit 4 Sociological theories

UNIT 1 WHAT IS POLITICS?

Unit Structure

1.1 Introduction
1.2 Learning Outcomes
1.3 The definition of politics: a broad conceptualisation
1.4 Politics as governing and governance
1.5 Politics and the exercise of power
1.6 Politics as a form of rule: politics, citizenship and democracy
1.7 Politics as collective choice
1.8 The political approach to human behaviour: people, resources and power
1.9. Politics beyond boundaries: a feminist perspective
1.10 Political philosophy and politics
1.11 Summary
1.12 References/Further Readings/Web Sources
1.13 Possible Answers to Self-Assessment Exercises (SAEs)

1.1 Introduction

What is politics? This apparently simple question is not as straightforward as it may first seem, and it raises many further and difficult questions. For example, is politics a universal feature of all human societies, past and present? Or is it confined to some types of society only and, if so, which societies and why? Is it possible that some societies have been, are or will be without politics? Is politics tied to certain sites that are institutional arenas where it takes place? Is it solely concerned with issues and decisions affecting public policy, that is, the

whole society? Or may politics be found in all groups and organizations, large or small, formal or informal? And how, if at all, is it to be distinguished from other social and economic activities? For instance, do wars, civil conflicts and revolutions represent extreme forms of politics? Or are they the result of the failure, or collapse, of politics? Does bargaining between businesses over prices and terms of contracts, or between managers and workers over pay and conditions, count as politics? Or are they simply expressions of economic processes in the form of market forces? Can they be both?

1.2 Learning Outcomes

At the end of this unit, you should be able to:

- Describe the nature of politics.
- State the various activities which are associated with the concept of politics.

1.3 The definition of politics: a broad conceptualisation

Greeks understood "politics" in a very broad sense. The word itself comes from the Greek word "city states" (polis), and Aristotle began his famous *Politics* with the observation that "man is by nature is a political animal". By this he meant that the essence of social existence is politics and that two or more men interacting with one another are invariably involved in a political relationship (Rodee, Anderson, Christol, and Greene, 1976:2).Aristotle also meant that this is a natural and inevitable predisposition among men and that very few people prefer an isolated existence to one that includes social companionship. As men seek to define their position in society, as they attempt to wring personal security from available resources, and as they try to influence others to accept their points of view, they find themselves engaging in politics. In this broad sense everyone is a politician. By politics we refer to what politicians do (Nnoli, 2003). This seems simple. But is it?

In a more specific sense, as Nnoli (2003:12) writes that politics is all activities that are directly or indirectly associated with the emergence, consolidation and use of state power. Politics has the state as its centrepiece. The state forms the basis for distinguishing those activities that take place in various arenas of life, such as the church, family, social club and the market from those activities that we refer to as politics.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 10 minutes.

1. The _____ understood "politics" in a very broad sense.

A. Greeks.

B. Republic of Naples.

C. Republic of Milan

D. France

2. _____began his famous Politics with the observation that "man is by nature is a political animal".

A. Aristotle

B. Plato

C. Socrates

D. St. Augustine.

3. As men seek to define their position in society, as they attempt to wring personal security from available resources, and as they try to influence others to accept their points of view, they find themselves engaging in politics _____ (True/False).

4. For Aristotle there is a natural and inevitable predisposition among men and that very few people prefer an isolated existence to one that includes social companionship _____ (True/False).

1.4 Politics as governing and governance

Politics has been conceptualised to be about governing and governance. Governance needs to be understood, fundamentally, as the provision of direction to the economy and society. This can also be called 'steering' (Rose, 1968). Arguing from a more sociological perspective, Jessop (1997: 105) suggests that understanding governance, and to some extent also practising governance, requires: First, simplifying models and practices which reduce complexity and increase congruence with the real world; secondly, developing the capacity for dynamic social learning; thirdly, developing methods for coordinating across different social forces; and finally, establishing both a common world view of individual action and a system of meta-governance.

Jessop stresses the need to think about governance as a dynamic process through which the means are found to make choices for collective adaptation to the surrounding economy and society. Politics as governance is the art of government, the exercise of control within the society through the making and enforcement of collective decisions. Furthermore, that process must be compatible with the social setting

within which it is being conducted, yet it finds means of reducing the complexity faced in order to provide the steering and control required.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 10 minutes.

1. *Jessop stresses the need to think about governance as a dynamic process through which the means are found to make choices for collective adaptation to the surrounding economy and society _____ (True/False).*
2. *Governance needs to be understood, fundamentally, as the provision of direction to the economy and society._____ (True/False).*
3. *Politics has been conceptualised to be about governing and governance. _____ (True/False).*

1.5 Politics and the exercise of force

Peter Nicholson has espoused the view that politics is the exercise of force. For him in a modern state, a particular body of people, the government, makes decisions, puts them into practice, adjudicates disputes, and generally runs and organizes the society. What makes the government's actions political, however, is not that they are general and public and may or do affect everyone in the society; after all, so are a manufacturer's decisions when he fixes the prices of his products. The distinctive mark of a political action is that it can be enforced, because the government can coerce people into obedience by the threat of physical force, and ultimately by using it. There are some very obvious instances of this. Governments make laws which tell their citizens to act, or not to act, in particular ways. These laws incorporate orders to specific officials to apprehend and punish those who disobey. That is, laws are sanctioned by force. This is true not only of criminal law, which lays down rules everyone must follow (e.g. do not injure others, do not steal), but also of civil law, which offers us facilities to use or not as we wish (e.g. to get married or to make a will). In the latter case, we need not avail ourselves of the law's services: but as soon as we do, we subject ourselves and others to the law and take on legal obligations which we can be forced to meet. For example, the person who marries can later be divorced, even against his or her will, and may become liable to maintenance payments which can be extracted by force. It is not only criminals but also those who flout the judgments of civil courts who may feel the force of the law, having their property confiscated, or being imprisoned. Furthermore, there is a key class of laws, which varies in extent and content from state

to state, solely concerned with securing the position of the state and of the government: laws covering treason, subversion, opposition, the expression of criticism, loyalty, official secrets, and so on. Every kind of law, administrative, constitutional or whatever can be seen in the end, directly or indirectly, potentially to involve the exercise of force.

It is true that making those sorts of law is only one of the functions which the government of a modern state performs. It also provides all kinds of services for the members of its society, to do with health, housing, employment, transport, energy, education and so on, and undertakes to defend them from internal disorder and external aggression. But in many cases the citizens are compelled to use these services, for instance, to send their children to school, to live only in housing which satisfies a certain standard, to be vaccinated, or to be defended against another state, or an internal enemy, with whom they may in fact sympathize. Once again the government may end up forcing people to do what they do not want to do. Furthermore, the government and all its activities have to be paid for, and this has to be done by the government taking for its own use resources which individuals would otherwise have possessed, for example by taxation. Taxation, one of the ancient and most basic features of government, is the forcible appropriation of individuals' property: some still regard as forced labour the effort spent in earning the money to pay taxes. In the modern state the hands of the government are everywhere, and even when helping are still ready to clench into iron fists and coerce people. This is why politics is so important. We cannot avoid it: and it involves our being forced to do things, or to pay for things, which we may not wish to.

Politics is about such matters as censoring entertainment, allowing women to have abortions, controlling the use of drugs and alcohol, overseeing the adoption of children, regulating scientific experiments, permitting the practice of religions, building a certain type of power station, financing a particular kind of defence armament, giving overseas aid, joining international organizations, or going to war with another state. In every case what the government decides is what everyone is required and may be forced to do or to have, like it or not. Of course, governments do not always actually resort to force. Their laws and policies may meet with widespread approval and support. Moreover, it is very expensive and sometimes risky to force people, and governments usually prefer as far as possible to get their way by other means, for instance by persuasion or by deceit, so that their orders are routinely accepted and their bureaucrats outnumber their police and soldiers. Often governments can rely upon goodwill built up over a long period, or can take advantage of passive acquiescence or inertia on most people's part. Governments take care to present themselves as legitimate, and nurse the general habit of obedience to authority which is so significant in politics, and yet so fragile. At the

same time, every state contains its criminals, tax evaders, dissidents and traitors, its nonconformists and perhaps active rebels, and every government is using force against some of its subjects – usually a minority but sometimes a majority. Even when force is not used, it could be: its possible exercise is always there, and that is what is distinctive about politics.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 10 minutes.

1. _____, one of the ancient and most basic features of government, is the forcible appropriation of individuals' property.

A. Salaries.
B. Remuneration.
C. Tithes
D. Taxation

2. _____ is about such matters as censoring entertainment, allowing women to have abortions, controlling the use of drugs and alcohol, overseeing the adoption of children, regulating scientific experiments, permitting the practice of religions, building a certain type of power station, financing a particular kind of defence armament, giving overseas aid, joining international organizations, or going to war with another state.

A. Politics
B. Warfare
C. Negotiation
D. Interest

3. Moreover, it is very expensive and sometimes risky to force people, and governments usually prefer as far as possible to get their way by other means, for instance by persuasion or by deceit, so that their orders are routinely accepted and their bureaucrats outnumber their police and soldiers_____ (True/False).

4. Governments take care to present themselves as legitimate, and nurse the general habit of obedience to authority which is so significant in politics, and yet so fragile _____ (True/False).

5. Every kind of law, administrative, constitutional or whatever, can be seen in the end, directly or indirectly, potentially to involve the exercise of force_____ (True/False).

6. The distinctive mark of a political action is that it can be enforced, because the government can coerce people into obedience by the threat of physical force, and ultimately by using it _____ (True/False).

1.6 Politics as a form of rule: politics, citizenship and democracy

Bernard Crick has argued that although one may find elements of politics even within totalitarian, autocratic, or any other form of government, this does not constitute a political form of rule. For, critically, political rule is rule based upon the mutual recognition by all that there are differing interests and values to be conciliated in societies and that public procedure for reaching acceptable compromises can be institutionalized. Certainly we know what we mean when we say that some tribal societies are more political than others, where elders sit in a circle to discuss how the unchanging customs and traditions can be applied in a particular case rather than the chief declaring the law; or that there was more politics in the Kremlin of Brezhnev than that of Stalin. But in neither of those cases was politics publicly and legally institutionalized. Nor did those processes allow or require the accountability of open publicity to ensure that the compromises reached for others would stick. In short, politics was not institutionalized as the form of rule. More worryingly, that the practices of politics depend on an agreed framework of order for enforcing rules and maintaining common and acceptable institutions, and so are far more readily applicable to individual states than to relations between states.

Politics rests on two preconditions, a sociological one and a moral one. The sociological precondition is that societies are all complex and inherently pluralistic. And they will still be, even if and when (hopefully) the injustices of class, ethnic and gender discriminations one day vanish or radically diminish. The moral precondition is that people need to recognize that it is normally better to conciliate differing interests than to coerce and oppress them perpetually. Nonetheless, while much political behaviour is prudential, there is always some moral context and it may be that there are some compromises which we think it would be wrong to make, and some possible ways of coercion or even of defence which we think are too cruel, too disproportionate or simply too uncertain. These thoughts are very much with us at the moment. Hannah Arendt was wiser than Clausewitz or Dr Kissinger (US Secretary of State in the 1970s) when she said that violence is the breakdown of politics not its 'continuance by other means' (Arendt, 1970: 11).

Self-Assessment Exercises (SAEs) 4

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. Bernard Crick has argued that although one may find elements of _____ even within totalitarian, autocratic, or any other form of government, this does not constitute a political form of rule.

A. Politics
B. Democracy
C. Dialogue.

D. Conflict.
2. _____ rests on two preconditions, a sociological one and a moral one.
A. Politics
B. Democracy
C. Dialogue
D. Conflict
3. Hannah Arendt was wiser than Clausewitz or Dr Kissinger (US Secretary of State in the 1970s) when she said that _____ is the breakdown of politics not its 'continuance by other means'
A. Violence
B. War
C. Violent struggle
D. Interests

1.7 Politics as collective choice

Albert Weale has observed that politics is collective choice. In the sense that problems of politics are problems about whether everyone can be protected from the effects of self defeating rational behaviour.

Most people, most of the time, are rational. Common sense tells us that rational people act so as to protect their interests. They lock up their property against thieves. They take special precautions when they are travelling in strange places. They ask their friends and acquaintances about their experience of builders, plumbers, lawyers and architects whom they are thinking of employing. They visit the schools that they are contemplating sending their children to. In short, whatever else they do, rational people do not consciously set out to make themselves worse off. People in politics, we expect, will be the same. Politicians would get short shrift from their populations if they needlessly taxed, spent money unwisely or engaged in reckless overseas enterprises. Yet, the common-sense observation that rational people will not act against their self-interest seems to meet some obvious counterexamples. Impartial and incorrupt government is to the advantage of most people in society, but in many places even honest people feel compelled to pay bribes to officials when they want something done. Global climate change will be very destructive if people continue to use fossil fuels in an inefficient way. Around the world fish stocks are over-fished, leading to the decline of fishing communities. In major cities traffic congestion leads to gridlock as each individual takes his or her own car to work. Public squalor sits alongside private affluence. In these sorts of example something seems to have gone wrong with our assumption that rational people will act in their self-interest. If everyone could make an individual contribution to the

collective effort by using public transport, fishing within agreed quotas or paying a little more for alternative energy supplies, then everyone would be better off, even taking into account the cost of making the contribution. When everyone stands on tiptoe no one sees any better; they just end up with tired legs. If they could all agree to stand, they would see as well and save themselves the tiredness. Situations such as these, in which individually rational behaviour – like standing on tiptoe – leads people to be worse off than they might otherwise be, should cause us to think. How can rational people behave so irrationally? If people cause environmental damage, can people not stop environmental damage? How, if it is rational for people to act so as to protect their self-interest in everyday private life, can it turn out that acting to protect their interests in some collective situations leads them to be worse off? How is it that what is rational for each is not rational for all?

Politics is by definition the realm of the collective – the body politic, as it used to be known. Problems of politics are therefore problems about whether everyone can be protected from the effects of self defeating rational behaviour. When laws are passed and public policies implemented, they have effects on all who fall under them. When international treaties are entered into, they are done so in the name of all citizens. Polluted air or rising sea levels do not lend themselves to individual solutions. Resource depletion affects all those dependent on the resource. 'Stop the world, I want to get off' is not an option. Politics is not about allowing some individuals to get off the world. It is about whether the world can be made a more tolerable place by altering the self-defeating logic that leads to people being worse off than they need be. A useful term in this context can be borrowed from economists. It is the notion of a public good. A public good has a rather precise definition in economics. It does not mean a good that is provided by the government, though many public goods are provided by governments. Instead it refers to a good from whose benefits people cannot be excluded, even if they have not contributed towards meeting its costs. Clean air is a public good in this sense. If it is available to anyone in a locality, it is available to everyone in the locality. An honest system of public administration is also a public good in this sense. So are many other things, including the conservation of natural resources, the provision of law and order, protection from external threats or the effects of natural disasters, a well-educated work force and co-operative social relations. In short, anything is a public good where it supplies spill-over benefits to those who do not have to pay for its production.

Self-Assessment Exercises (SAEs) 5

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. A _____ in economics refers to a good from whose benefits people cannot be excluded, even if they have not contributed towards meeting its costs.
A. Cost analysis
B. good
C. public good
D. Social institution
2. The problems of politics are problems about whether everyone can be protected from the effects of self defeating _____ behaviour.
A. Rational
B. Aggressive
C. Conflictual.
D. Antagonistic
3. _____ is by definition the realm of the collective.
A. Politics
B. Government
C. Communalism
D. Body politic
4. The idea that problems of politics are problems about whether everyone can be protected from the effects of self defeating rational behaviour is referred to as _____.
A. Collective choice.
B. Instrumentality
C. Rational choice.
D. Group coherence

1.8 The political approach to human behaviour: people, resources and power

Adrian Leftwich advances two linked arguments with respect to the political approach to human behaviour. The first is that politics, as an activity, is not confined to its usual association with public institutions concerned with the processes and practices of government, governing and the making of public policy. On the contrary, politics is a universal and pervasive aspect of human behaviour and may be found wherever two or more human beings are engaged in some collective activity, whether formal or informal, public or private. Moreover, politics is a fundamental, necessary and functional process of all such activity, however small-scale, however limited in scope and petty in its implications, and that it is therefore a feature of all human groups, institutions and societies, not just some of them: it always has been and always will be. It follows that only a Robinson Crusoe-like figure (at least until he or she encounters someone

like Friday) is evacuated from politics. Of course the forms of politics vary greatly, but are found everywhere – in societies with states and in societies without them. It is expressed in the formal public domains and relations of states, governments and people, as well as in the private domains of friends, family, clan and kin; it is present in public agencies and in private companies; it takes place in clubs or corporations, and in the web of more or less explicit relations of conflict, negotiation or co-operation between them all. What is common to all these contexts, and what makes them all political, is that each case represents a particular pattern of interaction between people, resources – and power. That's politics. The second argument flows from the first. If politics, thus defined, is an inescapable and intrinsic aspect of all collective human activity, then it follows that if we are to understand human behaviour, we need also to understand it politically. And that is why the study of politics in the broadest sense is so important. The conception of politics which is advanced here, therefore, forms the basis of what we shall call the political approach to human behaviour. Thus using foregoing as his point of departure Leftwich defined politics as all the activities of co-operation, negotiation and conflict, within and between societies, whereby people go about organizing the use, production or distribution of human, natural and other resources in the course of the production and reproduction of their biological and social life. These activities are nowhere isolated from other features of life in society, private or public. They everywhere both influence and reflect the distribution of power, the structure of social organization and the institutions of culture and ideology in a society, or smaller groups within it. And all this may further influence and reflect the relations of a society (or a group or institution within one) with both its natural and social environments, that is, with other societies or groups and institutions within them (Leftwich, 1983).

Self-Assessment Exercises (SAEs) 6

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. _____ defined politics as all the activities of co-operation, negotiation and conflict, within and between societies, whereby people go about organizing the use, production or distribution of human, natural and other resources in the course of the production and reproduction of their biological and social life.

A. Adrian Leftwich
B. Bernard Crick
C. Harold Lasswell
D. Wole Soyinka

2. _____ is expressed in the formal public domains and relations of states, governments and people, as well as in the private domains of friends, family, clan and kin; it is present in public agencies and in private companies; it takes place in clubs or corporations, and in the

web of more or less explicit relations of conflict, negotiation or co-operation between them all.

A. Politics
B. Conflict
C. Wars
D. Dialogue

3. _____ is a universal and pervasive aspect of human behaviour and may be found wherever two or more human beings are engaged in some collective activity, whether formal or informal, public or private.

A. Politics
B. Exchange
C. Conflict.
D. Confrontation

4. International Court of Justice is composed of _____ to nine-year terms of office by the UN General Assembly and the Security Council.

A. 15 judges appointed
B. 15 judges selected
C. 15 judges nominated
D. 15 judges elected

5. International Court of Justice Judges must be _____ except.

A. Persons of High moral character in their respective countries and recognized competence in international law.
B. Persons of unstable emotion in their respective countries and recognized competence in international law.
C. Persons who possess the qualifications required in their respective countries for appointment to the highest judicial offices and recognized competence in international law.
D. Persons who are jurist-consults in their respective countries with recognized competence in international law.

1.9 Politics beyond boundaries: a feminist perspective

For Judith Squires there is an oddly paradoxical relation between politics and feminism. On the one hand, the traditional institutional manifestations of politics located in government have been notoriously resistant to the incorporation of women, their interests or perspectives. Politics has been more exclusively limited to men and more self-consciously masculine than any other social practice (Brown, 1988: 4). On the other hand, feminism has always been explicitly political. Feminism, as Anne Phillips tells us, 'is politics' (Phillips, 1998: 1). Its project, to realize fundamental transformations in gender relations, is overtly political in the sense that it seeks to make more equal the power relations between men and women.

Women have largely been excluded from the political, where politics is defined as the institutional forum of government. But when it is defined primarily as a process of negotiation or struggle over the distribution of power it becomes evident that, far from being excluded from politics, women have both shaped and been shaped by its operation. Feminist theorists would appear to be claiming both that the political is explicitly masculine and excludes women, and also that women are engaged in political struggle to alter existing power relations between the sexes. The paradoxical nature of these two statements subjects the political itself to scrutiny. It also raises questions about the nature of feminist objectives in relation to the political: is the ambition to include women in a political from which they are currently excluded, or to reconfigure a political by which they are currently oppressed, or perhaps both? Thus, if there is a distinctively feminist answer to the question 'what is politics?' it is, in light of the argument above, an answer that takes two parts. The first part entails an endorsement of the ubiquity of politics, from which there follows a determination to reveal the artificial and unsustainable nature of existing attempts to maintain strong boundaries around a political realm. The second part entails a commitment to exploring and advocating ways in which social relations might be ordered differently, such that they embody a norm of gender justice. Feminists have tended to accept the broad conception of politics, taking this as a reality from which they go on to address the normative question of how to change the diverse spheres of social relations in pursuit of gender justice.

One should not, however, expect to find any great consensus in relation to the second part of the answer to 'what is politics?', for here there is significant normative dispute – as befits politics. Even within the early second-wave women's movement, serious division emerged between socialist and radical feminists, with socialist feminists emphasizing the importance of childcare, family allowance, women organizing in paid work, and women's control over their own fertility and sexuality, and radical feminists emphasizing violence against women as the central issue (Segal, 1987: 46). Such divisions have only increased and become more complex with the increased awareness of 'intersectionality' and the diversity of women's experiences and commitments. So one should resist the temptation to assume that feminists share a common political agenda with each other.

If feminists have a distinctive shared contribution to make to the debate about the nature of politics, it is perhaps in assuming a critical function, casting doubt on the presumed immutability of existing social relations, thereby rendering them political. But why is it that feminists have tended to adopt the broad definition of politics, eschewing attempts to define either the essence or the boundaries of the political? It is, at heart, because a central element of the feminist challenge to mainstream politics consists

in exposing the extent to which dominant conceptions of politics have been constituted in ways that simultaneously and systematically exclude women and femininity, on the one hand, and privilege men and masculinity, on the other hand. The central task in any feminist consideration of politics must therefore be to explore why and how politics has come to be associated with men and masculinity; how and why it has excluded women and femininity; and how this state of affairs might be changed. This means that a central element of any feminist engagement with the nature of politics will entail first and foremost an exploration and critique of existing assumptions regarding the boundaries of the political. Only once these presumed boundaries have been unsettled, and their androcentric nature understood, can we begin to develop conceptions of politics that are less gendered.

The long-standing feminist determination to unsettle dominant discourses regarding the boundaries of politics has frequently entailed a critique of the presumed correlation between politics and the public sphere. In particular, it has entailed various critiques of the public / private dichotomy and its association with a political / non-political dichotomy. In other words, feminists start by making visible the extent to which women have been systematically excluded from the political where politics is about the institutions of government. They then offer an expanded conception of politics, which politicizes previously presumed spheres of life, including spheres that have been conventionally understood to be paradigmatically female such as the domestic. Feminist contributions to debates about politics are not therefore limited to demands for inclusion within a political realm as currently conceived; they also entail varied attempts to re-configure politics as practices (of power) more generally.

Self-Assessment Exercises (SAEs) 7

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. *Feminist contributions to debates about politics are not therefore limited to demands for inclusion within a political realm as currently conceived; they also entail varied attempts to re-configure politics as practices (of power) more generally _____ (False/True).*

2. *Even within the early _____ women's movement, serious division emerged between socialist and radical feminists, with socialist feminists emphasizing the importance of childcare, family allowance, women organizing in paid work, and women's control over their own fertility and sexuality, and radical feminists emphasizing violence against women as the central issue.*

A. fourth -wave
B. first-wave

C. third-wave
D. second-wave
3. The central task in any feminist consideration of politics according to Judith Squires, must therefore be to explore why and how politics has come to be associated with men and _____.
A. Conflict
B. Struggle
C. Masculinity.
D. Party dominance

4. _____, as Anne Phillips tells us, 'is politics'.
A. Feminism.
B. Anarchism.
C. Socialism.
D. Communism.

1.10 Political philosophy and politics

Political philosophers offer no single answer to the question of what politics is. This is not very surprising, since they do not agree about what philosophy is either. Different kinds of philosopher treat issues in quite different ways, seeking different kinds of answer to different kinds of question. Some value analytical precision, absolute clarity of expression, and logical rigour. Others regard such virtues as inappropriately scientific and adopt a more literary or artistic approach. Some put the history of philosophy at the centre of the discipline. Others think that the important questions can be addressed without any historical input. This variety means that any attempt to explain how 'political philosophy' conceptualizes politics is bound to be biased, reflecting the particular views of the person doing the explaining. What follows, then, is not the answer to the question of how political philosophy thinks about politics, it is just an answer: quite a widely shared answer, to be sure, and an answer that has come to exert considerable influence over the way political philosophy is done in many parts of the world.

But, still, there are many who would take a very different line. Here, in summary, is the view: politics is concerned specifically with the state. And political philosophy asks whether there should be a state, how it should act, what moral principles should govern the way it treats its citizens and what kind of social order it should seek to create. As those 'shoulds' suggest, it is a branch of moral philosophy, interested in justification, in what the state ought (and ought not) to do. But the state, as political philosophers think about it, is not – or should not be – something separate from and in charge of those who are subject to its laws. Rather it ought to be the collective agent of the citizens, who decide what its laws are. So the question of how the state should treat its citizens

is that of how we, as citizens, should treat one another. The state is a coercive instrument. It has various means – police, courts, prisons – of getting people to do what it says, whether they like it or not, whether they approve or disapprove of its decisions. Political philosophy, then, is a very specific sub-set of moral philosophy, and one where the stakes are particularly high. It is not just about what people ought to do, it is about what people are morally permitted, and sometimes morally required, to make each other do.

This can seem a rather narrow and modern way of thinking about politics. It suggests that political philosophy is relevant only to those societies that have states. What about communities that manage their collective affairs without resort to any coercive apparatus? And it assumes that, where there is a state, it must be democratic if it is to be legitimate. What about all those states throughout history that have clearly not been collective agents of those subject to their laws? Good questions. The answer to the first is that one of the fundamental issues political philosophers raise is precisely whether states are indeed legitimate. It is open to the anarchist to argue that we can get along perfectly well without them, and her case may well appeal to examples of societies that have done so. And political philosophy, even in a narrow sense, is relevant to such societies. Anyone who argued, in a stateless society, that certain desirable goals might better be achieved by means of a state, and that this would justify establishing one, would be doing political philosophy. And anyone who disputed that claim would be doing it too. But if there is no state, or no discussion about whether there should be a state or what it should or could legitimately do, then there is no politics, at least not on the conception of politics I advance here. The second question accuses one of simply assuming that states should be democratic. (That is the bit about states being the collective agent of the citizens who decide what its laws are.) It is true that my kind of political philosopher works with that conception of the state, but it is a bit misleading to say that we simply assume it. We work on that basis because we think there are good reasons why the state should be that way. It is, of course, a legitimate question to ask what form the state should take. Plato famously thought that rule by wise guardians was best. So when one describes his way of thinking about what the state is – or should be – he is, in effect, taking a view within political philosophy. That still leaves plenty of questions up for grabs. What is the proper scope of state authority? Is majority rule always the best way to make political decisions? Is there any room for the idea of political expertise? What kind of reasons can citizens invoke when they vote? These are the questions that my kind of political philosopher tries to answer.

Self-Assessment Exercises (SAEs) 8

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. Political _____ offer no single answer to the question of what politics is.

A. Philosophers
B. Observers
C. Writers
D. Parties

2. International Court of Justice is a major_____ of the United Nations.

E. Legal institution
F. Economic institution
G. Political institution
H. Social institution

3. _____ famously thought that rule by wise guardians was best.

A. Plato
B. Socrates
C. Aristotle
D. St. Augustine

4. _____ is a coercive instrument. It has various means – police, courts, prisons – of getting people to do what it says, whether they like it or not, whether they approve or disapprove of its decisions.

A. State
B. Body politic
C. Government
D. The military

5. Essentially _____ asks whether there should be a state, how it should act, what moral principles should govern the way it treats its citizens and what kind of social order it should seek to create.

A. Political philosophy.
B. Politics.
C. Theory.
D. Political sociology.

1.11 Summary

It is now apparent to us that politics cannot have one view point. Politics has been conceptualised to be about governing and governance understood, fundamentally, as the provision of direction to the economy and society. There is also the view that politics is the exercise of force. Which means that in a modern state, a particular body of people, the government, makes decisions, puts them into practice, adjudicates disputes, and generally runs and organizes the society. Most critically Bernard Crick has highlighted the idea of politics as conciliation. For him, political rule is rule based upon the mutual recognition by all that there

are differing interests and values to be conciliated in societies and that public procedure for reaching acceptable compromises can be institutionalized. While the feminist angle notes the apparent tension between the claim that 'feminism is politics' and that politics has been exclusively limited to men.

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1.13 Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *Greeks.*
2. *Aristotle*
3. *True*
4. *True*

Answers to SAEs 2

1. *True.*
2. *True*
3. *True*

Answers to SAEs 3

1. *D - Taxation.*
2. *A - Politics,*
3. *True*
4. *True*
5. *True*
6. *True*

Answers to SAEs 4

1. *A - Politics.*
2. *A - Politics,*
3. *A- Violence*

Answers to SAEs 5

1. *C - Public good.*
2. *A - Rational,*
3. *A-Politics*
4. *A- Collective choice*

Answers to SAEs 6

1. *A - Adrian Leftwich.*
2. *A - Politics,*
3. *A- Politics*
4. *A- Collective choice*

Answers to SAEs 7

1. *True.*
2. *D - second-wave,*
3. *C- masculinity*
4. *A- Feminism*

Answers to SAEs 8

1. *A- Philosophers.*
2. *D - second-wave,*
3. *A-Plato*
4. *A- State*
5. *A- political philosophy*

UNIT 2 DEFINING THE STATE

Unit Structure

2.1 Introduction
2.2 Learning Outcomes
2.3 Defining the State
2.4 Emergence of states
2.4.1 The modern nation-State
2.5 The Nature and Purpose of the State: The philosophical definition of the state: The Platonic state, social contract and the state, etc
2.6 Summary
2.7 References/Further Readings/Websites
2.8 Possible Answers to Self-Assessment Exercises (SAEs)

2.1 Introduction

Historically, the state has not always been the primary political institution (Bottomore 1979; Tilly 1985) nor is it clear that it will continue to occupy such a central role. This is not to say that political institutions will disappear; to the contrary, the institution that manages political power may transform into something very different from the traditional state. Meanwhile, the state and the nation-state are important concepts for political sociologists. The focus of this unit is, what is the state and how does it differ from a nation; how is the state different from government; what are various state forms; how do different sociological theories view the state; and what does the future hold?

2.2 Learning Outcomes

At the end of this unit, you should be able to:

- define the concept of the state
- Identify the differences between the state and similar concept like nation, government etc.

2.3 Defining the state

Since ancient time, some political organizations have existed such as the Greek City-state and the Roman Empire. However, in contemporary time, the origin and evolution of the concept of the state could be traced to Machiavelli (1513) who expressed the concept in the early Sixteen Century as the power which has authority over men (Gauba, 2003). This conception of the state by Machiavelli, describes the nature of the state, but not the end of the state which was a question of political philosophy rather than political science or political sociology. The peculiar attribute

of the state identified by Machiavelli has attracted the attention of many modern scholars such as Max Weber (1920), Maclver and Page (1950), Frederick Watkins (1968), and Geoffrey Roberts (1971) among others. Weber (1920 in Gauba, 2003) sociologically defined the state in terms of the specific means peculiar to the state as to every political organization and sees the state as a human community with the monopoly of the legitimate use of physical force in a given geographical area. Maclver and Page (1950) posited that the state is distinguished from other organizations by its sole investment with the ultimate power of coercion. Frederick Watkins (1968) on his part, views the state as a geographically bounded part of human society united by common compliance to a single independent.

From this standpoint, Watkins (1968) emphasizes on the component of sovereignty, the distinctive of superior law-making authority whose decision is ultimate. Watkins further stated that the dominance of state commands is an indispensable ingredient which differentiates the state from other organizations of men. Georffrey Roberts (1971 in Gauba, 2003) evolves a working definition of the state and sees the state as thus:

> a jurisdictional region in which a people is governed by a set of political governments; and which with success claims the compliance of the citizenry for its laws; and is able to establish such compliance by its noncompetitive power of lawful coercion.

Legally speaking, the state can be seen as a human organization with a defined territorial sovereignty, population; and a government that ensures compliance to its jurisdiction.

2.4 Emergence of the state

Consistent with Weber's view, Tilly (1985: 172) defines the state as "relatively centralized, differentiated organizations the officials of which more or less successfully claim control over the chief concentrated means of violence within a population inhabiting a large, contiguous territory".

Where Tilly departs from Weber and others is in his view on state emergence. Rather than taking the Hobbesian view that equates the rise of the state with the need for a social contract, or trading submission to the state for protection, he argues that wars make states and that both war making and state making more closely resemble organized crime as those involved are "coercive and self-seeking entrepreneurs" (1985: 171). Tilly contends that just as a racketeer creates danger and then provides protection for a price, the state protects citizens against threats, both real and imagined, that are the consequences of the state's own activities.

Citizens tolerate this because the benefits of other state services (e.g. fire and police protection and public schools) outweigh the costs. In the past, professional soldiers and tax collectors held the right to use violence on behalf of kings. Kings eventually recognized the threat posed by private armies and roving bands of decommissioned soldiers and acted to consolidate power by disarming private armies and maintaining a standing one under monarch control. This approach was especially useful for keeping internal rivals in check.

Tilly contends that war making and capital accumulation created states because those controlling specific territories needed to extract resources from populations under their control to fund these efforts. Those in power warred to check or overcome their competitors. Capital accumulation through taxation provided a more permanent solution for financing wars than temporary measures such as selling off assets, coercing capitalists, or acquiring capital through conquest. One of the advantages of Tilly's thesis is that he accounts for the variety in state forms and the different routes to state building (Goldstone 1991). Tilly (1990) identifies two settings in which states emerge: "capital intensive" and "coercive intensive." In the first setting, resources are in the form of money controlled by capitalists and often concentrated in cities. States are smaller, city centred, and more commercialized with strong trade links. This results in a weaker state structure as capitalists collaborate with state building. In a coercive-intensive setting, resources are in the form of raw materials (e.g. grain and timber) and land. Large empires with fewer cities are a result with weaker trade links necessitating "high-level coercion structures" (Scott 2004: 5 of 10) as states developed without the cooperation of local capitalists.

For Tilly (1985), the activities of war making and other uses of state violence, such as state making or neutralizing rivals inside a power holder's base, and protection, or eliminating threats to citizens, are interrelated with and dependent on extraction (i.e. taxing) or acquiring the resources to carry out the first three activities. Due to the interdependent nature of extraction, war making, and state making, these activities depend on a centralized organization and increasingly large bureaucracy. For example, efficient extraction of resources in the form of taxes necessitates a bureaucratic apparatus (e.g. Internal Revenue Service), which, in turn, increases state making. External pressures to create states increases as territories organize into states to defend against other global powers. While Tilly's discussion concerns European states, he notes that decolonized, independent territories (e.g. 1947 partitioning of British India into India and Pakistan) acquired their military from outside. As a result, these states did not go through the process of negotiation between the rulers and the ruled, which expands civil or non-military aspects of the state. This is important because civil society is an important counter

balance to the state. Furthermore, newer states are more dependent on others for arms and expertise. As a result, the military comprises a larger proportion of the newer state apparatus. The recognition of the sovereignty of these states by influential nations such as the United States or Russia provides an incentive for ambitious individuals to use the military to take over the state. An example of this is Pakistan which has a history of the military subverting the democratic process. General Perez Musharraf's 1999 takeover was preceded by several previous military coups divided by periods of democratically elected governments. Pakistan became a democracy again in 2008 but is considered a fragile democracy with limited experience in transitioning power from one elected regime to another and where Prime Ministers often do not finish a full term.

For states where the military dominates the state apparatus, Tilly argues that the analogy between organized crime, state making, and war making is even more accurate. Goldstone argues that although Tilly's analysis is ground breaking, his "war-centred framework" (1991: 178) over-simplifies state formation by ignoring other factors that contribute to state making, including ideology and revolution. Goldstone points to the example of England and the role of the Reformation and religious conflict in shaping the state, or the role of nationalism in Italy. Bruce Porter (1994) contends that the timing and type of war shaped the different paths of state development. The Continental path of state building created absolutionist states and resulted first in civil war and then international war. A Constitutional path of state formation created constitutional monarchies with deliberating bodies, but leaner administrative bureaucracies. This path was followed when a state was able to avoid international war, but still had to contend with internal pressure and conflict. The Coalitional path is the result of states that were able to avoid civil war, but were often involved in international conflicts. These states avoided pressure to centralize and tended to build more republican forms of government. Finally, states that experienced both internal and international conflicts, often simultaneously, tended to form dictatorships. Although an important contribution, Porter's work is criticized for overemphasizing military determinants of state formation at the expense of other variables (Kestnbaum 1995).

Max Weber contends that "a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory" (Gerth and Mills 1946: 78). The state, then, has the ability to make and enforce laws and is run by those occupying positions in the state bureaucracy (Nagengast 1994). In short, the state has power over the lives of its citizens as well as persons currently residing within its borders. Robert Dahl (1963) argues that only the state decides who can use force, under what circumstances, and the type of force

allowed. The state does not have to use force nor does a monopoly mean that only the state can use force; however, only the state decides when force is permissible. There are three components to a Weberian view on the state.

a. Compulsory

Weber views the state as "a compulsory association with a territorial basis" (Heydebrand 1994: 26). The compulsory nature of the state is clear in that short of revolution, we have no choice but to submit to state authority as we physically reside within its borders. For example, a U.S. citizen travelling in Russia cannot refuse to obey Russia's laws while under Russian jurisdiction.

b. Monopoly

The state has a monopoly on the use of legitimate force within its borders (Runciman 1978). This does not mean that the state must use force. State domination is evidenced by the ability to have commands followed without the need to resort to coercion (Skrentny 2006). Recall the earlier metaphor of parent for understanding the state. Parents do not always need to threaten children with a spanking for compliance. Children usually comply because they accept the right of parents to punish even if they do not agree with the punishment. As described by Michael Mann (1988), there are two types of state power: despotic and infrastructural. Despotic power is the use of physical force or coercion administered by the military or police as agents of the state. Infrastructural power is a more modern power and refers to the ability of the state to influence and control major spheres of our lives without using physical force. Pierre Bourdieu refers to a related concept, symbolic violence. He contends that the state has a monopoly on the use of both physical and symbolic violence and emphasizes the latter in his work. For Bourdieu, symbolic violence is a condition for the ability to exercise a monopoly on physical violence. Symbolic violence is the gentle, invisible form of violence, which is never recognized as such, and is not so much undergone as chosen, the violence of credit, confidence, obligation, personal loyalty, hospitality, gifts, gratitude, piety—in short, all the virtues honoured by the code of honour—cannot fail to be seen as the most economical form of dominion. (Bourdieu 1977 cited by Loyal 2017: 30) Symbolic violence is not recognized because it is something imposed by the dominant over those being dominated. Symbolic violence exists when those with less power view themselves through the lens of those in power. In other words, we are complicit in our own domination.

c. Legitimacy

A driver obeys a police officer not only because a police officer carries a gun, but also because citizens recognize the right of a police officer to make traffic stops on behalf of the state. For Weber, "If the state is to exist the dominated must obey the authority claimed by the powers that be" (Gerth and Mills 1946: 78). However, the force that is being used must be "permitted or prescribed by the regulations of the state" (Runciman 1978: 41). What permissible varies between nations and, within the United States, between jurisdictions. What is constant across all is that only the state determines legitimacy. In Texas, lethal or deadly force is permissible to protect one's life and, under some circumstances, property, including that of one's neighbours (Texas Penal Code: www.statutes.legis.state.tx.us/Docs/PE/htm/PE.9.htm#9.42). In other jurisdictions, lethal force is only justified to protect one's life and the danger must be imminent. This means that, within the United States, someone who kills an intruder may be treated differently depending on local laws.2 Weber observed that fathers sometimes physically discipline their children. The State may limit parents' ability to use physical punishment to correct their children's behaviour. Some modern nation-states severely restrict corporal punishment to prevent child abuse (e.g. Sweden).

2.4.1 The modern nation-state

Defining the state is problematic because there are two conceptually different issues involved: What does the state look like and what does the state do or what are the institutional and functional dimensions (Mann 1988)? What we call "the state" is in reality a number of interacting institutions and organizations (Miliband 1993) comprising people occupying defined positions with specific responsibilities. The "modern nation-state" is an entity with a monopoly on the legitimate use of force linked to a specific territory recognized as sovereign by other nation-states and residing within its borders are groups sharing a common history, identity, and culture. The modern nation-state, with a centralized structure and elaborate bureaucracy, is a relatively recent human innovation (Bottomore 1979) having been in existence for only approximately 6,000 years (Berberoglu 1990).

Prior to the rise of the state, kinship relations or religious rituals determined authority with no specific group charged with decision-making responsibility (Bottomore 1979). For example, the decision to make war or peace with a neighbouring tribe might be made by all the adult members or only by some, although one person is the undisputed leader. Bureaucracy and rationalization, or the adoption of consistent

practice and procedures rather than capricious decision-making, are the hallmarks of the modern nation-state. While we often link the concepts of nation and state, there are important distinctions.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. *What we call "the state" is in reality a number of interacting institutions and organizations comprising people occupying defined positions with specific responsibilities _____ (True/False).*
2. *Symbolic violence exists when those with less power view themselves through the lens of those not in power_____ (True/False).*
3. *_____ is the use of physical force or coercion administered by the military or police as agents of the state.*
4. *_____ refers to the ability of the state to influence and control major spheres of our lives without using physical.*
5. *There are three components to a Weberian view on the state_____ (True/False).*

2.5 The Nature and Purpose of the State

Throughout antiquity, scholars have been divided, and provide differing explanations on the nature and purpose of the state. Four schools of thought are easily discernible:

- Those who believe that the state is designed to harmonize the various necessary parts of society. Scholars in this category include Plato, Aristotle, Aquinas, St' Augustine etc.
- The view that the state arose as an expression of a "Social Contract". Scholars in this category include Thomas Hobbes, John Locke, Jean Jack Rousseau and Machiavelli.
- The view that the state has been created by the struggle between certain conflicting social forces in the world. Hegel and Marx are the most important proponents of this school.
- There are also those who believe that the primary purpose of the state is to create necessary conditions and an enabling environment for unhindered market economy. Milton Friedman, Friedrich Hayek and a host of other Chicago school economists are the major purveyors of this school.

For Plato, society consists of a coordinated system of roles in which every member is assigned an appropriate function. The importance of the individual is linked to the value of the function or role he or she performs.

The state therefore exists to secure him the freedom not to exercise his free will, but to practice his calling in the social division of labour in the society. Plato therefore identifies three critical functions for the state: the satisfaction of the underlying physical needs, the protection of the society, and the governing of the society (Nnoli, 2003).

Just like Plato, Aristotle believed that the chief purpose of the state is to ensure the harmony of the members of society. It encourages the moral improvement of its citizens because it enables them to live harmoniously together in order to achieve the best possible life. For Aristotle, the state is self-sufficient in the sense that it alone provides all the conditions within which the highest type of development can take place. The life of the state is made up of intimate and mutually beneficial social, political, economic and cultural lives of citizens. These overlap with the interests of family, religion, and friendly personal intercourse in one harmonious whole.

Closely following the works of Plato and Aristotle, is the view of utilitarian thinker, Jeremy Bentham. Bentham regarded the notion of a modern state as an ideal, an aspiration, and examined the techniques of state building and methods that would promote modernization. For Bentham, the state was a legal entity with individualism as its ethical basis. He also recognised that these autonomous individuals, governed by their interests, constituted themselves into fragile groupings which the state had to maintain through discipline and cohesion, if it had to be an effective body. Through institutions and other techniques, the community was made responsive to the state, but the state was not allowed to trample on individual interests and wills. Bentham thought of ideas and devices to guarantee government protection of individual interests, namely that public happiness should be the object of public policy (Subrata and Sushila, 2007). Bentham therefore stipulated happiness, and not liberty, as the end of the state. The state was a contrivance created for fulfilling the needs of the individual. Government and a state had to be judged by their usefulness to the individual. He also insisted in the need for a watchful and interested government which would readily and willingly act whenever and wherever necessary for the happiness of the individual.

On the other hand, contract theorists differ from the above thinkers by their emphasis on human nature as the starting point for the formation of the state. States are formed for the sole purpose of obtaining security, especially against the aggressiveness of other men. All men are essentially selfish and seek only their own good. In this way, the good of everyone is threatened by the selfish actions of all men.

Accordingly, men enter into a tacit agreement with each other neither to inflict nor suffer harm. Thus, the state and law come into existence as a contract to facilitate cooperation between men.

Writing in England at the time of the civil war in the 1640s, Hobbes argued that the state should be conceived of a contract between a group of people to guarantee their mutual security and prosperity. Hobbes argued that the natural condition of humanity – the state of nature – was a thoroughly unpleasant one (Wolin, 1960). Individuals were concerned only with their own selfish interests, but since all individuals were roughly equal in their physical strength and cunning, it was difficult for anyone to succeed. Instead people lived in a state of anarchy, in constant fear of death. Life under these circumstances was "solitary, poor, nasty, brutish and short" (Aubrey, 1962). In such conditions, there could neither be wrong nor right, justice nor injustice. The state resulted to improve this situation and was a form of contract between the individual on the one hand and the government on the other hand: For selfish reasons the individual agreed to give up some of his/her individual liberties in exchange for the protection offered by the state. The ability of the state to offer this protection was its sole justification, and if it could be shown that the state could no longer guarantee security and prosperity, then it lost its justification for existence (Nnoli, 2003).

Locke's description of the state of nature was not as gloomy and pessimistic as Hobbes. For him, the state of nature was one of perfect equality and freedom regulated by the laws of nature. The individual was naturally free and became a political subject out of free choice (Wolin, 1960). Any defect in the state of nature arose from the absence of an organisation capable of protecting these rights. The state arose out of the contract of individuals in the state of nature in order to regulate and protect the individual's natural rights, especially the right to property. Therefore, an ideal state is that which protects life, liberty and private property (Nnoli, 2003).

The conflict or dialectical view of the state views the state as a creation of certain conflicting social forces in the world. One of its most prominent proponents, Hegel, presents the world as a totality in the process of continuous development, of ascent from the lower to the higher. In his view, development proceeds through the struggle and resolution of internal contradictions. The result is transition to a new stage, the elimination of the old contradictions and the emergence of new ones intrinsic to the new quality. For Hegel, the history of world civilization is a succession of national cultures in which each nation brings its peculiar and timely contribution to the whole human achievement. He therefore defined the state as a group that collectively protects the destiny of a people. It is an embodiment of political power. The state represented

universal altruism. It synthesized dialectically the elements within the family and civil society (Hegel, cited in Subrata and Sushila, 2007).

As in the case of the family, the state functioned in a manner that the interests of everyone were furthered and enhanced. It represented the universal tendencies within civil society, thus giving rise to the notion of citizenship. The state had "its reality in the particular self – consciousness raised to the place of the universal". The state was "absolutely rational" and had "substantive will" for realising itself through history, and was therefore eternal. This substantive unity is its own motive and absolute end. In this end, freedom attains its highest right. This end has the highest right over the individual, whose highest duty in turn is to be a member of the state (Hegel cited in Bondurant, 1958).

Karl Marx dissected the Hegelian theory of the modern state and its institutions in his "Critique of Hegel's Philosophy of Right" (1843). For Marx, the state is a historical product and a manifestation of the irreconcilability of classes. It arises where, when and insofar as class antagonism objectively cannot be reconciled. Conversely, the existence of the state proves that class antagonisms are irreconcilable. As Engels argues:

The state is, therefore, by no means a power-forced on society from without; as little is it "the reality of the ethical idea", the image and reality of reason" that Hegel maintains. Rather, it is a product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonism which it is powerless to dispel. But in order that these antagonisms, these classes with conflicting economic interests, might not consume themselves and society in fruitless struggle, it became necessary to have a power, seemingly standing above society, that would alleviate the conflict and keep it within the bounds of 'order', and this power, arisen out of society but placing itself above it, is the state.

Thus, the state is an organ of class rule, an organ of the oppression of one class by another (Nnoli, 2003). For Marx and Engels, the state expressed human alienation. It was an instrument of class exploitation and class oppression, for the economically dominant class exploited and oppressed the economically weaker class. The state apparatus served the ruling class, but acquired independence and became autonomous when the adversarial classes were in a state of temporary equilibrium. This phenomenon was described as Bonapartism (Subrata and Sushila, 2007).

Lastly, the neoliberal view of the state sees the sole function of the state as consisting in its ability to provide regulatory frameworks for a market driven society where private individuals and their self-interests are the

fulcrum around which both the society and the economy revolve. A neoliberal state preserves laissez – faire markets while adding a role for what they consider a minimal state – one that intervenes less frequently in the economy. This minimal state would protect private property, maintain order and provide some protection for the poor (Bockman, 2013).

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. For _____, society consists of a coordinated system of roles in which every member is assigned an appropriate function.

2. Just like Plato, Aristotle believed that the chief purpose of the state is to ensure the harmony of the members of society_____ (True/False).

3. The _____ view of the state views the state as a creation of certain conflicting social forces in the world.

4. Hobbes argued that the state should be conceived of a contract between a group of people to guarantee their mutual security and prosperity_____ (True/False).

5. For _____, the history of world civilization is a succession of national cultures in which each nation brings its peculiar and timely contribution to the whole human achievement.

2.6 Summary

Legally speaking, the state can be seen as a human organization with a defined territorial sovereignty, population; and a government that ensures compliance to its jurisdiction. As is common with social science concepts, there is varying viewpoints on the emergence of the state. Max Weber contends that "a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory". Tilly on the other hand contends that war making and capital accumulation created states because those controlling specific territories needed to extract resources from populations under their control to fund these efforts. The "modern nation-state" is an entity with a monopoly on the legitimate use of force linked to a specific territory recognized as sovereign by other nation-states and residing within its borders are groups sharing a common history, identity, and culture. Just like Plato, Aristotle believed that the chief purpose of the state is to ensure the harmony of the members of society while Bentham stipulated happiness, and not liberty, as the end of the state. On the other hand, contract theorists differ from the above thinkers by their emphasis on human nature as the starting point for the formation of the state. The conflict or dialectical view of the state,

as espoused by Hegel and later Marx, views the state as a creation of certain conflicting social forces in the world.

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2.8 Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *True*
2. *False*
3. *Despotic power*
4. *Infrastructural power*
5. *True*

Answers to SAEs 2

1. *Plato.*
2. *True*
3. *dialectical*
4. *True*
5. *Hegel*

UNIT 3 DIFFERENTIATING GOVERNMENT FROM THE STATE

Unit Structure

3.1. Introduction
3.2. Learning Outcomes
3.3. Differentiating government from the state
3.4. Features of Stateness
3.4.1. Differentiating Nation and State
3.4.2. Nationalism
3.5. Summary
3.6. References/Further Readings/Websites
3.7. Possible Answers to Self-Assessment Exercises (SAEs)

3.1. Introduction

Quite frequently, among fresh students of politics there is always the tendency to conflate the concepts of government and the state. At best there is an oft observed difficulty in distinguishing one from the other. The focus of this unit is to discuss both concepts and highlight their differences.

3.2. Learning Outcomes

At the end of this unit you should be able to:

- describe the concept of government and the state
- Identify the differences between the state and government.

3.3. Differentiating Government from the State

The state is not a single entity but a network of organizations. Following the lead of Tilly and Skocpol, Ann Orloff describes the state as "potentially [emphasis Orloff's] autonomous sets of coercive, extractive, judicial, and administrative organizations controlling territories and the populations within them" (1993: 9). Ralph Miliband (1993) provides a detailed description of the types of organizations that comprise the state. He subdivides the state into the following categories: government, administration, military and police, judiciary, sub-central governments, and legislative or parliamentary bodies.

a. Government

The state is often confused with government because the latter speaks on behalf of the state (Miliband 1993). Government is "the specific regime in power at any one moment" (Alford and

Friedland 1985: 1). In the United States, power switches back and forth between political parties with political appointees occupying important positions of power, yet government is less permanent because the state endures regardless of which party captures the presidency (Olsen and Marger 1993; Stepan 1988).

b. Administration Or Bureaucracy

Administration is the sphere that manages the day-to-day affairs of the state. Political appointees head U.S. departments such as State and Homeland Security, but civil servants remain regardless of which political party is in power. Generally, administrators are not simply instruments of government but take an active role in formulating policy (Miliband 1993). Perhaps this recognition is why some government officials allow political considerations to influence which persons are selected for non-political government appointments. In 2007, hearings over the firing of nine U.S. attorneys revealed that politics influenced hiring decisions at the U.S. Department of Justice, which is a violation of civil service laws. One job candidate was allegedly rejected for a prosecutor job because she was perceived as a lesbian while another received favourable reviews because he was conservative on the three big Gs: God, guns, and gays (Lichtblau 2008). Political appointees sometimes transfer into civil service jobs where they are difficult to fire. The practice of "burrowing in" happens during every presidential transition. Congressional Republicans warned the Obama administration after the 2016 election to avoid allowing political appointees to convert to career positions (Rein 2016).

Miliband asserts that the administrative feature of the state extends far beyond the traditional state bureaucracy and includes public corporations, central banks, regulatory commissions, and other bodies "enjoying a greater or lesser degree of autonomy … concerned with the management of the economic, social, and cultural and other activities in which the state is now directly or indirectly involved" (1993: 278). Miliband's definition is broader than state bureaucracy, but the latter is necessary as a "material expression of the state" and is an outcome of public policy shaped by politics (Oszlak 2005: 483). Furthermore, the state bureaucracy uses a myriad of resources including human, financial, technological, and material to produce programs or services, regulations, and even national symbols (Oszlak 2005). One example is the programs associated with what political sociologists call the welfare state. President Trump's former advisor, Steve Bannon, has called for the "deconstruction of the administrative state" seeing regulations, trade deals, and taxes as infringing on U.S. sovereignty and threatening economic growth (Rucker and Costa 2017). The state bureaucracy is certainly a powerful entity

that has much influence on the lives of citizens and noncitizens alike.

c. Military And Police

Kourvetaris (1997) contends that there is little consensus among political sociologists regarding whether the military and police are considered part of the state system or a separate institution. Given that both act at the behest of the state and are under the authority of a political leader who occupies a government position (e.g. mayor, governor, or president), it seems reasonable to consider both aspects of the state. Miliband agrees, calling police and military forces as the branch concerned with the "management of violence" (1993: 279). Skocpol's (1993) definition of the state also includes the police and military. Finally, Tilly (1975) argues that the repressive features of the state including taxation, policing, and the armed forces were historically essential for the making of a strong state. For an authoritarian or nondemocratic state, the military either controls the state or is in charge of its coercive capabilities (Stepan 1988).

For democracies, there is concern regarding the role of military and intelligence organizations. Nations need a strong defence, but when the military and state security apparatus is not accountable to civilian authorities or when "security organizations … attempt to act with secrecy and autonomy, democratic control of policy is severely challenged" (Stepan 1988: ix). While Stepan was writing in the aftermath of the Iran–Contra scandal,3 the current "war on terror" waged by the United States and its allies renews these concerns because of the more controversial aspects of the U.S. Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) and Foreign Intelligence Surveillance Act (FISA). The Patriot Act amends FISA and makes it easier for the U.S. government to gather intelligence on U.S. citizens. Stepan advocates for the development of the capacity within civil society "to speak with knowledge and authority on complex matters of geopolitics, arms, security, and peace" (1988: x) as a counterpoint to the state. Political sociology is ideally suited to prepare individuals who take seriously Stepan's call to action.

d. Judiciary

Skrentny (2006) argues that the United States is a legal state with political actors using the law and courts to meet political ends. Courts have a substantial impact through policy making regardless of whether jurists are conservative or liberal. Not only is the U.S. judiciary independent of politicians heading the government, but it also acts to protect persons under state control. For example, the

U.S. Supreme Court in two different decisions rejected the position of the George W. Bush administration that enemy combatants held at the U.S. Naval base in Guantánamo Bay, Cuba, are beyond the jurisdiction of American courts. This allowed detainees the right to challenge their captivity before a federal judge (Gearan 2004; Savage 2008). Sociologists need to pay more attention to the role of both law and the courts in state building and the making of public policy (Skrentny 2006).

e. Sub-central

Miliband's fifth element is defined as "an extension of central government and administration, the latter's antennae or tentacles" (1993: 279). This component not only communicates and administers from the centre to the periphery, but also brings citizen concerns from the periphery to the centre. Despite centralization, these units are also power centres in and of themselves as they "affect very markedly the lives of the population they have governed" (1993: 280). Miliband does not give specific examples, but branch offices of federal agencies fit this category. The FBI, Immigration Customs Enforcement (ICE), and the Department of Justice all have regional offices that not only communicate and administer federal mandates, but also communicate local concerns and issues back to Washington. These regional offices are examples of "diffusion of control" or having a national presence that is diffused throughout the country (Oszlak 2005). Sub-central units of government may manifest themselves differently in other democratic societies because of cultural differences. One example is a rural village located in central Chhattisgarh (a state of India) that is remote due to inaccessible roads and the lack of electricity. Residents had little direct interaction with lower state officials. State officials interact with the village chief or Patel. Village residents view the Patel as the most powerful village elder, as he is associated with divine legitimacy. Some villagers even believe the gods (Froerer 2005) choose the Patel. This places the Patel above the law. For these villagers, their experience with the tentacles of central government is mediated by a figure that is endowed with traditional authority as well as divine legitimacy.

f. Legislative Or Parliamentary

Miliband characterizes the relationship between the legislative body of a state and its administration or the chief executive as both cooperation and conflict. Legislative bodies are independent power centres that are often in conflict with the chief executive. Like sub central units, these bodies also serve a communication function by articulating to the state the needs and concerns of the populations they represent as well as acting as a conduit articulating state priorities to a local population. Because the state is comprised of

various units with varying degrees of autonomy, Bottomore (1979) reminds us that the state is not a unified force. For example, the United States has an independent judiciary where judges make decisions that may conflict with the policies of the executive or legislative branches. In the 1930s, the U.S. Supreme Court ruled as unconstitutional some of Franklin D. Roosevelt's New Deal programs designed to combat the Great Depression. There were several legal challenges to an executive order enacted for national security reasons by President Donald Trump to restrict entry into the United States of individuals from mostly Muslim majority countries. The U.S. Supreme Court allowed the travel ban to take effect, while those challenges make their way through lower courts.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. The country is not a single entity but a network of organizations _____ (True/False).

2. The state is often confused with the executive because the latter speaks on behalf of the state_____ (True/False).

3. Administration is the sphere that manages the day-to-day affairs of the state_____ (True/False).

4. The _____ and _____ are the branch concerned with the "management of violence".

5. Ralph Miliband subdivides the state into the following categories: _____,_____,_____,_____,_____, and _____.

3.4. Features of stateness

Oszlak (2005) contends that features of "stateness" include diffusion of control, externalization of power, the institutionalization of authority, and the capacity to reinforce a national identity. Diffusion is subdivided into two processes: (1) the ability to extract necessary fiscal resources for performing state functions and reproducing the state bureaucracy and (2) the development of a professional group of civil servants that has the expertise necessary to carry out administrative functions. Externalization of power is the recognition of a nation-state by others. The institutionalization of authority refers again to Weber's ideas regarding the monopoly on coercion. Finally, the capacity to reinforce a national identity requires producing symbols that inspire loyalty to a nation-state as well as a sense of belonging and unity. This sense of shared culture, belonging, and unity is captured in the concept of nation.

3.4.1. Differentiating Nation and State

The concepts of nation and state are often confused or considered synonymous. These concepts are distinct as nation refers to a shared culture, identity, and a desire for political self-determination (Bottomore 1979), while the state is a legal entity. Nation and state may coincide as the United States is recognized as a nation-state, because there is both a shared sense of national unity and a distinct geographical area controlled by U.S. laws that other nation-states recognize. Political sociologists have contributed to this confusion by overemphasizing the organizational character of the state at the expense of the importance of nation (Vujačić 2002). Perhaps because of the rise of ethnic nationalism and conflict, only recently have sociologists recognized the political importance and value placed on the perception of nations by citizens (Greenfield and Eastwood 2005).

3.4.2. Nationalism

Nationalism is "a 'perspective or a style of thought,' an image of the world, 'at the core of which lies … the idea of the nation' which we understand to be the definition of a community as fundamentally equal and sovereign" (Greenfield and Eastwood 2005: 250) with sentiments such as "we the people" capturing the essence of nation. While nation and state are often linked, a sense of nation can independently exist where there is no state, such as in Gaza or Palestine. In some areas, a region may wish to break off and form a separate nation such as the creation of South Sudan in 2011. Not all nationalist expression necessarily leads to separation, because a culturally distinct group might prefer to maintain its sense of national identity within a multinational state, such as French-speaking Québec, which is considered a nation within a state. State and nation can be mutually reinforcing but need to be conceptualized as separate entities (Vujačić 2002). The state is a legal creation, while the attachment to nation is emotional. While the process of separation is oftentimes bloody (e.g. Yugoslavia), it need not be, such as with the mostly peaceful breakup of the former Soviet Union and Czechoslovakia (Vujačić 2004).

When nationalism coincides with a specific territory that is recognized as an autonomous political unit, it is termed a nation-state. Nationalist ideology that coincides with a state is advantageous because it provides "the state with a new source of legitimacy and dramatically increase[s] its mobilization potential in comparison to traditional state structures" (Vujačić 2002: 136). An important question for political sociologists is whether nationalism is a cause or a consequence of the increased fragmentation of larger political units or the breaking of states into smaller units (e.g. Yugoslavia into Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, and Serbia). Schwarzmantel (2001) argues that it is both, but this depends on the nature of the nationalist movement in

question. For example, nationalism based on ethnicity is more fragmentary, as its appeal will be limited to members of that ethnic group. Nation-building in areas where a variety of ethnic groups coexist cannot rely on a nationalism that is primarily based on ethnic identity. Nationalism that comes at the expense of another ethnic, race, or religious group may result in political violence including genocide.

Nationalism is often an expression of civil religion or "attaching sacred qualities to certain institutional arrangements and historical events" (Scott and Marshall 2005: 71), which celebrates state or civil society and serves the same function as religion, including social cohesion and value socialization. In The Elementary Forms of Religious Life, Emile Durkheim distinguishes between the sacred and the profane. "Sacred things are things protected and isolated by prohibitions; profane things are those things to which the prohibitions are applied and that must keep at a distance from what is sacred" (Durkheim 1995 [1912]: 38). The profane is ordinary and the sacred extraordinary. When the profane transitions to the sacred, the totius substantiae is transformed (Durkheim 1995 [1912]). Both people and inanimate objects are eligible for transformation. When that happens the powers thereby conferred on that object behave as if they were real. They determine man's [sic] conduct with the same necessity as physical force … If he has eaten the flesh of an animal that is prohibited, even though it is perfectly wholesome, he will feel ill from it and may die. The soldier who falls defending his flag certainly does not believe he has sacrificed himself to a piece of cloth.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. State refers to a shared culture, identity, and a desire for political self-determination, while the nation is a legal entity _____ (True/False).

2. While nation and state are often linked, a sense of nation cannot exist where there is no state_____ (True/False).

3. When nationalism coincides with a specific territory that is recognized as an autonomous political unit, it is termed a _____.

4. The state is a legal creation, while the attachment to nation is emotional_____ (True/False).

5. The ability to extract necessary fiscal resources for performing state functions and reproducing the state bureaucracy and the development of a professional group of civil servants that has the expertise necessary to carry out administrative functions is referred to as _____.

3.5. Summary

While many of the ideas on the future of the state are theoretical and need empirical verification, what cannot be denied is the importance of political institutions and the ways in which these entities impact every facet of social life. Whether future political sociologists will study the effects and interactions of the nation-state, the transitional state apparatus, or Empire, we expect that there will continue to be rich diversity in both theoretical perspectives and empirical approaches. That diversity will be a direct result of the past and current debates taking place among pluralist, elite, Marxist, and political institutionalists who continue to refine their arguments to overcome weaknesses identified by competing perspectives. Rational choice and postmodern views will also continue to be influential. Future chapters will take a closer look at the impact of the state on our everyday lives, theoretical contributions for understanding other political processes such as voting and other forms of political participation, and the many globalization debates.

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3.7. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. False
2. False
3. True
4. police and military forces
5. Government, administration, military and police, judiciary, sub-central governments, and legislative or parliamentary bodies.

Answers to SAEs 2

1. False
2. False
3. nation-state
4. True
5. diffusion of control

UNIT 4 SOCIOLOGICAL THEORIES OF STATE

Unit Structure

4.1. Introduction
4.2. Learning Outcomes
4.3. Sociological theories
4.4. Marxist theories of capitalist states
4.5. Emerging views of the state
4.6. Summary
4.7. References/Further Readings/Websites
4.8. Possible Answers to Self-Assessment Exercises (SAEs)

4.1. Introduction

Sociological theories of the state have attempted to answer four basic questions: "(1) in whose interests does the state act? (2) Who influences and controls the state? (3) to what extent do the masses hold political elites accountable?; and (4) how do states change?" (Olsen and Marger 1993: 252). Alford and Friedland (1985) recognized three basic models of power summarizing state–societal relations including pluralist, elite (managerial), and class or Marxist views of the state. Rather than championing one specific theoretical model, Alford and Friedland argue that all three theories are useful depending on the level of analysis, with pluralism for the individual, elite for examining the state as a set of networked organizations, and the class model for society. Additionally, there are newer perspectives such as institutionalism, rational choice, and postmodernism.

4.2. Learning Outcomes

At the end of this unit,you should be able to:

- define the concept of the state
- Identify the differences theories of the state.

4.3. Sociological theories

i. Pluralism

Alford and Friedland (1985) contend that pluralists do not really refer to the state per se. Instead pluralists substitute phrases such as political system, the polity, or the pluralist system. Nonetheless, pluralists have a view of the state with important distinctions when compared to other theorists, including worldview, the nature of political institutions, and the relations between them.

Pluralism is associated with sociologists Talcott Parsons and Seymour Lipset as well as political scientists Robert Dahl and Ted Gurr. According to Marvin Olsen (1993), one of the basic premises of pluralism can be traced back to Tocqueville who argued for the creation of voluntary associations to combat the potential for "tyranny of the majority." Tocqueville believed that the latter was an outcome of mass equality occurring in the absence of a hierarchical power structure that typifies feudal societies. The growth in voluntary associations leads to the development of a strong civil society that functions independent of the state. By virtue of this independence, voluntary associations have their own power base. Olsen (1993) mentions several characteristics these organizations share, including voluntary membership based on shared interests and concerns, limited sphere in the lives of members, being private or not connected to government, an ability to connect grassroots activism to the national level, and sufficient resources to influence political leaders. Olsen acknowledges that some of these organizations are political, such as political parties and nonpartisan political action groups. However, these groups may also be non-political in nature, such as professional associations or religious or civic groups termed "parapolitical actors" (1993: 147) that become involved only when their direct interests are at stake. Pluralism, then, involves an arena of competing organizational actors that attempt to influence the state. The state favours no particular set of actors. Although individuals independently do not have a great deal of power and influence, their concerns are heard through their membership in these voluntary associations. According to pluralists, the core function of the state is to "achieve consensus and thus social order through continuous exchanges of demands and responses by social groups and government" (Alford 1993: 260). In contrast to elite and class perspectives, the pluralist model rejects that the state represents one dominant group at the expense of others or that the state is controlled by elites.

For pluralists, the state is "an impartial arbitrator among competing pressure groups" (Alford and Friedland 1985; Olsen and Marger 1993: 255). Pluralists recognize the state as an institution that deals with power but oppose the idea that the state has any interests of its own (Olsen and Marger 1993). If the process works as intended, the state and society's interests are one and the same (Alford and Friedland 1985). This is in direct opposition to state-centrics who view the state as having its own interests. Pluralists also oppose Marxists regarding the importance of social class. For pluralists, social class is only one of many competing interest groups (Alford 1993). Olsen is quite right when he remarks that pluralism is "the

unofficial political philosophy of the United States" (1993: 150), as pluralism sounds very similar to what grade school children are taught about democracy. In fact, democratic is one of the many terms writers have used when writing about pluralism (Alford and Friedland 1985). Class theorists take this a step further and argue that pluralism is a deliberate falsehood taught to hide the real source of power in any capitalist democracy: big business. In comparing the pluralist perspective to others, Alford and Friedland write "In both managerial [elite] and class perspectives, popular identifications with the state or with local political party organizations are products of elite manipulation or false consciousness deriving from the illusory universality of the capitalist state" (1985: 24).

Regardless of which theory is correct on this latter point, the pluralist paradigm suffers from some important weaknesses. Expanding on more general criticisms, six weaknesses of this model are viability, harmony of interest, difficulty of new organizations to enter the political process, iron law of oligarchy, lack of sufficient power resources, and the lack of viable political channels (Olsen 1993). Viability refers to the question of whether individuals really are connected to and involved with voluntary organizations. While one might be a card-carrying member, this does not equal participation. This is an important criticism because one of the premises of pluralism is that voluntary associations provide an opportunity to develop the skills necessary to become more politically effective. Furthermore, without active member participation, organizations will not be effective conduits between society and government. With Robert Putnam's book Bowling Alone (2000) concluding that involvement in voluntary associations is declining, there is little evidence of viability. More recent research suggests that the downward trend in voluntary association membership is continuing (Painter and Paxton 2014). Harmony of interests assumes that despite competing interests, there is a basic consensus on core values. Olsen (1993) contends that when this is not the case, pluralism may result in societal paralysis and even destruction. Earlier, we found that those with less power resources typically lose in the political process (Piven and Cloward 1988). Resource procurement is difficult for newer organizations undercutting the ability to participate in the society–state mediation process (Olsen 1993). At worse, these groups become simply mouthpieces for government as they lack resources needed to maintain autonomy. Further, even with resources, if there is no mechanism for influencing the state, effectiveness is limited. In other words, pluralism "specifies the role that intermediate organizations should enact in political affairs, but

says nothing about how this role should be carried out" (Olsen 1993: 151). Olsen's final criticism concerns Robert Michels' "iron law of oligarchy" or the tendency for all organizations to become centralized and controlled by only a few (Zeitlin 1981). If this is the case, it would seem that civic organizations and other voluntary associations are not really a training ground for future leaders as folks do not join, and of those who do, most will not have the opportunity to assume a leadership role.

ii. Elite views of the State

Alford and Friedland prefer managerial to elite or bureaucratic to describe this perspective as they emphasize the "organizational base of elites and their control of the state" (1985: 161). We use the term elite because this is the more common label. Prewitt and Stone (1993) contend that elite theory is based on two principles: (1) society can be divided into two groups, the masses and the smaller number that rule them; and (2) the nature and direction of any society can be understood by understanding the composition, structure, and conflicts of those who rule. The core function of the state is maintaining the dominance of existing elites (Alford 1993). Like class theorists, elite theorists believe that power is concentrated, but disagree that it is based on class position. For elite theorists, managerial control is more important than property ownership (Alford and Friedland 1985) as power is the result of holding positions of authority in bureaucracies that control resources, and these complex organizations manage every important sphere of social life. Important bureaucracies may be political or governmental institutions, but can also be banks, corporations, religious organizations, or the media, to name only a few (Alford 1993). Unlike pluralists who believe that ordinary citizens can be influential through voluntary associations, elite theorists view those controlling the state bureaucracy "as relatively insular and rarely influenced by other members of society" (Olsen and Marger 1993: 255). What makes elites inaccessible also explains why elite control is so successful. "The combination of expertise, hierarchical control, and the capacity to allocate human, technological, and material resources gives the elites of bureaucratic organizations power not easily restrained by the mechanisms of pluralistic competition and debate" (Alford 1993: 259). While elite theorists argue that real power rests with those who occupy positions within dominant organizations, this does not mean that elites are unified. Quite the contrary, elites compete with other elites for control and influence and use their positions to manipulate information and frame public opinion. In short, they manipulate the masses. There are a variety of different "flavors" of

elite theory, but key types include classical elite, power elite, and class domination views.

iii. Classical elite theory

Theorists including Robert Michels, Vilfredo Pareto, and Gaetano Mosca are often lumped together under one rubric when ignoring important distinctions in their social theorizing. Yet, as discussed earlier, there are some important commonalties including the view that elite rule is necessary. Michels takes a less negative view of the masses by leaning more toward the ideas of Max Weber, including his view of bureaucratic structure by noting the inevitability of such organizations as well as potential negative outcomes. Marger (1987) argues that compared to his contemporaries, Michels is the most sociological, and for this reason, we focus on his ideas. Michels believed that the real power struggle was not between the elites and the masses, but between old elites and newer ones challenging the former for leadership positions. Michels' "iron law of oligarchy" was based on his analysis of the German Social Democratic (GSD) party. The GSD was deliberately chosen to illustrate that iron law, or rule by only a few, occurs even when an organization is governed by democratic principles (Marger 1987).

iv. Power elite

Unlike some classical elite views, C. Wright Mills was critical of elite control and bureaucracy, believing that they undermined democracy. Like Michels, he believed that society was controlled by elites, specifically, "the power elite" comprising three interlocking groups: corporate, political, and military. Elites can use their position in one domain to become dominant in another. An example is the number of past U.S. presidents who were military generals (e.g. Washington, Grant, Jackson, and Eisenhower) or wealthy Americans who translate wealth into political power (e.g. Kennedy, Rockefeller, Bush, and Trump). Unlike classical theorists, Mills also conceptualized a mediating level between "the power elite" and the masses termed middle levels of power or organized special interest groups. The third level is the unorganized masses (Mills 1956). Mills believed that three factors explained the cohesive and unified nature of the power elite: common socialization as a result of similar career paths and educational experiences, the maintenance of continued personal and business ties (e.g. marriage and business arrangements), and the interdependent nature of the triangle of power (Olsen and Marger 1993).

v. Class domination theory

G. William Domhoff is an intellectual heir of C. Wright Mills and also credits E. Digby Baltzell, Paul M. Sweeney, and Robert A. Dahl as important influences (Domhoff 1993). While some describe Domhoff as an "empirical Marxist" (Lo 2002), he explicitly rejects this label (Domhoff 1993) and criticizes elite theory and prefers what he calls "class domination theory" (Domhoff 2006). We include him under the elite rubric because he shares with other elite theorists a belief that there is a dominant group in society with elite membership based on both having wealth and holding a position of power. He is best known for his analysis of four intertwining power structure networks: policy planning, candidate selection, special interests, and opinion shaping (Domhoff 2006). Domhoff argues that the power elite are a "corporation-based upper class" comprised of both owners and top-level corporate executives. The power elite control enough money and wealth, occupy enough positions of power, and win enough of the time to conclude that the federal government is dominated—though not necessarily totally controlled, by the power elite. While Mills emphasizes similar socialization experiences and current interpersonal ties through business and family connections, Domhoff emphasizes the similarity of social backgrounds by investigating social club membership, private school membership, and attendance at prestigious universities (Domhoff 2006, 2014). For example, though Bill Clinton was not born wealthy, he shares with other elites his membership in prestigious organizations, social clubs, and educational experiences (e.g. Yale Law School, Georgetown University, and Oxford). Domhoff argues in the latest edition of "Who Rules America" that the corporate community and the upper class are basically two sides of the same coin and the corporate rich are one and the same, so there is less emphasis on members of the upper class 'controlling' the corporate community and greater use of the concept of a 'corporate rich' to express this basic unity of corporation and class. (2014: vii)

Critics of elite theory question whether elites are truly cohesive enough to rule, whether the masses are really dominated by elites, and whether elite models are too simplistic. Domhoff criticizes other elite theorists for not acknowledging the ability of the corporate elite to dominate political elites such as elected officials. Although Domhoff encourages us to consider the importance of class domination, he does not hold to other tenets of Marxism such as the primacy of class struggle and the means of production (Domhoff 1993). Class-Based Views of the State While class-based theories are more a theory of society than a specific theory

of state (Alford and Friedland 1985), Olsen and Marger (1993) contend that the ideas of class theorists represent "one of the most comprehensive explanations of the state and its power" (252). As previously discussed, there are a variety of neo-Marxian perspectives on the state, but these perspectives share some core concepts and assumptions. For Marxists, economics determines the actual nature of the state and the role played in influencing other aspects of social life. All institutions are shaped by the mode of economic production. For this reason, class theorists use the term capitalist state rather than only state to underscore the role of capitalism. Under capitalism, "the state is controlled by and acts in the interests of the productive property-owning class" (Olsen and Marger 1993: 252). The core function of the state is to maintain and reproduce the existing class relationships using both formal (law and the courts) and informal (socialization of children in schools and families) means (Alford 1993). Skocpol argues that "the crucial difference of opinion is over which means the political arena distinctly embodies: fundamentally consensually based legitimate authority, or fundamentally coercive domination" (1993: 307). Class-based theorists believe the latter and that the state emerged as a mechanism for controlling the masses.

Class conflict is managed by both force and control of ideology (Nagengast 1994). Viewing the state as shaped by economic forces and dominated by the capitalist class challenges the pluralist view of an institution that arbitrates between competing interest groups and an autonomous state that acts on behalf of greater society. However, neo-Marxists disagree on the exact nature of the relationship between the dominant capitalist class and the form and functioning of the state. According to Gold, Lo, and Wright (1975), there are three Marxist theories of capitalist states—instrumental, structural, and Hegelian–Marxist—that seek to answer two basic questions: "Why does the state serve the interests of the capitalist class?" and "How does the state function to maintain and expand the capitalist system?" (Gold, Lo, and Wright 1993: 269).

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. _____ is associated with sociologists Talcott Parsons and Seymour Lipset as well as political scientists Robert Dahl and Ted Gurr.

2. Unlike pluralists who believe that ordinary citizens can be influential through voluntary associations, elite theorists view those

controlling the state bureaucracy "as relatively insular and rarely influenced by other members of society"_____ (True/False).
3. There are a variety of different "flavors" of elite theory, but key types include _____, _____, and _____ views.
4. Robert Michels' "iron law of oligarchy" specifies the tendency for all organizations to become centralized and controlled by only a few_____ (True/False).
5. Pluralists recognize the state as an institution that deals with power but oppose the idea that the state has any interests of its own_____ (True/False).

4.4. Marxist theories of capitalist states

i. Instrumental

Ralph Miliband is perhaps the most well-known proponent of this view that gives primacy to understanding the ties between the ruling class and the state (Gold, Lo, and Wright 1993). Quite simply, the state serves the interests of the capitalist class because the state is an instrument or tool used by this class to dominate society. This does not mean that dominant class members directly rule by holding office; rather, they rule indirectly by exerting control over state officials (Olsen and Marger 1993). This perspective has driven a research agenda that has examined the direct ties between members of the capitalist class and the state as well as other related institutions such as political parties and how the capitalist class shapes government policy to fit their interests (Gold, Lo, and Wright 1993). This shaping can be direct through the development of state policy or indirect through pressure and influence.

Gold and colleagues argue that this view has been important for the development of the sociology of the capitalist class. Research from this perspective documents both the existence of a dominant class and the connections between members and the state apparatus. Nonetheless, there are criticisms of instrumentalism, including a failure to consider state autonomy, historical exceptions, and causation. The failure to include autonomy includes two types: that of the state and other related institutions. As Gold and colleagues argue, "There are also state policies which cannot easily be explained by direct corporate initiatives but which may come from within the state itself" (1993: 271). For example, to preserve the capitalist state, the state may need to enact policies such as social security payroll taxes or import restrictions that are opposed by capitalists (Block 1993). This would not be possible without an autonomous state. Furthermore, culture and ideology are promoted by the state and not simply manipulated by the

capitalist class (Gold, Lo, and Wright 1993). As Block argues, this view "neglects the ideological role of the state. The state plays a critical role in maintaining the legitimacy of the social order, and this requires that the state appear to be neutral in the class struggle" (1993: 296).

Even if the instrumentalists are correct, the fact that the state must appear neutral calls for a more nuanced and complicated framework for analyzing state policy (Block 1993). Related to the argument of state autonomy is the criticism of historical exception. This argument suggests that not all policies enacted by a capitalist state are interests of the dominant class. Gold, Lo, and Wright (1993) note that business leaders were opposed to Franklin D. Roosevelt's New Deal programs. In fact, these leaders considered Roosevelt, a member of the upper class, a "class traitor" (Brands 2008). Gold, Lo, and Wright (1993) also note that even if some of the reforms implemented by the state on behalf of the working class ultimately co-opt the working class, to assume that all reforms are a co-optation denies the possibility of class struggle over reform. Finally, the issue of causation challenges the assumption that state policy can be explained by the voluntary acts of powerful persons rather than an acknowledgement that the actions of the ruling class can be limited by structural factors. Gold, Lo, and Wright (1993) contend that this view of causation is the result of an instrumentalist view that rose to challenge a pluralist view of the state. Both views contend that social causes are due to actions of dominant actors that act on behalf of their own interests. The difference is that instrumentalists see one dominant actor, the ruling class, whereas pluralists believe that there are many groups attempting to control the state. This view of a dominant class that acts in a manner consistent with its own interests assumes that the ruling class is cohesive and unified (Block 1993). In Fred Block's "The Ruling Class Does Not Rule", he argues that a "viable Marxist theory of the state depends on the rejection of the idea of a conscious, politically directive, ruling class" (1993: 305). This alternative view is a structural theory of the state.

ii. Structural

Just as Miliband is associated with an instrumental view of the state, Nicos Poulantzas is a main proponent of the structural view. The historical Miliband–Poulantzas debate was the duelling neo-Marxists' perspectives of instrumentalism and structuralism. While agreeing that the state acts to maintain capitalism, Poulantzas rejects instrumentalism, arguing that state functioning is a direct consequence of both structure and the contradictions of capitalism. Because society is dependent on a functioning

economy, state officials must protect the economy and, in doing so, serve the interests of the dominant class (Olsen and Marger 1993).

According to Gold, Lo, and Wright, structuralists are interested in "how the state attempts to neutralize or displace these various contradictions" (1993: 271) in order to maintain the capitalist system. In Poulantzas' (1975) influential book, Political Power and Social Classes, he argues that there is a contradiction between the social character of production and the private appropriation of surplus product, threatening the current system through working-class unity and capitalist-class disunity. Capitalist-class disunity is fostered by competition. Far from being unified, capitalists compete with each other for surplus, and therefore do not always share economic and political interests. The only way to protect the long-term interests of the capital class, as opposed to short-term individualized interests of specific capitalists, is to have a state that maintains some autonomy, even if the state, from time to time, enacts working-class concessions such as minimum-wage laws. The long-term survival of capitalism is dependent on providing these concessions in an attempt to prevent working-class unity. Without such concessions, workers might band together and overthrow the capitalist state. In summarizing the structuralist view, Gold, Lo, and Wright (1993) note that the degree of state autonomy varies depending on the degree of conflict between classes, the intensity of divisiveness within classes, and which factions constitute a dominant-class power bloc. Gold et al. argue that the lack of any discussion that might explain how these functional relationships are regulated weakens this approach to understanding the capitalist state.

iii. Hegelian–Marxist

This final neo-Marxist perspective begins with the question, "what is the state?" The answer is a mystification or an institution that serves the interests of the dominant class though it appears to serve the interests of society as a whole. This shows that the state is an illusion, with most writers exploring how this mystification process occurs. Most writers emphasize the role of ideology, consciousness, and legitimacy. Although these ideas have advanced the understanding of politics, they are not a coherent theory of the state much less of the relation between the state and society (Gold, Lo, and Wright 1993). Thinkers associated with this perspective (e.g. Herbert Marcuse, Jürgen Habermas, and Georg Lukacs) include what is called the Frankfurt School of Critical Theory.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. _____ are interested in "how the state attempts to neutralize or displace these various contradictions" in order to maintain the capitalist system.

2. Capitalist-class disunity is fostered by competition_____ (True/False).

3. Ralph Miliband is perhaps the most well-known proponent of the instrumental view that gives primacy to understanding the ties between the ruling class and the state_____ (True/False).

4. Thinkers associated with the _____ perspective include what is called the Frankfurt School of Critical Theory.

4.5. Emerging views of the state

i. Rational Choice

Rational Choice Theory (RCT) views all political entities as rational actors. Lobbying, foreign policy, or the relations between other nation-states, as well as domestic policy, are seen in terms of a game where various players vie for scarce resources, including power. Kiser and Bauldry (2005) argue that RCT has only recently become influential in political sociology and that this is due to the development of a sociological version that bypasses earlier criticisms by incorporating the influence of history, culture, and institutions. Because RCT has only recently emerged as a viable perspective for political sociologists, there is not a fully developed theory of the state. Yet, researchers have applied this theory to actions of political actors, including the state. Examples of substantive areas of research guided by RCT include nationalism, congressional policy making, and the existence of red tape in bureaucracies (Kiser and Bauldry 2005). RCT has also been applied to social movement participation and the state response to terrorism. Despite the promise of RCT, it still needs to synthesize several different approaches to develop a more general theory and is not useful in situations where there is a high degree of uncertainty about the benefits and costs of actions or when both costs and benefits are low (Kiser and Bauldry 2005).

ii. Postmodern

Some postmodernists may claim that politics is dead, or rather "politics is secret, veiled, or now even sub-political" (Agger and Luke 2002: 162), with the study of politics moving from traditional

power centres such as parliament or congress to the capitalist economy and culture. Agger and Luke embrace the postmodern turn in political sociology, believing that it challenges all political theorists to "rethink politics" (2002: 160), which will result in a broadening research agenda. Postmodernism is heavily influenced not only by Marx and critical theory thinkers but also by philosophers and other humanities scholars. This broad perspective is not bound to a single discipline or to a narrowly focused question such as "what is the state?" Postmodernists seem more interested in describing the consequences of the state or declaring the state obsolete, rather than defining the state itself. While Lo (2002) characterizes Hardt and Negri's work as an example of what he terms a postcolonial Marxist perspective, their work shares with a postmodern view a look at the political beyond the state to Empire as well as power in a global context.

iii. The Welfare State

The welfare state refers to the social and economic managerial role of a nation-state (Melling 1991). In "state corporatism," social and economic organizations are controlled by the state. This dictatorial rule is a feature of state–society relations under totalitarianism. In contrast, "liberal corporatism" involves the state sharing space with other groups that are organized voluntarily and are recognized as representing various sectors of society such as gun owners, business, labour, or specific occupational groups that are recognized as a channel of political representation. These groups work with the state to negotiate competing interests. Not all democracies are corporatist states, but in states that are both corporatist and democratic, corporatist groups are recognized in exchange for submitting to the primacy of the state (Streeck and Kenworthy 2005). In their review of public policy and the welfare state, Hicks and Esping Andersen (2005) describe three types of welfare states—liberal, social democratic, and conservative—differentiated by population coverage, role of the private market, target population, decommodification, defamilialization, recommodification, and poverty reduction through redistribution of income. It is important to note that these concepts are ideal types with specific nations perhaps illustrating hybrids of two or more types. Types of Welfare States All welfare states vary in terms of the types of social programs that are enacted as a function of state capacity. States with a higher degree of capacity will initiate social welfare programs earlier than those with a more limited capacity (Orloff 1993). The types of welfare states or "welfare regimes" differ by the degree of state capacity as well as cultural values that define who is considered worthy of receiving state support and the role that family is supposed to play in supporting its members.

iv. Liberal

The United States has avoided corporatism and has opted for a liberal market state where there is little state control over the economy and where there are many competing interest groups. Liberal states initiate programs in reaction to market and family failures and also initiate their programs later than social democratic or conservative welfare states (Orloff 1993). The welfare state is much more restricted and conceived more as a safety net targeted toward the needy through the use of means tests. Private market solutions are preferred over broad policies that might extend universal health care coverage or family benefits such as paid maternity or paternity leave. Calls to privatize social security are an example of a proposed private market solution. Liberal welfare states tend not to "defamilialize" or to encourage the shift from the family to paid providers of responsibilities such as child care or elder care. This means that the state does not subsidize the cost of day care for young children or the elderly, with the exception of welfare mothers participating in job training or other required employment programs as a condition of receiving benefits. Liberal welfare states also do not support women-friendly employment policies such as paid maternity leave or efforts to recommodify individuals with job training or other programs designed to ensure full employment for adults. Compared to the other two types of welfare regimes, liberal-market states have a lower capacity for proactive public policy as these states initiate their welfare policies much later than other welfare states (Orloff 1993).

v. Social Democratic

The social democratic welfare state as illustrated by some Scandinavian countries is an example of a democratic corporatist state. These nations have a more extensive welfare state that is more inclusive and includes not only the poor or some other narrowly defined groups, but also universal programs that attempt to provide "cradle-to-grave" security such as health care, subsidized day care for children and elders, as well as minimum income guarantees. Private market solutions are rejected in favour of government-run programs covering all citizens. There is a strong commitment to gender equality through defamilialization or providing external resources for traditional family obligations such as day care. High tax rates mean that income is redistributed to fund social welfare programs with a high commitment to poverty reduction including recommodification, which maximizes the market power of the individual in the labour market through income guarantees and opportunities for job training and retraining. These states have also tried to buffer workers from volatile markets through decommodification. All of the benefits

provided by this type of welfare state means that a worker need not accept just any job. Korpi (2003) notes that structural changes in the economy such as post industrialization or the shift to a more service sector base have led to a retrenchment or scaling back of the welfare state in Western Europe. In addition to economic factors, Orloff (1993) adds demographic changes and international economic competition as other reasons for cutting back on services and eligibility.

vi. Conservative

This type of welfare state practices corporatism based on occupational groups, such as unionized coal miners or dock workers, which target male breadwinners for social welfare programs. These programs are based on the primacy of the male breadwinners and the need for families to look after their members, both young and old. Like social democratic welfare states, the private market is not embraced as a solution for meeting typical welfare needs such as pensions or health care. Similar to liberal states, there is low commitment to poverty reduction, income redistribution, and defamilialization. Example of nations' classified as having this type of state include Germany, France, Italy, and Spain (Hicks and Esping-Andersen 2005). While Esping Anderson's classic work, The Three Worlds of Welfare Capitalism (1990), is widely regarded as having instigated a valuable debate in the social policy literature, it also is widely criticized. One such criticism is for ignoring the role of gender (Bambra 2007). Role of Race and Gender The U.S. welfare state provides some respite from poverty by redistributing income, but at the same time, it also acts to reinforce a stratification system (Esping-Andersen 1990) that reflects class, race, and gender bias as minorities and poor women are overrepresented in the public assistance sphere (e.g. food stamps and public housing), while white men are more often found in the more generous social insurance sphere with private pension and health insurance (Misra 2002). Misra calls on sociologists to explore how welfare policy has been shaped by bias. For example, in the United States, some programs using a means test such as income eligibility have often excluded African-Americans entirely or paid out smaller benefits in order to ensure an adequate supply of low-paid agricultural workers (Quadagno 1988). Gender stereotypes are also reinforced through welfare policy as a conservative welfare state targets only male breadwinners and defamilialization is rejected as families should take care of their own. This reinforces more traditional gender roles of the female homemaker and male breadwinner.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 7 minutes.

1. Rational Choice Theory (RCT) views all political entities as irrational actors. _____ (True/False).

2. Postmodernism is heavily influenced not only by Marx and critical theory thinkers but also by philosophers and other humanities scholars_____ (True/False).

3. The welfare state refers to the social and economic managerial role of a nation-state _____ (True/False).

4. Postmodernists seem more interested in describing the consequences of the state or declaring the state obsolete, rather than defining the state itself._____ (True/False).

5. Due to the fact that RCT has only recently emerged as a viable perspective for political sociologists, there is not a fully developed theory of the country_____ (True/False).

6. The _____ is much more restricted and conceived more as a safety net targeted toward the needy through the use of means tests.

4.6. Summary

This unit reviewed the most recognized three basic models of power summarizing state–societal relations i.e. pluralist, elite (managerial), and class or Marxist views of the state. For pluralists, the state is "an impartial arbitrator among competing pressure groups" (Alford and Friedland 1985; Olsen and Marger 1993: 255). Pluralists recognize the state as an institution that deals with power but oppose the idea that the state has any interests of its own. Like class theorists, elite theorists believe that power is concentrated, but disagree that it is based on class position. For the Marxist inspired theories, the state serves the interests of the capitalist class because the state is an instrument or tool used by this class to dominate society.

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4.8. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1.	*Pluralism*	*4.*	*True*
2.	*True*	*5.*	*True*
3.	*classical elite, power elite, and class domination*		

Answers to SAEs 2

1.	*Structuralists*	*4.*	*Infrastructural power*
2.	*True*	*5.*	*Hegelian-Marxian*
3.	*True*		

Answers to SAEs 3

1.	*False*	*4.*	*True*
2.	*True*	*5.*	*False*
3.	*True*	*6.*	*welfare state*

MODULE 2 CITIZENSHIP AND THE STATE

In this Module, an attempt has been made to offer a broad insight to the concept of citizenship. Thus, the aims of the Module are, first, to present some of the latest scholarship on citizenship in an accessible way; second, to highlight the irreducibly political nature of citizenship; and third, to explore some of the challenges confronting the very possibility of citizenship today.

Unit **1** What is citizenship?
Unit 2 Why is being able to vote so crucial
Unit 3 Theories of citizenship and their history
Unit 4 Citizenship as equal legal status: from imperial Rome to human rights

UNIT 1 WHAT IS CITIZENSHIP?

Unit Structure

1.1. Introduction
1.2 Learning Outcomes
1.3 What is citizenship?
1.3.1. Why political citizenship?
1.4. Summary
1.5 References/Further Reading
1.6. Possible Answers to Self-Assessment Exercises (SAEs)

1.1. Introduction

Interest in citizenship has never been higher. Politicians as well as scholars of all stripes stress its importance, as do church leaders, captains of industry, and every kind of campaigning group – from those supporting global causes, such as tackling world poverty, to others with a largely local focus, such as combating neighbourhood crime. Governments across the world have promoted the teaching of citizenship in schools and universities, and introduced citizenship tests for immigrants seeking to become naturalized citizens. Types of citizenship proliferate continuously, from dual and transnational citizenship, to corporate citizenship and global citizenship. Whatever the problem – be it the decline in voting, increasing numbers of teenage pregnancies, or climate change – someone has canvassed the revitalization of citizenship as part of the solution. In the sections below, we shall attempt to discuss some of the key issues regarding the concept of citizenship.

1.2. Learning Outcomes

At the end of this unit ,you should be able to:

- Describe the concept of citizenship.
- Discuss the key elements of citizenship

1.3. What is citizenship?

The sheer variety and range of these different uses of citizenship can be somewhat baffling. Historically, citizenship has been linked to the privileges of membership of a particular kind of political community – one in which those who enjoy a certain status are entitled to participate on an equal basis with their fellow citizens in making the collective decisions that regulate social life. In other words, citizenship has gone hand in hand with political participation in some form of democracy – most especially, the right to vote. The various new forms of citizenship are often put forward as alternatives to this traditional account with its narrow political focus. Yet, though justified in some respects, to expand citizenship too much, so that it comes to encompass people's rights and duties in all their dealings with others, potentially obscures its important and distinctive role as a specific kind of political relationship. Citizenship is different not only to other types of political affiliation, such as subject hood in monarchies or dictatorships, but also to other kinds of social relationship, such as being a parent, a friend, a partner, a neighbour, a colleague, or a customer.

Over time, the nature of the democratic political community and the qualities needed to be a citizen has changed. The city states of ancient Greece, which first gave rise to the notion of citizenship, were quite different to the ancient Roman republic or the city states of Renaissance Italy, and all differed tremendously from the nation states that emerged in the late 18th and early 19th centuries and that still provide the primary context for citizenship today. In large part, the contemporary concern with citizenship can be seen as reflecting the view that we are currently witnessing a further transformation of political community, and so of citizenship, produced by the twin and related impacts of globalization and multiculturalism. In different ways, these two social processes are testing the capacity of nation states to coordinate and define the collective lives of their citizens, altering the very character of citizenship along the way.

1.3.1. Why political citizenship?

Citizenship has traditionally referred to a particular set of political practices involving specific public rights and duties with respect to a given political community. Broadening its meaning to encompass human

relations generally detracts from the importance of the distinctively political tasks citizens perform to shape and sustain the collective life of the community. Without doubt, the commonest and most crucial of these tasks is involvement in the democratic process – primarily by voting, but also by speaking out, campaigning in various ways, and standing for office. Whether citizens participate or not, the fact that they can do so colours how they regard their other responsibilities, such as abiding by those democratically passed laws they disagree with, paying taxes, doing military service, and so on. It also provides the most effective mechanism for them to promote their collective interests and encourage their political rulers to pursue the public's good rather than their own.

Democratic citizenship is as rare as it is important. At present, only around 120 of the world's countries, or approximately 64% of the total, are electoral democracies in the meaningful sense of voters having a realistic chance of changing the incumbent government for a set of politicians more to their taste. Indeed, a mere 22 of the world's existing democracies have been continuously democratic in this sense for a period of 50 years or more. And though the number of working democracies has steadily if slowly grown since the Second World War, voter turnout in established democracies has experienced an equally slow but steady decline. For example, turnout in the United States in the period 1945 to 2005 has decreased by 13.8% from the high of 62.8% of eligible voters in 1960 to the low of 49.0% in 1996, and in the UK turnout has gone down by 24.2% from the high of 83.6% in 1950 to the low of 59.4% in 2001. True, as elsewhere, both countries have experienced considerable fluctuations between highs and lows over the past 60 years, depending on how contested or important voters felt the election to be, while in some countries voting levels have remained extremely robust, with Sweden, for example, experiencing a comparatively very modest low of 77.4% in 1958 and a staggering high of 91.8% in 1976. The general downward trend is nevertheless undeniable. Yet, despite citizens expressing increasing dissatisfaction with the democratic arrangements of their countries, they continue to approve of democracy itself. The World Values Survey of 2000–2 found that 89% of respondents in the US regarded democracy as a 'good system of government' and 87% the 'best', while in the UK 87% thought it 'good' and 78% the 'best' (in Sweden it was 97% and 94% respectively). Whatever the perceived or real shortcomings of most democratic systems, therefore, most members of democratic countries seem to accept that democracy matters and that it is the prospect of influencing government policy according to reasonably fair rules and on a more or less equal basis with others that forms the distinguishing mark of the citizen. In those countries where people lack this crucial opportunity, they are at best guests and at worst mere subjects – many, getting on for 40% of the world's population, of authoritarian and oppressive regimes.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 10 minutes.

1. Historically, citizenship has been linked to the _____ of membership of a particular kind of political community.

A. Challenges.
B. Rewards.
C. Immunities
D. Privileges

2. _____ is different not only to other types of political affiliation, such as subject-hood in monarchies or dictatorships, but also to other kinds of social relationship, such as being a parent, a friend, a partner, a neighbour, a colleague, or a customer.

A. Citizenship
B. Statehood
C. Patriotism.
D. Statesmanship

3. The city states of ancient Greece, first gave rise to the notion of citizenship _____ (True/False).

4. Citizenship has traditionally referred to a particular set of political practices involving specific public rights and duties with respect to a given political community, without doubt, the commonest and most crucial of these tasks is involvement in demonstrations and protests _____ (True/False).

5. At present, only around 120 of the world's countries, or approximately 64% of the total, are electoral democracies in the meaningful sense of voters having a realistic chance of changing the incumbent government for a set of politicians more to their taste_____ (True/False).

6. Citizenship has traditionally referred to a particular set of political practices involving specific public rights and duties with respect to a given political community _____ (True/False).

1.4. Summary

In this unit, we have discussed the concept of citizenship. To summarize: a right to citizenship does imply certain rights, but these need not be such as to exhaust the whole concept of citizenship, as legal conceptions of citizenship propose. Rather, it is through being a citizen in a fuller, political sense that we generate rights. Although, for all practical purposes, the exercise of political citizenship is best pursued at the state level, this does not negate the notion of a global or cosmopolitan citizenship. Instead, it places an obligation on states and their citizens to

secure the possibility for the exercise of citizenship within self-governing political communities for all. On the one hand, this duty involves not undermining the capacity of citizens in existing polities to govern themselves by exploiting or dominating their countries. On the other hand, it requires that non-citizens be allowed access to membership on non-discriminatory terms.

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1.6. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *D. privileges*
2. *A. Citizenship*
3. *True*
4. *False*
5. *True*
6. *True*

UNIT 2 WHY IS BEING ABLE TO VOTE SO CRUCIAL

Unit Structure

2.1. Introduction
2.2. Learning Outcomes
2.3. Why is being able to vote so crucial, and how does it relate to all the other qualities and benefits that are commonly associated with citizenship?
2.4. The components of citizenship: towards a definition
2.5. The paradox and dilemma of citizenship
2.6. Summary
2.7. References/Further Reading
2.8. Possible Answers to Self-Assessment Exercises (SAEs)

2.1. Introduction

Citizens have increasingly felt politicians will do anything for their vote and once in power employ it selfishly and ineptly. Civic solidarity has decreased accordingly as inequalities have grown between social groups. While the better educated and wealthier sections of society have pushed governments and politicians to do less and less, the poorer sections, who find it harder to organize in any case, have increasingly withdrawn from politics altogether. The problem seems to be two-fold. On the one hand, citizens have adopted a more consumer-orientated and critical view of democratic politics. They have taken a more self-interested stance, assuming that others, their fellow citizens, politicians, and thosein the public sector more generally, do so too. On the other hand, politicians have likewise treated citizens more like consumers and both marketized the public sector where possible and acted themselves rather like the heads of rival firms. Commentators differ as to which came first, but most accept these two developments have fuelled each other, producing increasing disillusionment with democratic politics. Instead of being viewed as a means of bringing citizens together in pursuit of those public interests from which they collectively benefit, politics has come to be seen as but an inefficient mechanism for individuals to pursue their private interests.

2.2. Learning Outcomes

At the end of this unit, you should be able to:

- Describe why voting is essential to citizenship
- Discuss the key issues in democratic citizenship

2.3. Why is being able to vote so crucial, and how does it relate to all the other qualities and benefits that are commonly associated with citizenship?

All but anarchists believe that we need some sort of stable political framework to regulate social and economic life, along with various political institutions – such as a bureaucracy, legal system and courts, a police force and army – to formulate and implement the necessary regulations. At a bare minimum, this framework will seek to preserve our bodies and property from physical harm by others, and provide clear and reasonably stable conditions for all the various forms of social interaction that most individuals find to some degree unavoidable – be it travelling on the roads, buying and selling goods and labour, or marriage and co-habitation. As we shall see, many people believe we need more than this bare minimum, but few doubt that in a society of any complexity we require at least these elements and that only a political community with properties similar to those we now associate with a state is going to provide them.

The social and moral dispositions that increasingly have come to be linked to citizenship, such as good neighbourliness, are certainly important supplements to any political framework, no matter how extensive. Rules and regulations cannot cover everything, and their being followed cannot depend on coercion alone. If people acted in a socially responsible way only because they feared being punished otherwise, it would be necessary to create a police state of totalitarian scope to preserve social order – a remedy potentially far worse than the disorder it would seek to prevent. But we cannot simply rely on people acting well either. It is not just that some people may take advantage of the goodness of others. Humans are also fallible creatures, possessing limited knowledge and reasoning power, and with the best will in the world are likely to err or disagree.

Most complex problems raise a range of moral concerns, some of which may conflict, while the chain of cause and effect that produced them, and the likely consequences of any decisions we make to solve them, can all be very hard if not impossible to know for sure. Imagine if there was no highway code or traffic regulations and we had to coordinate with other drivers simply on the basis of us all possessing good judgement and behaving civilly and responsibly towards each other. Even if everyone acts conscientiously, there will be situations, such as blind corners or complicated interchanges, where we just lack the information to make competent judgements because it is impossible to second guess with any certainty what others might decide to do. Political regulation, say by installing traffic lights, in this and similar cases coordinates our interactions in ways that allow us to know where we stand with regard to

others. In areas such as commerce, for example, that means we can enter into agreements and plan ahead with a degree of confidence.

Now any reasonably stable and efficient political framework, even one presided over by a ruthless tyrant, will provide us some of these benefits. For example, think of the increased uncertainty and insecurity suffered by many Iraqi citizens as a result of the lack of an effective political order following the toppling of Saddam Hussein. However, those possessing no great wealth, power, or influence – the vast majority of people in other words – will not be satisfied with just any framework. They will want one that applies to all–including the government–and treats everyone impartially and as equals, no matter how rich or important they may be. In particular, they will want its provisions to provide a just basis for all to enjoy the freedom to pursue their lives as they choose on equal terms with everyone else, and in so far as is compatible with their having a reasonable amount of personal security through the maintenance of an appropriate degree of social and political stability. And a necessary, if not always a sufficient, condition for ensuring the laws and policies of a political community possess these characteristics is that the country is a working electoral democracy and that citizens participate in making it so. Apart from anything else, political involvement helps citizens shape what this framework should look like. People are likely to disagree about what equality, freedom, and security involve and the best policies to support them in given circumstances. Democracy offers the potential for citizens to debate these issues on roughly equal terms and to come to some appreciation of each other's views and interests. It also promotes government that is responsive to their evolving concerns and changing conditions by giving politicians an incentive to rule in ways that reflect and advance not their own interests but those of most citizens.

The logic is simple, even if the practice often is not: if politicians consistently ignore citizens or prove incompetent, they will eventually lose office. Moreover, in a working democracy, where parties regularly alternate in power, a related incentive exists for citizens to listen to each other. Not only will very varied groups of citizens need to form alliances to build an electoral majority, often making compromises in the process, but also they will be aware that the composition of any future winning coalition is likely to shift and could exclude them. So the winners always have reason to be respectful of the needs and views of the losers.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The social and moral dispositions that increasingly have come to be linked to _____, such as good neighbourliness, are certainly important supplements to any political framework, no matter how extensive.

A. Diplomacy
B. Citizenship
C. Politics
D. Individuals

2. All but _____ believe that we need some sort of stable political framework to regulate social and economic life, along with various political institutions – such as a bureaucracy, legal system and courts, a police force and army – to formulate and implement the necessary regulations.

A. Conservatists
B. Foreign staff
C. Anarchists
D. Soldiers

3. Rules and regulations cannot cover everything, and their being followed cannot depend on coercion alone _____ (True/ False).

2.4. The components of citizenship: towards a definition

Citizenship, therefore, has an intrinsic link to democratic politics. It involves membership of an exclusive club – those who take the key decisions about the collective life of a given political community. And the character of that community in many ways reflects what people make it. In particular, their participation or lack of it plays an important role in determining how far, and in what ways, it treats people as equals. Three linked components of citizenship emerge from this analysis – membership of a democratic political community, the collective benefits and rights associated with membership, and participation in the community's political, economic, and social processes – all of which combine in different ways to establish a condition of civic equality.

The first component, membership or belonging, concerns who is a citizen. In the past, many have been excluded from within as well as outside the political community. Internal exclusions have included those designated as natural inferiors on racial, gender, or other grounds; or as unqualified due to a lack of property or education; or as disqualified through having committed a crime or become jobless, homeless, or mentally ill. So, in most established democracies women obtained the vote long after the achievement of universal male suffrage, before which many workers were

excluded, while prisoners often lose their right to vote, as does–by default – anyone who does not have a fixed address. Many of these internal grounds for exclusion have been dropped as baseless, though others remain live issues, as does the unequal effectiveness of the right to vote among different groups. However, much recent attention has concentrated on the external exclusions of asylum seekers and immigrants. Here, too, there have been changes towards more inclusive policies at both the domestic and international levels, though significant exclusionary measures persist or have recently been introduced. Yet, the current high levels of international migration, though not unprecedented, have been sufficiently intense and prolonged and of such global scope as to have forced a major rethink of the criteria for citizenship.

None of these criteria proves straightforward. Citizenship implies the capacity to participate in both the political and the socio-economic life of the community. Yet, the nature of that participation and the capabilities it calls for have varied over time and remain matters of debate. Citizens must also be willing to see themselves as in some sense belonging to the particular state in which they reside. At the very least, they must recognize it as a centre of power entitled to regulate their behaviour, demand taxes, and so on, in return for providing them with various public goods. How far they must also identify with their fellow citizens is a different matter. A working democracy certainly requires some elements of a common civic culture: notably, broad acceptance of the legitimacy of the prevailing rules of politics and probably a common language or languages for political debate. A degree of trust and solidarity among citizens also proves important if all are to collaborate in producing the collective benefits of citizenship, rather than some attempting to free-ride on the efforts of others. The extent to which such qualities depend on citizens possessing a shared identity is a more contested, yet crucial, issue as societies become increasingly multicultural.

The second component, rights, has often been seen as the defining criterion of citizenship. Contemporary political philosophers have adopted two main approaches to identifying these rights. A first approach seeks to identify those rights that citizens ought to acknowledge if they are to treat each other as free individuals worthy of equal concern and respect. A second approach tries, more modestly, simply to identify the rights that are necessary if citizens are to participate in democratic decision-making on free and equal terms. Both approaches prove problematic. Even if most committed democrats broadly accept the legitimacy of one or other of these accounts of citizens' rights as being implicit in the very idea of democracy, they come to very different conclusions about the precise rights either approach might generate. These differences largely reflect the various ideological and other divisions that form the mainstay of contemporary democratic politics. So

neo-liberals are likely to regard the free market as sufficient to show individuals equality of concern and respect with regard to their social and economic rights, whereas a social democrat is more likely to wish to see a publicly supported health service and social security system too. Similarly, some people might advocate a given system of proportional representation as necessary to guarantee a citizen's equal right to vote, others view the plurality first past the post system as sufficient or even, in some respects, superior. As a result of these disagreements, the rights of citizenship have to be seen, somewhat paradoxically perhaps, as subject to the decisions of citizens themselves.

That paradox seems less acute, though, once we also note that making rights the primary consideration is in various respects too reductive. We tend to see rights as individual entitlements – they are claims individuals can make against others, including governments, to certain standards of decency in the way they are treated. However, though rights attach to individuals, they have an important collective dimension that the link with citizenship serves to highlight. What does the work in any account of rights is not the appeal to rights as such but to the arguments for why people have those rights. Most of these arguments have two elements. First, they appeal to certain goods as being important for human beings to be able to lead a life that reflects their own free choices and effort – usually the absence of coercion by others and certain material preconditions for agency, such as food, shelter, and health. Second, and most importantly from our point of view, they imply that social relations should be so organized that we secure these rights on an equal basis for all. Rights are collective goods in two important senses, therefore. On the one hand, they assume that we all share an interest in certain goods as important for us to be able to shape our own lives. On the other hand, these rights can only be provided by people accepting certain civic duties that ensure they are respected, including cooperating to set up appropriate collective arrangements. For example, if we take personal security as an un-contentious shared human good, then a right to this good can only be protected if all refrain from illegitimate interference with others and collaborate to establish a legal system and police force that upholds that right in a fair manner that treats all as equals. In other words, we return to the arguments establishing the priority of political citizenship canvassed earlier. For rights depend on the existence of some form of political community in which citizens seek fair terms of association to secure those goods necessary for them to pursue their lives on equal terms with others. Hence, the association of rights with the rights of democratic citizens, with citizenship itself forming the right of rights because it is the 'right to have rights' – the capacity to institutionalize the rights of citizens in an appropriately egalitarian way.

The third component, participation, comes in here. Calling citizenship the 'right to have rights' indicates how access to numerous rights depends on membership of a political community. However, many human rights activists have criticized the exclusive character of citizenship for this very reason, maintaining that rights ought to be available to all on an equal basis regardless of where you are born or happen to live. As a result, they have sometimes argued against any limits on access to citizenship. Rights should transcend the boundaries of any political community and not depend on either membership or participation. Though there is much justice in these criticisms, they are deficient in three main respects.

First, the citizens of well-run democracies enjoy a level and range of entitlements that extend beyond what most people would characterize as human rights – that is, rights that we are entitled to simply on humanitarian grounds. Of course, it could be argued with some justification that many of these countries have benefited from the indirect or direct exploitation of poorer, often non-democratic, states and various related human rights abuses, such as selling arms to their authoritarian rulers. Rectifying these abuses, though, would still allow for significant differentials in wealth between countries. For, second, rights also result from the positive activities of citizens themselves and their contributions to the collective goods of their political community. In this respect, citizenship forms the 'right to have rights' in placing in citizens' own hands the ability to decide which rights they will provide for and how. Some countries might choose to have high taxes and generous public health, education, and social security schemes, say, others to have lower taxes and less generous public provision of these goods, or more spending on culture or on police and the armed forces. Finally, none of the above rules out recognizing the 'right to have rights' as a human right that creates an obligation on the part of existing democratic states to aid rather than hinder democratization processes in non-democratic states, to give succour to asylum seekers and to have equitable and non-discriminatory naturalization procedures for migrant workers willing to commit to the duties of citizenship in their adopted countries.

So membership, rights, and participation go together. It is through being a member of a political community and participating on equal terms in the framing of its collective life that we enjoy rights to pursue our individual lives on fair terms with others. If we put these three components together, we come up with the following definition of citizenship:

Citizenship is a condition of civic equality. It consists of membership of a political community where all citizens can determine the terms of social cooperation on an equal basis. This status not only secures equal rights to the enjoyment of the collective goods provided by the political association

but also involves equal duties to promote and sustain them – including the good of democratic citizenship itself.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.
1. _____ implies the capacity to participate in both the political and the socio-economic life of the community.
A. Patriotism
B. Citizenship
C. Loyalty
D. Faithfulness
2. Contemporary _____ have adopted two main approaches to identifying citizenship rights.
A. Diplomats
B. Rulers
C. Foreign ministers
D. Political philosophers
3. Three linked components of citizenship are – membership of a democratic political community, the collective benefits and rights associated with membership, and participation in the community's political, economic, and social processes_____ (True/ False).

2.5. The paradox and dilemma of citizenship

Earlier it was suggested that citizenship involves a paradox encapsulated in viewing it as the 'right to have rights. That paradox consists in our rights as citizens being dependent on our exercising our basic citizenship right to political participation in cooperation with our fellow citizens. For our rights derive from the collective policies we decide upon to resolve common problems, such as providing for personal security with a police force and legal system. Moreover, once in place, these policies will only operate if we continue to cooperate to maintain them through paying taxes and respecting the rights of others that follow from them. So rights involve duties – not least the duty to exercise the political rights to participate on which all our other rights depend. This paradox gives rise in its turn to a dilemma that can affect much cooperative behaviour. Namely, that we will be tempted to shirk our civic duties if we feel we can enjoy the collective goods and the rights they provide by relying on others to do their bit rather than exerting ourselves. And the more citizens act in this way, the less they will trust their fellow citizens to collaborate with them. Collective arrangements will seem increasingly unreliable, prompting people to abandon citizenship for other, more individualistic, ways of securing their interests.

This dilemma proves particularly acute if the good in question has the qualities associated with what is technically known as a 'public good' – that is a good, such as street lighting, from which nobody can be excluded from the benefits, regardless of whether they contributed to supporting it or not. In such cases, a temptation will exist for individuals to 'free-ride' on the efforts of others. So, if the neighbours either side of my house pay for a street light, they will not be able to stop me benefiting from it even if I choose not to help them with the costs. In many respects, democracy operates as a public good of this kind and so likewise confronts the quandary of free-riding. The cost of becoming informed and casting your vote is immediate and felt directly by each individual, while the benefits are far less tangible and individualized, as are the disadvantages of not voting. You will gain from living in a democracy whether you vote or not, while any individual vote contributes very little to sustaining democratic institutions. And the shortcomings of democracy – the policies and politicians people dislike – tend to be more evident than its virtues, which are diffuse, and in newly democratized countries, often long term. As a result, the temptation to free-ride is great.

In fact, political scientists used to be puzzled why citizens bothered to vote at all – it seemed irrational. Given the very small likelihood any one person's vote will make a difference to the election result, it hardly seems worth the effort. Even the fear that democracy may collapse should have little effect on this self-centred reasoning. As an individual, it still pays the free-rider to rely on the efforts of others. After all, if others fail to do their part, there will be little point in the free-rider doing so. In the past, it seems that citizens simply were not so narrowly instrumental in their reasoning. They appear to have valued the opportunity of expressing their views along with others. The growing fear, symbolized by the decline in voting, is that such civic-mindedness has lessened, with citizens becoming more self-interested and calculating in their attitudes not just to political participation but also to the collective goods political authorities exist to provide. They have also felt that their fellow citizens and politicians are likewise concerned only with their own interests. American national election studies, for example, reveal that over the past 40 years the majority of US citizens have come to feel that government benefits a few major interests rather than those of everyone, although the percentage has fluctuated between lows of 24% and 19% in 1974 and 1994 respectively believing it benefited all, to highs of 39% and 40% in 1984 and 2004. Likewise, a British opinion poll of 1996 revealed that a staggering 88% of respondents believed Members of Parliament served interests other than their constituents' or the country's – with 56% contending they simply served their own agenda. This change in people's attitudes and perceptions presents a major challenge to the practice and purpose of citizenship. Most of the collective goods that citizens collaborate to support and on which their rights depend are subject to the

public goods dilemma described above. Like voting, the cost of the tax I pay to support the police, roads, schools, and hospitals will seem somehow more direct and personal than the benefits I derive from these goods, and a mere drop in the ocean compared to the billions needed to pay for them. Like democracy, these goods also tend to be available to all citizens regardless of how much they pay or, indeed, whether they have paid at all. True, these goods do not have the precise quality of public goods – some degree of exclusion is possible. However, it would be both inefficient and potentially create great injustices to do so. Moreover, in numerous indirect ways we all do benefit from a good transport system, a healthy and well-educated population, and from others as well as ourselves enjoying personal security. That said, people will always be naturally inclined to wonder whether they are getting value for money or are contributing more than their fair share. Such concerns are likely to be particularly acute if people feel little sense of solidarity with each other or believe others to be untrustworthy, especially when it comes to the sort of redistributive measures needed to support most social rights. Consequently, the inducements to adopt independent, non-cooperative behaviour for more apparently secure, short-term advantages will be great – even if, as will often be the case, such decisions have the perverse long-term effect of proving more costly or less beneficial not just for the community as a whole but even for most of the defecting individuals.

This tendency has been apparent in the trend within developed democracies for wealthier citizens to contract into private arrangements in ever more areas, from education and health to pensions and even personal security, often detracting from public provision in the process. So, people have opted to send their children to private schools, taken out private health insurance, employed private security firms to police their gated neighbourhoods, and sought to pay less in taxation for public schemes. But the net result has often been that the cost of education, health, and policing has risen because a proliferation of different private insurance schemes proves less efficient, while the depleted public provision brings in its wake a number of costly social problems – a less well-educated and healthy workforce, more crime, and so on.

Governments have responded to this development in four main ways. First, they have partly marketized some of these services, in form if not always in substance. One consequence of it being either technically impossible or morally unjust to exclude people from the benefits of ‘public goods’ is that standard market incentives do not operate. Companies have no reason to compete for customers by offering lower prices or better products if they cannot restrict enjoyment of a good to those who have paid them for it. Governments have tried to overcome this problem by getting companies periodically to compete for the contract to supply a given public service and by trying to guarantee citizens certain

rights as customers. In so doing, they have stressed the state's role as a regulator rather than necessarily as a provider of services. The aim is to guarantee that given standards and levels of provision are met, regardless of whether a public or a private contractor actually offers the service concerned. In this way, governments have tried to reassure citizens that as much attention will be paid to getting value for money and meeting their requirements as would be the case if they were buying the service on their own account. Their second response has complemented this strategy by stressing the responsibilities of citizens–especially of those who are net recipients of state support. For example, a number of states have obliged recipients of social security benefits to be available for and actively to seek work, engage in retraining, and possibly to do various forms of community service. By such measures, they have tried to reassure net contributors to the system that all are pulling their weight and so retain their allegiance to collective arrangements. Third, they have adopted an increasingly marketized approach to the very practice of electoral politics. They have conducted consumer research as to citizens' preferences and attempted to woo them through branding and advertising. Finally, they have attempted to overcome cynicism about using state power to support the public interest by depoliticizing standard-setting and the regulation of the economic and political markets alike to supposedly impartial bodies immune from self-interest, such as independent banks and the courts.

These policies have had mixed results. By and large, they have been most successful for those services that can be most fully marketized, such as some of the former public utilities like gas, electricity, and telephones, and where there are reasonably clear, technical criteria for what a good service should be and how it might be obtained. For other goods – particularly those where the imperatives for public provision are as much moral as economic, and defection into private arrangements is comparatively easy, such as health care or education–a partial withdrawal from, and a resulting attenuation of, public services has occurred in many advanced democratic states.

Meanwhile, disillusion about politics has grown. Citizens have increasingly felt politicians will do anything for their vote and once in power employ it selfishly and ineptly. Civic solidarity has decreased accordingly as inequalities have grown between social groups. While the better educated and wealthier sections of society have pushed governments and politicians to do less and less, the poorer sections, who find it harder to organize in any case, have increasingly withdrawn from politics altogether. The problem seems to be two-fold. On the one hand, citizens have adopted a more consumer-orientated and critical view of democratic politics. They have taken a more self-interested stance, assuming that others, their fellow citizens, politicians, and those in the

public sector more generally, do so too. On the other hand, politicians have likewise treated citizens more like consumers and both marketized the public sector where possible and acted themselves rather like the heads of rival firms. Commentators differ as to which came first, but most accept these two developments have fuelled each other, producing increasing disillusionment with democratic politics. Instead of being viewed as a means of bringing citizens together in pursuit of those public interests from which they collectively benefit, politics has come to be seen as but an inefficient mechanism for individuals to pursue their private interests.

Globalization has been widely perceived as further promoting both these sources of political disaffection. That many public goods, from security against crime to monetary stability, can only be obtained through international mechanisms has added to civic disaffection and the belief in the shortcomings of political measures. International organizations are inevitably much more distant from the citizens they serve. Size matters, and it is much harder to feel solidarity with very large and highly diverse groups with whom one has few, if any, shared cultural or other references and hardly any direct interaction. As a result, short-term individualized behaviour is much more likely. Put simply, cheating on strangers is easier than with people you meet everyday and will continue to interact with into the foreseeable future. The more complex and globalized societies are, the more we all become strangers to each other. It also becomes much harder to influence or hold politicians to account. Your vote is one in millions rather than thousands, and it is more difficult to combine with others in groups sharing one's interests and concerns that are of sufficient size to influence those with power. Again, markets and weak forms of depoliticized regulation have come to be seen as more competent and impartial than collective political solutions.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The _____ in citizenship consists in our rights as citizens being dependent on our exercising our basic citizenship right to political participation in cooperation with our fellow citizens.

A. Paradox.
B. Issues
C. Challenges.
D. Consequences.

2. _____ is a good, such as street lighting, from which nobody can be excluded from the benefits, regardless of whether they contributed to supporting it or not.

A. Public good
B. Government property

C. Public property
D. Collective
3. _____ has decreased accordingly as inequalities have grown between social groups.
A. Civic solidarity
B. Civic responsibility
C. Civic duties
D. Social solidarity

2.6. Summary

In this unit, we have discussed the issues involved in democratic citizenship. The unit discussed how democracy offers the potential for citizens to debate these issues on roughly equal terms and to come to some appreciation of each other's views and interests. It was further highlighted that, in a working democracy, where parties regularly alternate in power, a related incentive exists for citizens to listen to each other. It was also pointed out that there are three linked components of citizenship – membership of a democratic political community, the collective benefits and rights associated with membership, and participation in the community's political, economic, and social processes – all of which combine in different ways to establish a condition of civic equality. Finally the unit examined the paradox of citizenship which consists in our rights as citizens being dependent on our exercising our basic citizenship right to political participation in cooperation with our fellow citizens.

2.7. References/Further Reading

D. Heater, What Is Citizenship? (Polity, 1998)

P. Norris (ed.), Critical Citizens (Oxford University Press, 1999)

J. G. A. Pocock, 'The Ideal of Citizenship since Classical Times', can be found in R. Beiner (ed.), Theorizing Citizenship (SUNY Press, 1995), pp. 29–52.

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D. Held, Political Theory and the Modern State (Polity, 1989),

2.8. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *B. citizenship*
2. *C. anarchists*
3. *True*

Answers to SAEs 2

1. *B- Citizenship*
2. *D-political philosophers*
3. *True*

Answers to SAEs 3

1. *A- paradox*
2. *A- Public good*
3. *A-Civic solidarity*

UNIT 3 THEORIES OF CITIZENSHIP AND THEIR HISTORY

Unit Structure

3.1 Introduction
3.2 Learning Outcomes
3.3 Theories of citizenship and their history
3.3.1. Two models of citizenship
3.4. Summary
3.5. References/Further Reading
3.6. Possible Answers to Self-Assessment Exercises (SAEs)

3.1 Introduction

In this unit we shall examine a critical aspect of understanding the concept of citizenship – theories. Theories of citizenship fall into two types: normative theories that attempt to set out the rights and duties a citizen ideally ought to have, and empirical theories that seek to describe and explain how citizens came to possess those rights and duties that they actually have. In different but related ways, both types of theory appeal to history. However, they also have distinct differences.

3.2 Learning Outcomes

At the end of this unit, you should be able to:

- Describe the theories of citizenship and practice in the modern era
- Discuss the models of citizenship

3.3 Theories of citizenship and their history

Normative theories look to history to explore the ideal of the good citizen. Past accounts of citizenship have inevitably shaped how we think about what it is to be a citizen. They provide a sort of scrapbook of ideas about the attributes and advantages of citizenship: who is a citizen, the kind of contribution the state and other citizens can expect of him or her and under which circumstances, and what he or she can expect of them and when. Accordingly, contemporary normative theories of citizenship tend to elaborate upon and test themselves against older views. They point out the logical inconsistencies of past theories, drop certain elements on the grounds of their out datedness or undesirability, and embellish or add others as more appropriate to present conditions in order to come up with what they believe is the best possible account of citizenship today. For example, military service was an integral part of older views of citizenship, but has gradually been dropped in more recent accounts.

By contrast, empirical theories explore the social, economic, and political processes that have fashioned the emergence of citizenship in different times and places, and the ways this status has been granted to different groups of people. These theories seek to understand how and why citizenship arose in given circumstances and took the forms it did. However, it would be wrong to regard these accounts as purely explanatory. Implicitly or explicitly, they are invariably motivated by a particular normative ideal and focus on identifying the ways certain normative possibilities were foreclosed or opened up. Indeed, normative theories themselves play an independent role within any explanatory theory of citizenship by legitimizing and shaping the demands and actions of the various social and political actors who create citizenship. So, people in ancient Greece and Rome had very different views of the ideal of citizenship to ours and these provided a justification for the way these societies were organized. But elaborations of these same ideals have also inspired many later thinkers and activists – including some today – to militate for changes to the way citizenship is practised or defined within their own very different societies.

The dominant 'models' of citizenship are very much rooted in ancient Greece and Rome, with these two 'classic' accounts orientating much later thinking on the topic. These concern the development of democratic citizenship within the nation states of Western Europe. Yet these theories have often had a normative purpose of their own: namely, to see the democratic, welfare states that arose after the Second World War as partial realizations and syntheses of various aspects of the two dominant normative models of citizenship.

3.3.1 Two models of citizenship

In an important essay, the historian of ideas J. G. A. Pocock observed how the Greek and Roman characterizations of citizenship offer the classical models not only because they belong to the 'classical' period of history but also in setting the terms of much later debate on the subject. The so-called Greek model of citizenship is drawn principally from the writings of Aristotle and what we know of the political system in Athens and, to a lesser extent, Sparta in the 5th and 4th centuries BC.

The key feature of this view was the equality of citizens as rulers or makers of the law. Along with the writings of defenders and analysts of the Roman republic of c. 510–27 BC, the Greek model and its Roman republican variants have inspired those theories of citizenship that stress political participation as its defining element. By contrast, Pocock identifies what he calls the Roman model of citizenship with imperial Rome. The key feature of this view of citizenship was equality under the law. As such, it could be extended to all subjects of the Roman Empire.

This account inspires those later theories of citizenship that see equality of legal status as its main element.

Clearly, to construct a history of the idea of citizenship around these two models is overly schematic. However, it remains true that later thinkers frequently refer back to them, be it to bemoan their passing, refine and update them, or to denounce them and advocate the need to begin afresh. In particular, much contemporary thinking and theorizing about citizenship can be roughly characterized as an attempt to elaborate on one or other of them and possibly overcome the tensions between them. So, even if dubious as history, it is a justifiable exercise in historiography – or the tracing of how certain people have thought about the past – to look at the citizenship tradition in Western political thought through the lens of these two views.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. Theories of citizenship fall into two types: _____and_____.
2. The dominant 'models' of citizenship are very much rooted in ancient _____and_____.

3. _____ look to history to explore the ideal of the good citizen.
A. Citizenship
B. Normative theories
C. Structuralism
D. Institutional theory
4. _____ explore the social, economic, and political processes that have fashioned the emergence of citizenship in different times and places, and the ways this status has been granted to different groups of people.
A. Institutional theories
B. Citizenship theories
C. Social distinctions
D. Empirical theories

3.4 Summary

In this unit, we have discussed the two broad theories normative and empirical. Normative theories look to history to explore the ideal of the good citizen. Past accounts of citizenship have inevitably shaped how we think about what it is to be a citizen. By contrast, empirical theories explore the social, economic, and political processes that have fashioned the emergence of citizenship in different times and places, and the ways

this status has been granted to different groups of people. The unit also highlighted the fact that, according to the historian of ideas J. G. A. Pocock, how the Greek and Roman characterizations of citizenship offer the classical models not only because they belong to the 'classical' period of history but also in setting the terms of much later debate on the subject.

3.5 References/Further Reading

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D. Held, Political Theory and the Modern State (Polity, 1989),

3.6 Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *normative theories and empirical theories*
2. *Greece and Rome*
3. *B- Normative theories*
4. *D- Empirical theories*

UNIT 4 CITIZENSHIP AS EQUAL PARTICIPATION: ANCIENT GREECE AND THE ROMAN REPUBLIC

Unit Structure

4.1. Introduction
4.2 Learning Outcomes
4.3. Citizenship as equal participation: ancient Greece and the Roman republic
4.4. Citizenship as equal legal status: from imperial Rome to human rights
4.5. Modern democracy: uniting political and legal citizenship?
4.6. The making of modern democratic citizenship
4.7. Summary
4.8. References/Further Reading
4.9. Possible Answers to Self-Assessment Exercises (SAEs)

4.1. Introduction

In this unit, we shall examine the Greek and Roman models of citizenship. The Greek model is largely inspired by the writings of Aristotle, particularly his account of citizenship in 'The Politics', written sometime between 335 and 323 BC. Aristotle regarded human beings as 'political animals' because it is in our nature to live in political communities – indeed, he contended, only within a polis, or city state, could human potential be fully realized. However, people played the roles appropriate to what Aristotle believed was their natural station in life, with only some qualifying as polites, or citizens. Both republican and imperial Rome offer important contrasts in these respects. The Roman republic for example was born of class discord and the struggle of the plebeians to obtain rights against the patricians.

4.2. Learning Outcomes

At the end of this unit, you should be able to:

- describe citizenship practice in the Greek and Roman era
- state similarities and differences between the practice of citizenship today and in the ancient era

4.3. Citizenship as equal participation: ancient Greece and the Roman republic

To be a citizen in ancient Greece it was necessary to be a male aged 20 or over, of known genealogy as being born to an Athenian citizen family, to

be a patriarch of a household, a warrior – possessing the arms and ability to fight – and a master of the labour of others, notably slaves. So gender, race, and class defined citizenship, many of the main contemporary debates turn on how far they continue to do so. As a result, large numbers were excluded: women (though married Athenian women were citizens for genealogical purposes); children; immigrants, or 'metics' – including those whose families had been settled in Athens for several generations (although they were legally free, liable to taxation, and had military duties); and above all, slaves. It is reckoned that the number of citizens in Athens fluctuated between 30,000 and 50,000, while the number of slaves was of the order of 80,000 to 100,000. Therefore, citizenship was enjoyed by a minority, though a substantial one. Yet, this was inevitable given the high expectations of citizens. For their capacity to perform their not inconsiderable citizenly duties rested on their everyday needs being looked after by the majority of the population, particularly women and slaves.

Aristotle described as citizens 'all who share in the civic life of ruling and being ruled in turn'. Though he acknowledged that what this entailed differed between polities and even between different categories of citizen within the same city state, he considered it to involve at some level 'the right of sharing in deliberative and judicial office'. In Athens this meant at a minimum participating in the Assembly, which met at least 40 times a year and required a quorum of 6,000 citizens for plenary sessions, and, for citizens aged over 30, doing jury service – again, a frequent responsibility given that juries numbered 201 or more, and on some occasions over 501. All the major issues came before the Assembly – declarations of war and the concluding of peace, the forming of alliances, public order, and finance and taxation. In addition, there were some 140 local territorial units of government, or demes, and these constructed their own agorae, or assembly points for public discussion of local affairs and decrees. Unlike involvement in the assemblies, jury service was at least paid. However, jurors were chosen by lot from among those who presented themselves to discourage both its becoming a regular income and jury packing.

Meanwhile, many citizens could not avoid also holding public office at some period. With the exception of generals, who were elected by the Assembly and could serve multiple terms for as long as they were successful, public offices were chosen by lot and usually held for one or a maximum of two years. The aim of these devices was to increase the likelihood that all would have an equal chance of exercising political power, although the short terms of office and the checks operated by the different bodies on each other meant this power was severely circumscribed. Citizens were organized into 10 'tribes' based on residence, with each selecting 50 councillors chosen by lot from among

candidates elected by the demesto sit in the Council of 500 for a year. They all served for a tenth of their term on the Committee of 50, which proposed legislation, and for one day as the president of the Committee. Day-to-day administration was in the hands of some 1,200 'magistrates', chosen annually by lot from those who stood for office, with the period of service restricted to two terms. Although all public offices were paid, selection by lottery and short terms meant there could be no career politicians. Yet, citizenship itself, if one adds military service and participation in local affairs, was a fairly full occupation.

Athens was unusual among Greek city states in being so democratic. Indeed, Aristotle, who periodically resided in Athens but was not born there and so not an Athenian citizen, expressed a personal preference for systems that mixed democracy with aristocratic and monarchical elements. However, even in those systems that did so, citizenship remained fairly onerous. For example, like his mentor Plato, Aristotle had a certain, if more mooted, admiration for the much more austere citizenship code of Sparta. By contrast to Athens, where the arts, philosophy, and the cultivation of leisure were much admired, Sparta emphasized military service above all else. Children were separated from their families aged 7 and subjected to a rigorous training, and thereafter were attached to a 'mess'. Given that they still had to attend the Assembly, Spartan citizens became even more permanent public servants than their Athenian counterparts. In fact, it was precisely their limited opportunities to develop private interests that Plato in particular so admired.

Aristotle acknowledged that such forms of citizenship were likely to be possible only in fairly small states. That was important not just so everyone could have a turn at ruling and to keep the tasks of government sufficiently simple as to be manageable without a professional bureaucracy or political class, but also because it was only in smaller settings that the requisite civic virtues were likely to be fostered. Although the Athenians probably invented the idea of taking a vote to settle disagreements, unanimity was the ideal, and it appears likely that most issues were settled by consensus–if need be, following extended debate. Aristotle surmised that such concord, or homonoia, depended on a form of civic friendship among citizens that was likely to proceed only from living together in a tightly knit community. Citizens must know each other, share values, and have common interests. Only then are they likely to be able to agree on which qualities are best forgiven offices and select the right people for them, harmoniously resolve disputed rights, and adopt collective policies unanimously. Even so, agreement rested on citizens possessing a sense of justice, being temperate by exercising self-control and avoiding extremes, having a capacity for prudent judgement, being motivated by patriotism, so they put the public good above private advantage, and being courageous before danger, especially military

threats. In sum, a citizen must not belong 'just to himself' but also to 'the polis'.

Though in the Greek model citizenship was the privilege of a minority, it provided a considerable degree of popular control over government. Of course, we know that the Assembly and Council tended to be dominated by the high born and wealthy. It is also true that Aristotle's ideal of concord was often far from the reality, at least in Athens. There were persistent tensions between different classes and factions. Disagreements there were often bitter and personal, ending with the physical removal of opponents through ostracism or even their execution on trumped-up charges of treason. Nonetheless, in a very real sense those people who qualified as citizens did rule, thereby giving us the word 'democracy', from the Greek demokratia, or people (demos) rule (kratos).

Unsurprisingly, Greek citizenship has appeared to many later thinkers as the epitome of a true condition of political equality, in which citizens have equal political powers and so must treat each other with equal concern and respect. They have viewed the trend towards delegating political tasks to a professional class of politicians and public administrators with foreboding, as presaging a loss of political freedom and equality, and lamented the – in their opinion – short-sighted tendency for ever more citizens to desert public service to pursue personal concerns. By contrast, critics of this model of citizenship argue that it was not so much an ideal as hopelessly idealized. In reality, it was doubly oppressive. On the one hand, it rested on the oppression of slaves, women, and other non-citizens. On the other hand, it was oppressive of citizens in demanding they sacrifice their private interests to the service of the state. As we saw, the two forms of oppression were linked: citizens could only dedicate themselves to public life because their private lives were serviced by others. Both have also been the mark of totalitarian regimes. The latter too have typically treated non-citizens as less than fully human and have demanded not just allegiance but also the total identification of citizens with the state, regarding all dissent as indicative of self-interest rather than an alternative point of view or valid concern. As well as being repressive, such systems tend to be highly inefficient – not least in diverting all talent away from the private sphere of the economy on which the wealth of a society rests. Contrary to what was intended, making the public sphere the main avenue of personal advancement can lead to corruption and the abuse of public power for private again.

Both republican and imperial Rome offer important contrasts in these respects. The Roman republican model of citizenship is sometimes collapsed into the Greek model. But while there are some similarities, there are also striking differences. Though classes existed in Greek society, including among those who qualified as citizens, the ideal of

citizenship became classless with the aspiration to 'concord', a product of putting class and other private interests to one side. By contrast, the Roman republic was born of class discord and the struggle of the plebeians to obtain rights against the patricians. The key event in this early history was the 'secession' of the plebeians to the Aventine Hill in 494 BC, where they swore an oath of mutual support to get the patricians to appoint officials who would look after their interests, a move that led to the creation of Tribunes of the People, elected by a new Plebeian Council, who possessed the power to veto the acts of other magistrates, including each other. The Plebeian Council also dealt with civil litigation, though this function fell with the creation of permanent courts, and most importantly had the power to pass laws (plebiscita). Initially, these laws applied only to the common people, but ultimately encompassed all classes. Three other popularly elected assemblies existed: one based on family clan groupings, one elected by serving soldiers based on their legionary units, or centuries, and a third based on tribal divisions. However, these exercised judicial rather than legislative powers.

Despite being able to vote for and sit on all these bodies, as well as being eligible to become Tribunes and magistrates, Roman citizens never possessed anything like the political influence of their Athenian counterparts. True power rested with the Senate. While entry to the Senate ceased to depend on rank around 400 BC, being composed instead of popularly elected magistrates, it was dominated by the patricians – especially among the higher magistracy, particularly the Consuls who formed the executive. The slogan Senatus Populus que Romanus ('The Senate and the Roman People', frequently abbreviated to SPQR) suggested a partnership between the Senate and the people within the popular assemblies. In reality, Senate and people were always in tension, with the influence of the plebeians waxing and waning depending on their importance as support for different factions among the patricians. As the historians of the Roman republic and, drawing on them, Machiavelli and other later neo-Roman republican theorists appreciated, this ongoing class conflict gave politics and citizenship a much more instrumental character than the Greek ideal of disinterested service to the public good. Although Roman republicans such as Cicero characterized civic virtue in similar terms to the Greeks, as selfless devotion to public duty, and warned against the pursuit of riches as a source of corruption in and out of office, few were willing to emulate the modest farming lifestyle of Cincinnatus, the model Roman republican hero, who according to legend abandoned his plough to save the republic and returned to it once the task was done. The Roman patriciate was fabulously wealthy. In Machiavelli's eyes, the true lesson of the Roman experience was that the selfish interests of the aristocracy and the people could only be restrained if each could counter the other. The republic institutionalized such mutual restraint by ensuring no person or institution could exercise power except in combination with

at least one other person or institution, so both could check and balance each other. Accordingly, there were two Consuls, each able to veto the other's decisions, ten Tribunes with similar countervailing powers, and so on, with none able to hold office for more than a year. The need to divide power in this way was elaborated by later republican theorists. It was a key feature of the city states of Renaissance Italy, especially Florence and Venice, which inspired Machiavelli's writings on the subject, and informed the constitutional debates of the English Civil War of the 17th century and the political arrangements of the Dutch republic into the 18th century. In the work of the American Federalists, especially Madison, the division of powers became a central element of the US Constitution. Underlying this account was a distinctively realist view of citizenship, which would be more easily adaptable to modern democratic politics than the Greek view. Instead of viewing the private interest and the public interest as diametrically opposed, so that all elements of the first had to be removed from politics, the public interest emerged from the clash and balancing of private interests. Consequently, citizens had self-interested reasons to participate because they could only ensure their concerns figured in any collective decisions so long as they took part and were counted. Indeed, when we turn to the descriptive theories, we shall see how modern citizenship has largely developed from the struggles of different groups to have their interests addressed on an equal basis to others.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The slogan _____ suggested a partnership between the Senate and the people within the popular assemblies.

2. The _____ of citizenship is largely inspired by the writings of Aristotle, particularly his account of citizenship in The Politics, written sometime between 335 and 323 BC.

3. The key feature of the Roman model of citizenship was _____.

4.4. Citizenship as equal legal status: from imperial Rome to human rights

As the Roman republic became overlaid by the Empire, the link between citizenship and private interests underwent a dramatic change. Eligibility for Roman citizenship was at first similar to the criteria for Greek citizenship – citizens had to be native free men who were the legitimate sons of other native free men. As Rome expanded – initially within Italy, then over the rest of Europe, and finally into Africa and Asia – two important innovations came about. First, the populations of conquered

territories were given a version of Roman citizenship while being allowed to retain their own forms of government, including whatever citizenship status they offered. Second, the version of Roman citizenship given was of a legal rather than a political kind – 'civitas sine suffragio', or 'citizenship without the vote'. So, the Empire allowed dual citizenship, though it reduced Roman citizenship to a legal status. As a result, the legal and political communities pulled apart. The scope of law went beyond political borders and did not need to be co-extensive with a given territorial unit. To cite the famous case of St Paul – on arrest in Palestine, he proudly declared himself 'a Jew of Tarsus, a city in Cilicia, a citizen of no mean city'. But not being in Tarsus, it was his additional status as a Roman citizen that allowed him to claim rights against arbitrary punishment, thereby escaping a whipping, and to ask for trial in Rome.

According to the Aristotelian ideal, political citizenship had depended on being freed from the burdens of economic and social life – both in order to participate and to ensure that public rather than private interests were the object of concern. By contrast, legal citizenship has private interests and their protection at its heart. Within Roman law, legal status belonged to the owners of property and, by extension, their possessions. Since these included slaves, a free person was one who owned himself. So conceived, as in many respects it remains to this day, law was about how we could use ourselves and our things and those of others, and the use they may make of us and our things. As the example of St Paul shows, the resulting privileges and immunities, including the right to sue and be sued in given courts, were far from trivial. However, that the rule of law can be detached from the rule of persons, in that those subject to it do not have to be involved in either its making or its administration, creates disadvantages as well as advantages.

The advantage is that the legal community can, as we saw, encompass a number of political communities and hold their rulers and officers to account, thereby limiting their discretion to act against the law. Law can be universal in scope and extent, enabling millions of dispersed individuals to pursue their private interests by engaging and exchanging with each other across space and, through such legal acts as bequests, through time, without any direct contact. The disadvantage lies in these same citizens becoming the imperial subjects of the law's empire, who are ruled by it rather than ruling themselves. Yet the rule of law is only ever rule through law by some person or persons. Law can have many sources and enforcers, and different laws and legal systems will apply to different groups of persons and have differing costs and benefits for each of them. If law's empire depends on an emperor, then the danger is that law becomes a means for imperial rule rather than rule of and for the public.

Of course, a tradition quickly emerged that identified the source of law beyond the will of any human agent or agency – seeking it instead in nature, God's will or reason. These arguments offer different intellectual constructions of what they claim to be the fundamental law of all human associations. Such law supposedly operates as a superior or higher law, which binds all political rulers – be it an absolute monarch or the people themselves – and trumps whatever laws they may pass. These depictions of fundamental law have proved tremendously influential in international law, especially human rights law, and lie behind many arguments for domestic constitutions. However, such accounts always come up against the self-same problem that, as with ordinary law, only persons can interpret and implement higher or fundamental law – that, as I noted above, the rule of law is enacted through the rule of persons.

Perhaps the most powerful of these intellectual constructions of higher law – and probably the most influential among contemporary legal and political theorists – sought to square the circle by bringing together the rule of law and the rule of citizens within the ideal of a social contract. Emerging in the 17th and 18th centuries as an account of the justification and limits of the powers of the monarch within a state, it takes as its starting point the equal status of human beings as proprietors of themselves and co-possessors of the world. The underlying intuition is that a just political and legal sovereign power would be one to which free and equal individuals could be expected to unanimously consent. Such consent, the theory goes, would be given only to a power that offers fair and equitable mechanisms and rules for securing their common interest to be able to pursue their own good in their own way, freeing them from the uncertainties of mutual harm without itself becoming a source of harm to them. In other words, it tries to unite the political ideal of the equality of virtuous citizens, who rule and are ruled in turn so as to uphold the public interest, with the legal ideal of individuals as rights bearers, who pursue their private interests protected by the rule of law. This argument does not necessarily rest on any actual consent by citizens to generate their obligation to obey a just sovereign. For many theorists in this tradition, it is sufficient that the political and legal system is so organized that we could imagine all citizens oughtto hypothetically consent to it – or, at least, have no compelling reason not to do so. The idea of a contract is simply a device for thinking about which political and legal arrangements and principles treat people equitably and justly. However, as with theories of God-given or natural law, the terms of the contract are likely to be viewed differently by different theorists, according to the moral and empirical presuppositions they bring to bear in their characterizations of human nature and the causal structure of social relations.

For example, the social contract theories of the 17th-century English philosophers Thomas Hobbes and John Locke portray quite different accounts of human nature and social relations, producing divergent views of what we would consent to. For Hobbes, human beings were apt to pursue their self-interest aggressively and distrust others. Consequently, life outside the state was 'nasty, brutish and short', and they were inclined to consent to any sovereign power capable of offering them security against the risks individuals posed to each other. By contrast, Locke had a much more benign view of the human nature and was inclined to believe that Hobbes underestimated the degree to which state power might be an even greater danger to individual liberty than other individuals. As he put it, Hobbes appeared 'to think, that men are so foolish, that they take care to avoid what mischief may be done them by pole-cats, or foxes; but are content, nay, think it safety, to be devoured by lions.' He believed people would only consent to a limited form of government. Such differences as those between Hobbes and Locke indicate that there are liable to be as many views of 'higher law' as there are theorists of it. The disagreements among theorists mirror those between citizens and return us once more to the dilemma that the source of the rule of law will always lie within the rule of persons. That is, that what the rule of law is thought to mean and how that law is interpreted and applied always lies with people.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The social contract theories of the 17th-century English philosophers _____and_____ portray quite different accounts of human nature and social relations, producing divergent views of what we would consent to.

2. According to the _____ ideal, political citizenship had depended on being freed from the burdens of economic and social life – both in order to participate and to ensure that public rather than private interests were the object of concern.

3. The link between citizenship and private interests underwent a dramatic change as the _____ became overlaid by the Empire.

4. The version of Roman citizenship given to its outposts was of a _____ rather than a _____ kind.

A. Legal/political.
B. State/institutional
C. Sociological/liberal.
D. State/legal.

5. 'civitas sine suffragio', or _____.

A. Your vote is your power
B. no power to vote
C. citizenship without the vote
D. power to the people

6. Eligibility for Roman citizenship was at first similar to the criteria for _____ citizenship.
A. Greek
B. British
C. Egyptian
D. Israeli

4.5. Modern democracy: uniting political and legal citizenship?

The ensuing dilemma confronted the two great revolutions that inaugurated the modern democratic era – the American Revolution of 1776 and the French Revolution of 1789. Both attempted to resolve it by seeing their constitutional settlements as instances of an actual contract between citizens. So, the putative authors of the American Constitution are 'We the People of the United States', while the French Declaration of the Rights of Man and the Citizen declares 'the source of all sovereignty lies essentially in the Nation'. However, these formulas preserve a dualism between the 'public' political citizen, who acts as a collective agent – the 'people' or the 'nation' – and the private, 'legal' citizen, who is the subject of the law and the possessor of 'natural' rights to liberty, property, and the pursuit of happiness. Civic virtue gets assigned to a single constitutional moment and enshrined in the institutions that popular act creates, leaving selfish citizens to pursue their personal interests under the law. Meanwhile, a tension between the two models remains. It is doubtful that even the most well-designed institutions and laws can economize too much on the virtues of citizens, or that citizens feel they are 'theirs' if – the founding moment apart – they cannot actively participate in shaping them.

The political and legal views of citizenship have come to be associated with two traditions of political thought – the republican and the liberal – with many accounts portraying the first as having been slowly displaced by the second. Whereas the republican tradition tends to see liberty as the product of laws that citizens have participated in creating for themselves, liberalism has tended to view law as a necessary evil that should seek to preserve as much of the natural liberty of individuals as is compatible with social life. Nevertheless, such intellectual constructions need to be handled with care. For a start, there have there been numerous varieties of republicanism and liberalism – as we saw, for example, the Greek and Roman views of republican citizenship contained numerous differences, and both these views were subsequently adapted in different ways by later thinkers. Moreover, the two traditions have not only co-existed but became increasingly mixed with the development of democratic nation states during the 19th and 20th centuries. Lying midway between a city state and an empire, the nation state emerged as their most viable alternative – able to combine certain key advantages while avoiding their

disadvantages. If the polis was too small to survive the military encroachments of empires, the empire was too large to allow for meaningful political participation. The nation state had sufficient size to sustain both a complex economic infrastructure and an army, while being not so large as to make a credible – if less participatory – form of democracy impossible. As a result, it became subject to pressures to create a form of citizenship that could successfully integrate popular and legal rule by linking political participation and rights with membership of a national democratic political community. It is this development that informs the sociological theories of citizenship.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The political and legal views of citizenship have come to be associated with two traditions of political thought – _____ and _____.

2. The putative authors of the _____ Constitution are 'We the People of the United States'.

A. American.
B. French
C. British.
D. Portuguese.

3. Lying midway between a city state and an empire, the nation state emerged as their most viable alternative – able to combine certain key advantages while avoiding their disadvantages.

A. State
B. Nation
C. Country
D. nation state

4. The _____ Declaration of the Rights of Man and the Citizen declares 'the source of all sovereignty lies essentially in the Nation'.

5. The _____tradition tends to see liberty as the product of laws that citizens have participated in creating for themselves.

A. Liberal
B. Conservative
C. Socialist
D. Republican

4.6. The making of modern democratic citizenship

The sociologists T. H. Marshall and Stein Rokkan established what has become the standard narrative of the evolution of modern democratic citizenship. This account draws on their analysis of the history of West European democracies in the 18th, 19th, and 20th centuries. They saw citizenship as the product of the interrelated processes of state-building,

the emergence of commercial and industrial society, and the construction of a national consciousness, with all three driven forward in various ways by class struggle and war. Though these three processes tended to be phased, each provided certain of the preconditions for bringing together popular and legal rule within the new context of democratic, welfare, nation states operating within a capitalist market economy.

The first, state-building, phase consisted of administrative, military, and cultural unification at the elite level, accompanied by territorial consolidation and the creation of an elementary, state-wide bureaucratic and legal infrastructure. This phase created a sovereign political body possessing authority over all activities within a given territorial sphere, with those people residing within it becoming its legitimate subjects. The second phase saw the emergence of commercial and industrial economies. This process led to the creation of the infrastructural public goods required by market economies, such as a unified transport system, a standardized system of weights and measures and a single currency, and the establishment of a regular and unitary legal system. Markets also gradually broke down traditional social hierarchies and systems of ascribed status, fostering freedom of contract and equality before the law – particularly with regard to civil and economic rights. The third, nation-making, phase involved the socialization of the masses into a national consciousness suited to a market and industrial economy by means of compulsory education, linguistic standardization, a popular press, and conscript armies. These promoted a common language and guaranteed standards of numeracy and literacy appropriate for a mobile workforce capable of acquiring the generic skills needed for industry. They also helped create affective bonds between both co-nationals themselves and citizens and their state.

The net effect of these three processes was to create a ‘people’, who were entitled to be treated as equals before the law and possessed equal rights to buy and sell goods, services, and labour; whose interests were overseen by a sovereign political authority; and who shared a national identity that shaped their allegiance to each other and to their state. All three elements became important for democratic citizenship. The first provided the basis for regarding all persons as entitled to the equal protection of the laws – a condition people came to see was unlikely to obtain without an equal right to frame them. The second created a community of interest, most particularly in controlling sufficiently those running the state to ensure that the rulers responded to and promoted the concerns of the ruled rather than oppressing them. The third led citizens to consider themselves as a people, sharing certain common values and various special obligations towards one another. It also fashioned the context for a public sphere in which people could communicate with each other using a common idiom

and according to rules and practices that were broadly known and accepted.

In a brilliant essay, T. H. Marshall argued that the citizenship potential offered by the emergence of national markets and nation states had been unleashed by a succession of class struggles. Drawing on the British experience, he contended that there had been three periods in the historical evolution of citizenship. Each period had witnessed the acquisition of a different set of rights and duties by citizens as a given group struggled to attain equal status as a full member of the community. The first period, roughly from the 17th to mid-19th centuries, saw the consolidation of the civil rights needed to engage in a range of social and economic activities, from the freedoms to own property and exchange goods, services, and labour required by a functioning market, to the liberties of thought and conscience necessary to attend a chosen church and to express dissent. The second period, extending from the end of the 18th century to the start of the 20th, coincided with the gaining of political rights to vote and stand for election, first by all property owners, then all adult males, and finally women as well. The third period, going from the end of the 19th to the mid-20th century, involved the creation of social rights. Initially, these had consisted simply of 'the right to a modicum of economic welfare and security' but had gradually been extended 'to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society'. So these rights came to include not only social insurance against unemployment or debilitating illness, but also more extensive rights to education, at least up to secondary school, and to health care and pensions.

Marshall's account has come in for considerable criticism. Some have argued that he overlooks the role played by external pressures in promoting rights, others that even in Britain the three sets of rights neither arose in quite the order or periods that he mentions, nor proved quite as complementary as he assumed. Thus, social rights have emerged in most countries before rather than after political rights – indeed, they were often offered by the politically dominant class of the time as a way of damping down demands for political rights. Social rights can also clash with certain civil rights, such as the right to property. However, these corrections to the details of his argument are perfectly compatible with its underlying logic, which remains compelling. Although Marshall has sometimes been read as suggesting that there is an almost inevitable progression from civil to political to ever fuller social rights, this was not his view. He saw the acquisition of rights as a contingent and never-ending struggle. Each phase in the development of rights stems from a subordinate group managing to win concessions from those with power in their fight to be treated with equal concern and respect. In these ways, legal citizenship was altered to encompass new groups through the formal or informal

exercise of political citizenship, often by exploiting existing legal rights to gain others. Success in each case came from the ruling classes needing the voluntary cooperation of the ruled to retain their authority. Since different groups can take advantage of different circumstances, the development of citizenship naturally has differed from country to country. For example, the need for mass conscript armies during the First and Second World Wars, and, in consequence, for women's labour to run the domestic economy, aided considerably the acquisition of political and social rights by men and women in many European countries in this period. Yet, in countries such as Spain, Portugal, and Switzerland which remained outside these conflicts, these pressures were absent. As a result, in these countries changes to women's status came by a different and much slower route.

Writing in the 1950s, when the economies of West European countries were in the ascendant and welfare spending expanding, it was natural for Marshall to treat social rights as the culmination of the struggle for an ever more inclusive and egalitarian form of citizenship. Needless to say, subsequent events have tended to challenge that optimistic conclusion. It is not just that many aspects of the post-war welfare settlements Marshall celebrated became eroded during the economic downturn and restructuring of the 1970s, 1980s, and 1990s. Many of the economic and social assumptions on which this settlement rested have also been criticized by those seeking to further expand rather than curtail citizenship. Environmentalists have attacked the emphasis on increasing economic production, feminists its continued overlooking of the subordinate role of women in the labour market, multiculturalists the failure to even mention issues of ethnicity, cosmopolitans its focus on the nation state, and so on. As with the criticisms of Marshall's historical narrative, these observations do not necessarily contradict the main thrust of his argument. They merely indicate how each attempt to realize a form of equal citizenship generates its own unanticipated shortcomings and problems – producing new struggles over the way the political community, rights, and participation are defined.

In two respects, current developments may be undermining Marshall's schema. First, legal citizenship has become ever more autonomous from political citizenship as globalization erodes the nation state without creating alternative political communities capable of providing a focus for participation in the promotion of collective goods. For example, international organizations such as the World Bank, the World Trade Organization, and the International Monetary Fund regulate a great deal of international trade, but citizens can control them only very indirectly through their governments. Moreover, such bodies are subject to international law and courts which have very little political accountability at all. Even the EU, which does have direct elections to a special European

Parliament, is to a large degree under the control of government executives, on the one hand, and the European Court of Justice, on the other. However, citizenship has been increasingly defined in terms of global human rights to deal with this development. However, the absence of a political dimension suggests that it offers a somewhat second-rate account of what being a citizen involves. Second, and to some extent relatedly, those with power and wealth have become increasingly able to operate without the consent of the comparatively poor and powerless. The more mobile the wealthy become, the harder it is to control their activities and to tax them so they contribute to public goods. As a consequence of these two developments, the capacity for citizenship to be shaped through processes of struggle may have declined.

Self-Assessment Exercises (SAEs) 4

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The need for mass conscript _____ during the First and Second World Wars, and, in consequence, for women's labour to run the domestic economy, aided considerably the acquisition of political and social rights by men and women in many European countries in this period.

A. Armies.
B. Workers
C. Political cadres.
D. Gendarmes.

2. In two respects, current developments may be undermining Marshall's schema. First, legal citizenship has become ever more autonomous from political citizenship as globalization erodes the nation state. Second, and to some extent relatedly, those with power and wealth have become increasingly able to operate without the consent of the comparatively poor and powerless _____(False/True).

3. The sociologists _____ and _____ established what has become the standard narrative of the evolution of modern democratic citizenship.

4.7. Summary

In this unit, we have discussed citizenship in the ancient era. In Greece Aristotle described as citizens 'all who share in the civic life of ruling and being ruled in turn'. This description necessarily highlights the practice of politics within that clime. The aim of these devices was to increase the likelihood that all would have an equal chance of exercising political

power. In Rome, however, despite being able to vote for and sit on several bodies, as well as being eligible to become Tribunes and magistrates, Roman citizens never possessed anything like the political influence of their Athenian counterparts. True power rested with the Senate. The sociologists T. H. Marshall and Stein Rokkan established what has become the standard narrative of the evolution of modern democratic citizenship. This account draws on their analysis of the history of West European democracies in the 18th, 19th, and 20th centuries.

4.8. References/Further Reading

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4.9. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *Senatus Populus que Romanus*
2. *Greek model*
3. *equality under the law*

Answers to SAEs 2

1. *Thomas Hobbes and John Locke*
2. *Aristotelian*
3. *Roman republic*
4. *A-Legal/political*
5. *C-'citizenship without the vote'*
6. *A- Greek*

Answers to SAEs 3

1. *the republican and the liberal*
2. *A- American*
3. *D- nation state*
4. *French*
5. *D- republican*

Answers to SAEs 4

1. *A- armies*
5. *True.*
6. *T. H. Marshall and Stein Rokkan*

MODULE 3 LAW AND ITS ACCOUTREMENTS

In this Module, the objective is to introduce the lay reader – including the prospective or novice student of law, politics, or other social sciences – to the fundamentals of law and legal systems, avoiding as much technical jargon as possible. Thus attempt have been made to distil the essentials of the complex phenomenon of law: its roots, its branches, its purpose, practice, institutions, and its future.

Unit 1 What is law?
Unit 2 The functions of law
Unit 3 Courts
Unit 4 Lawyers

UNIT 1 WHAT IS LAW

Unit Structure

1.1. Introduction
1.2 Learning Outcomes
1.3 What is law?
1.3.1 The genesis of law
1.4. The Western legal tradition
1.5. Civil law and common law
1.5.1. Other legal traditions
1.6. Summary
1.7. Further Reading/Reference
1.8. Possible Answer to Self-Assessment Exercises (SAEs)

1.1. Introduction

Different kinds of philosophical questions can be asked about law. John Rawls's major works (1996, 1999) can be seen as treatises on what the content of law should be if a state is to be both legitimate and just. Other inquiries lie more clearly within legal theory in that they evaluate different ways of designing the kind of governance structure we call law (Kornhauser 2 004) : Should we prefer formally realizable legal rules (Kennedy 1 976), or more open standards? What principles must legal rules or standards satisfy to realize the moral ideal of the rule of law, and thus govern us appropriately as responsible agents?

1.2 Learning Outcomes

At the end of this unit, you should be able to:

- Define the role of law in society.
- Explain the interconnections between law and politics.
- Explore the challenges of entrenching law in society.

1.3 What is law?

In very broad terms, two principal answers have been given to this deceptively simple question. On the one hand is the view that law consists of a set of universal moral principles in accordance with nature. This view (adopted by so-called natural lawyers) has a long history dating back to ancient Greece. For so-called legal positivists, on the other hand, law is nothing more than a collection of valid rules, commands, or norms that may lack any moral content. Others perceive the law as fundamentally a vehicle for the protection of individual rights, the attainment of justice, or economic, political, and sexual equality. Few believe that the law can be divorced from its social context. The social, political, moral, and economic dimensions of the law are essential to a proper understanding of its workaday operation. This is especially true in times of change. It is important to recognize the fragility of formalism; we skate on dangerously thin ice when we neglect the contingent nature of the law and its values. Reflection upon the nature of law may sometimes seem disconcertingly abstruse. More than occasionally, however, it reveals important insights into who we are and what we do. The nature and consequences of these different positions should become apparent before long.

1.3.1 The genesis of law

Despite the importance of law in society, its manifestation in the form of general codes fi rst appears only around 3000 BC. Prior to the advent of writing, laws exist only in the form of custom. And the absence of written law retards the capacity of these rules to provide lasting or extensive application.

Among the first written codes is that of Hammurabi, king and creator of the Babylonian empire. It appeared in about 1760 BC, and is one of the earliest instances of a ruler proclaiming a systematic corpus of law to his people so that they are able to know their rights and duties. Engraved on a black stone slab (that may be seen in the Louvre in Paris), the code contains some 300 sections with rules relating to a broad array of activities ranging from the punishment that is to be inflicted on a false witness (death) to that to be meted out to a builder whose house collapses

killing the owner (death). The code is almost entirely devoid of defences or excuses, a very early example of strict liability. The king was, in fact, acknowledging the existence of even earlier laws (of which we have only the barest of evidence), which his code implies. In truth, therefore, the code echoes customs that preceded the reign of this ancient monarch.

A more striking example of early law-making may be found in the laws of the Athenian statesman Solon in the 6th century BC. Regarded by the ancient Greeks as one of the Seven Wise Men, he was granted the authority to legislate to assist Athens in overcoming its social and economic crisis. His laws were extensive, including significant reforms to the economy, politics, marriage, and crime and punishment. He divided Athenian society into five classes based on financial standing. One's obligations (including tax liability) depended on one's class. He cancelled debts for which the peasants had pledged their land or their bodies, thereby terminating the institution of serfdom. To resolve disputes between higher- and lower-ranked citizens, the Romans, in about 450 BC, issued, in tablet form, a compilation of laws known as the Twelve Tables. A commission of ten men (Decemviri) was appointed in about 455 BC to draft a code of law binding on all Romans (the privileged class – the patricians – and the common people – the plebeians) which the magistrates (two consuls) were required to enforce. The result was a compilation of numerous statutes, most derived from prevailing custom, that filled ten bronze tablets. The plebeians were unimpressed with the result, and a second commission of ten was appointed in 450 BC. It added another two tablets.

During the period of the so-called classical jurists, between the 1st century BC and the middle of the 3rd century AD, Roman law achieved a condition of considerable sophistication. Indeed, so prolific were these jurists (Gauis, Ulpian, Papinian, Paul, and several others) that their enormous output became hopelessly unwieldy. Between 529 and 534 AD, therefore, the Eastern emperor, Justinian, ordered that these manifold texts be reduced to a systematic, comprehensive codification. The three resulting books, the Corpus Juris Civilis (comprising the Digest, Codex, and Institutes), were to be treated as definitive: a conclusive statement of the law that required no interpretation. But this illusion of unconditional certainty soon became evident: the codification was both excessively lengthy (close to a million words) and too detailed to admit of easy application.

Its meticulous detail proved, however, to be its huge strength. More than 600 years after the fall of the Western Roman Empire, Europe witnessed a revival in the study of Roman law. And Justinian's codification, which had remained in force in parts of Western Europe, was the perfect specimen upon which European lawyers could conduct their experiments.

With the establishment in about AD 1088 in Bologna of the first university in Western Europe, and the burgeoning of universities throughout Europe in the succeeding four centuries, students of law were taught Justinian's law alongside canon law. Moreover, the contradictions and complexity of the codes turned out to be an advantage, since the rules were, despite the emperor's fantasy of finality, susceptible to interpretation and adaptation in order to suit the requirements of the time. In this way, Roman civil law spread throughout most of Europe – in the face of its detractors during the Renaissance and the Reformation.

By the 18th century, however, it was recognized that more concise codes were called for. Justinian's codification was replaced by several codes that sought brevity, accessibility, and comprehensiveness. The Napoleonic code of 1804 came close to fulfilling these lofty aspirations. It was exported by colonization to large tracts of Western and Southern Europe and thence to Latin America, and it exerted an enormous influence throughout Europe. A more technical, abstract code was enacted in Germany in 1900. What it lacks in user-friendliness, it makes up for in its astonishing comprehensiveness. Known as the BGB, its influence has also been considerable: it afforded a model for the civil codes of China, Japan, Taiwan, Greece, and the Baltic states.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. More than 600 years after the fall of the Western Roman Empire, Europe witnessed a revival in the study of Roman law _____ (True/False)

2. During the period of the so-called _____, between the 1st century BC and the middle of the 3rd century AD, Roman law achieved a condition of considerable sophistication.

3. A striking example of early law-making may be found in the laws of the Athenian statesman ____ in the 6th century BC.

4. Prior to the advent of writing, laws exist only in the form of _____.

A. Ethos.
B. Values
C. Norms.
D. Custom.

5. Among the first written codes is that of _____, king and creator of the Babylonian empire.

A. Hammurabi
B. Hammurab
C. Solomon
D. Solon

6. For _____, on the other hand, law is nothing more than a collection of valid rules, commands, or norms that may lack any moral content.
A. legal positivists
B. legal empiricists
C. legal observers
D. lawyers

1.4 The Western legal tradition

The Western legal tradition has a number of distinctive features, in particular:

- A fairly clear demarcation between legal institutions (including adjudication, legislation, and the rules they spawn), on the one hand, and other types of institutions, on the other; legal authority in the former exerting supremacy over political institutions.
- The nature of legal doctrine which comprises the principal source of the law and the basis of legal training, knowledge, and institutional practice.
- The concept of law as a coherent, organic body of rules and principles with its own internal logic.
- The existence and specialized training of lawyers and other legal personnel.

While some of these characteristics may occur in other legal traditions, they differ in respect of both the importance they accord to, and their attitude towards, the precise role of law in society. Law, especially the rule of law, in Western Europe is a fundamental element in the formation and significance of society itself. This veneration of law and the legal process shapes also the exercise of government, domestically and internationally, by contemporary Western democracies.

The ideal of the rule of law is most closely associated with the English constitutional scholar Albert Venn Dicey, who in his celebrated work An Introduction to the Study of the Law of the Constitution, published in 1885, expounded the fundamental precepts of the (unwritten) British constitution, and especially the concept of the rule of law which, in his view, consisted of the following three principles:

- The absolute supremacy or predominance of regular law as opposed to the infl uence of arbitrary power.
- Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts.
- The law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 4 minutes.

1. The nature of legal doctrine which comprises the principal source of the law and the basis of legal training, knowledge, and institutional practice is a distinctive feature of the _____.

A. Western legal tradition
B. Eastern legal tradition
C. American legal tradition.
D. Roman legal tradition.

2. The ideal of the _____ is most closely associated with the English constitutional scholar Albert Venn Dicey.

A. Separation of powers
B. Law primacy
C. Rule of law
D. inter pares

3. That the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts is one of the accoutrements of the _____.

A. Separation of powers
B. Law primacy
C. Rule of law
D. inter pares

1.5 Civil law and common law

The system of codified law that obtains in most of Europe, South America, and elsewhere is known as civil law, in contrast to the common law system that applies in England, former British colonies, the United States, and most of Canada. Civil law is frequently divided into four groups. First, is French civil law, which obtains also in Belgium and Luxembourg, the Canadian province of Quebec, Italy, Spain, and their former colonies, including those in Africa and South America. Second, German civil law, which is, in large part, applied in Austria, Switzerland, Portugal, Greece, Turkey, Japan, South Korea, and Taiwan. Third, Scandinavian civil law exists in Sweden, Denmark, Norway, and Iceland. Finally, Chinese (or China) law combines elements of civil law and socialist law. This is by no means an airtight classifi cation. For example, Italian, Portuguese, and Brazilian law have, over the last century, moved closer to German law as their civil codes increasingly adopted key elements of the German civil code. The Russian civil code is partly a translation of the Dutch code.

Though the two traditions – common law and civil law – have, over the last century, grown closer, there are at least five significant differences

between the two systems. First, the common law is essentially unwritten, non-textual law that was fashioned by medieval lawyers and the judges of the royal courts before whom they submitted their arguments. Indeed, it may be that this entrenched oral tradition, supported by a strong monarchy, developed by experts before the revival in the study of Roman law, explains why that system was never 'received' in England.

Codification has been resisted by generations of common lawyers, though this hostility has been weaker in the United States, where since its establishment in 1923, the American Law Institute (a group of lawyers, judges, and legal scholars) has published a number of 'restatements of the law' (including those on contract, property, agency, torts, and trusts) to 'address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was'. They seek to clarify rather than codify the law. Their standing as secondary authority is demonstrated by their widespread (though not always consistent) acceptance by American courts. More significant is the Uniform Commercial Code (UCC) which establishes consistent rules in respect of a number of key commercial transactions that apply across the country. With 50 states with different laws, uniformity in respect of commercial transactions is obviously vital. Imagine the confusion in the absence of such standardization: you live in New York and buy a car in New Jersey that is made in Michigan, warehoused in Maine, and delivered to your home.

Second, the common law is casuistic: the building blocks are cases rather than, as in the civil law system, texts. Ask any American, Australian, or Antiguan law student how most of his or her study-time is spent. The answer will almost certainly be 'reading cases'. Question their counterparts from Argentina, Austria, or Algeria, and they will allude to the civil and penal codes they persistently peruse. The consequence of the common lawyer's preoccupation with what the judges say – rather than what the codes declare – is a more pragmatic, less theoretical approach to legal problem-solving.

Third, in view of the centrality of court decisions, the common law elevates the doctrine of precedent to a supreme position in the legal system. This doctrine means both that previous decisions of courts that involve substantially similar facts ought to govern present cases and that the judgments of higher courts are binding on those lower in the judicial hierarchy. The justification for the idea is that it engenders constancy, predictability, and objectivity, while allowing for judges to 'distinguish' apparently binding precedents on the ground that the case before them differs from them in some material respect.

A fourth generalization is that while the common law proceeds from the premise 'where there is a remedy, there is a right', the civil law tradition generally adopts the opposite position: 'where there is a right, there is a remedy'. If the common law is essentially remedial, rather than rights-based, in its outlook, this is plainly a result of the so-called writ system under which, from the 12th century in England, litigation could not commence without a writ issued on the authority of the king. Every claim had its own formal writ. So, for example, the writ of debt was a prerequisite to any action to recover money owing, and the writ of right existed to recover land. In the 17th century, the writ of habeas corpus (literally 'you must produce the body') was a vital check on arbitrary power, for it required the production of a person detained without trial to be brought before a court. In the absence of a legal justification for his imprisonment, the judge could order the individual to be liberated. It took a century for civil law jurisdictions to accept this fundamental attribute of a free society.

Finally, in the 13th century, the common law introduced trial by jury for both criminal and civil cases. The jury decides on the facts of the case; the judge determines the law. Trial by jury has remained a fundamental feature of the common law. This separation between facts and law was never adopted by civil law systems. It illustrates also the importance of the oral tradition of common law as against the essential role of written argument employed by the civil law. There are also certain jurisdictions, such as Scotland, that, though their legal systems are not codified, preserve varying degrees of Roman influence. On the other hand, some jurisdictions have avoided the impact of Roman law, but because of the prominence of legislation, these systems resemble the civil law tradition. They include Scandinavian countries, which inhabit an unusual place in the 'Romano-Germanic' family.

1.5.1 Other legal traditions

i. Religious law

No legal system can be properly understood without investigating its religious roots. These roots are often both deep and durable. Indeed, the Roman Catholic Church has the longest, continuously operating legal system in the Western world. The influence of religion is palpable in the case of Western legal systems:

> [B]asic institutions, concepts, and values … have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries, reflecting new attitudes toward death, sin, punishment, forgiveness, and salvation, as well as new assumptions concerning the relationship of the divine to the human and of faith to reason.

In Europe in the 12th century, ecclesiastical law played an important role in a number of fi elds. Ecclesiastical courts claimed jurisdiction over a wide range of matters, including heresy, fornication, homosexuality, adultery, defamation, and perjury. Canon law still governs several churches, especially the Roman Catholic Church, the Eastern Orthodox Church, and the Anglican Communion of Churches.

The rise of secularism has not completely extinguished the impact of religious law. The jurisdiction of Western legislatures and courts over exclusively religious matters is frequently curtailed, and many legal systems incorporate religious law or delegate toreligious institutions matters of a domestic nature. Nevertheless, one of the hallmarks of Western legality is the separation between church and state. While a number of prominent religious legal traditions co-exist with state systems of law, some have actually been adopted as state law. The most significant are Talmudic, Islamic, and Hindu law. All three derive their authority from a divine source: the exposition of religious doctrine as revealed in the Talmud, Koran, and Vedas respectively. All have influenced secular law in a variety of ways. For example, Talmudic law had a significant impact on Western commercial, civil, and criminal law. In addition to common and civil law systems, it is possible to identify four other significant legal traditions. Islamic law (or the Sharia) is based largely on the teachings of the Koran. It extends to all aspects of life, not merely those that pertain to the state or society. It is observed by more than one-fifth of the population of the world, some 1.3 billion people. At its core, Hinduism postulates the notion of Kharma: goodness and evil on earth determine the nature of one's next existence. Hindu law, especially in relation to family law and succession, applies to around 900 million individuals, mostly in living in India.

ii. Customary law

To constitute custom, the practices involved require something beyond mere usage or habit. They need to have a degree of legality. This is not always easy to discern, though customary law continues to play an important role, especially in jurisdictions with mixed legal systems such as occur in several African countries. The tenacity of custom is evident also in India and China. Indeed, in respect of the latter, the Basic Law of the Special Administrative Region of Hong Kong provides that customary law, as part of the laws previously in force in Hong Kong (prior to 1 July 1997), shall be maintained.

iii. Mixed legal systems

In some jurisdictions two or more systems interact. In South Africa, for example, the existence of Roman-Dutch law is a consequence of the influence of Dutch jurists who drew on Roman law in their writing. This tradition was exported to the Cape Colony in the 17th and 18th centuries. The hybrid nature of South Africa's legal system is especially vivid, since, following the arrival of English common law in the 19th century, the two systems co-existed in a remarkable exercise of legal harmony. And they continue to do so:

Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England. Even if it were true (which it is not) that the whole of South African private law and criminal law had remained pure Roman-Dutch law, the South African legal system as a whole would still be a hybrid one, in which civil- and common-law elements jostle with each other.

The mixture is no longer nearly as effective in Sri Lanka or Guyana, to where Roman-Dutch law was exported in 1799 and 1803 respectively, but where the common law now predominates.

iv. Chinese law

Traditional Chinese society, in common with other Confucian civilizations, did not develop a system of law founded by the ideas that underlie Western legal systems. Confucianism adopted the concept of 'li': an intense opposition to any system of fixed rules that applied universally and equally. Though Chinese 'legalists' sought to undermine the political authority of this Confucian philosophy of persuasion by championing 'rule by law' ('fa') in place of the organic order of the Confucian 'li', the latter continues to dominate China.

The spectacular modernization of China has generated a need for laws that facilitate its economic and financial development. But this new legalism has not been accompanied by an ideological partiality for law along Western lines. The role of law in modern China remains decidedly instrumental and pragmatic. Its system is essentially civilian and hence largely codified, but this has not yet engendered either greater esteem for the law or a diminution in the control of the Communist Party.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. The role of law in modern China remains decidedly instrumental and pragmatic _____ (True/False).

2. The rise of _____ has not completely extinguished the impact of religious law.

3. _____ still governs several churches, especially the Roman Catholic Church, the Eastern Orthodox Church, and the Anglican Communion of Churches.

4. No legal system can be properly understood without investigating its _____.

5. The system of codified law that obtains in most of Europe, South America, and elsewhere is known as _____.

A. common law
B. local law
C. international law
D. civil law

6. In the 13th century, the _____ introduced trial by jury for both criminal and civil cases.

A. common law
B. civil law
C. international law
D. customary law

7. Civil law is frequently divided into _____ groups.

A. Four
B. Five
C. Six.
D. Seven

1.6 Summary

In this unit, we discussed two broad conceptions of law. On the one hand is the view that law consists of a set of universal moral principles in accordance with nature. This view (adopted by so-called natural lawyers) dates back to ancient Greece. For so-called legal positivists, on the other hand, law is nothing more than a collection of valid rules, commands, or norms that may lack any moral content. We noted that the first written codes is that of Hammurabi, king and creator of the Babylonian empire. Early law-making may also be found in the laws of the Athenian statesman Solon in the 6th century BC. The enormous output by a series of Roman jurists led the Eastern emperor, Justinian, to order that the manifold texts be reduced to a systematic, comprehensive codification. More than 600 years after the fall of the Western Roman Empire, Europe witnessed a revival in the study of Roman law. By the 18th century,

Justinian's codification was replaced by several codes that sought brevity, accessibility, and comprehensiveness. The Napoleonic code of 1804 came close to fulfilling these lofty aspirations.

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1.8 Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *True*
2. *classical jurists*
3. *Solon*
4. *D- custom*
5. *A- Hammurabi*
6. *A- legal positivists*

Answers to SAEs 2

1. *A- Western legal tradition*
2. *C- rule of law.*
3. *C- Rule of law*

Answers to SAEs 3

1. *True*
2. *Secularism*
3. *Canon law*
4. *religious roots*
5. *D- civil law*
6. *A- common law*
7. *A- four*

UNIT 2 THE FUNCTIONS OF LAW

Unit Structure

2.1 Introduction
2.2 Learning Outcomes
2.3 The functions of law
2.4. The sources of law
2.5 Law's branches
2.5.1 Public and private law
2.6 Constitutional and administrative law
2.6.1 Other branches
2.7 Summary
2.8 Further Reading/Reference
2.9. Possible Answer to Self-Assessment Exercises (SAEs)

2.1. Introduction

This unit will focus on the functions of law in society. To begin with a valid example, Football, chess, bridge are unthinkable without rules. A casual poker club could not function without an agreed set of rules by which its members are expected abide. It is not surprising therefore that when they are formed into larger social groups, humans have always required laws. Without law, society is barely conceivable. We tend, unfortunately, towards egoism. The restraint that law imposes on our liberty is the price we pay for living in a community. 'We are slaves of the law' wrote the great Roman lawyer Cicero, 'so that we may be free'. And the law has provided the security and self-determination that has, in large part, facilitated social and political advancement.

2.2. Learning Outcomes

At the end of this unit, you should be able to:

- describe benefits of law in society
- discuss the functions of law

2.3. The functions of law

i. Order

The cliché 'law and order' is perhaps more accurately rendered 'law for order'. Without law, it is widely assumed, order would be unattainable. And order – or what is now popularly called 'security' – is the central aim of most governments. It is an essential prerequisite of a society that aspires to safeguard the well-being of its members. Thomas Hobbes famously declared that in

his natural state – prior to the social contract – the condition of man was 'solitary, poor, nasty, brutish and short', though more than one student has rendered this maxim as '… nasty, British and short'. Law and government are required, Hobbes argues, if we are to preserve order and security. We therefore need, by the social contract, to surrender our natural freedom in order to create an orderly society. His philosophy is nowadays regarded as somewhat authoritarian, placing order above justice. In particular, his theory – indeed, his self-confessed purpose – is to undermine the legitimacy of revolutions against even malevolent governments. He recognizes that we are fundamentally equal, mentally and physically: even the weakest has the strength to kill the strongest. This equality, he suggests, engenders discord. We tend to quarrel, he argues, for three main reasons: competition (for limited supplies of material possessions), distrust, and glory (we remain hostile in order to preserve our powerful reputations). As a consequence of our inclination towards conflict, Hobbes concludes that we are in a natural state of continuous war of all against all, where no morals exist, and all live in perpetual fear. Until this state of war ceases, all have a right to everything, including another person's life. Order is, of course, only one part of the functions of law story.

ii. Justice

Though the law unquestionably protects order, it has another vital purpose. In the words of the 20th-century English judge Lord Denning:

> The law as I see it has two great objects: to preserve order and to do justice; and the two do not always coincide. Those whose training lies towards order, put certainty before justice; whereas those whose training lies toward the redress of grievances, put justice before certainty. The right solution lies in keeping the proper balance between the two.

The pursuit of justice must lie at the heart of any legal system. The virtual equation of law with justice has a long history. It is to be found in the writing of the Greek philosophers, in the Bible, and in the Roman Emperor Justinian's codification of the law. The quest for clarity in the analysis of the concept of justice has, however, not been unproblematic. Both Plato and Aristotle sought to illuminate its principal features. Indeed, Aristotle's approach remains the launching pad for most discussions of justice. He argues that justice consists in treating equals equally and 'unequals' unequally, in proportion to their inequality. Acknowledging that the equality implied in justice could be either arithmetical (based on the identity of the persons concerned) or geometrical (based on maintaining the same proportion), Aristotle

distinguishes between corrective or commutative justice, on the one hand, and distributive justice, on the other. The former is the justice of the courts which is applied in the redress of crimes or civil wrongs. It requires that all men are to be treated equally. The latter (distributive justice), he argues, concerns giving each according to his desert or merit. This, in Aristotle's view, is principally the concern of the legislator.

In his celebrated book, The Concept of Law, H. L. A. Hart maintains that the idea of justice:
… consists of two parts: a uniform or constant feature, summarised in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.
He contends that in the modern world the principle that human beings are entitled to be treated alike has become so well established that racial discrimination is usually defended on the ground that those discriminated against are not 'fully human'.

An especially influential theory of justice is utilitarianism, which is always associated with the famous English philosopher and law reformer Jeremy Bentham. In his characteristically animated language:

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. … The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

To this end, Bentham formulated a 'felicific calculus' by which to assess the 'happiness factor' of any action.

There are numerous competing approaches to the meaning of justice, including those that echo Hobbes' social contract. A modern version is to be found in the important writings of John Rawls who, in rejecting utilitarianism, advances the idea of justice as fairness which seeks to arrive at objective principles of justice that would hypothetically be agreed upon by individuals who, under a veil of ignorance, do not know to which sex, class, religion, or social position they belong. Each person represents a social class, but they have no idea whether they are clever or dim, strong or weak. Nor do they know in which country or in what period they are living. They possess only certain elementary knowledge about the laws of science and psychology. In this state of blissful ignorance, they must unanimously decide upon a contract the general principles of

which will define the terms under which they will live as a society. And, in doing so, they are moved by rational self-interest: each individual seeks those principles which will give him or her the best chance of attaining his chosen conception of the good life, whatever that happens to be.

Justice is unlikely to be attained by a legal system unless its rules are, as far as possible, reasonable, general, equal, predictable, and certain. None of these objectives can be achieved in absolute terms; they are ideals.

Further, the law establishes a framework within which unavoidable disputes may be resolved. Courts are the principal forum for the resolution of conflict. Almost every legal system includes courts or court-like bodies with the power to adjudicate impartially upon a dispute and, following a recognized procedure, to issue an authoritative judgment based on the law.

The law facilitates, often even encourages, certain social and economic arrangements. It provides the rules to enable parties to enter into the contract of marriage or employment or purchase and sale. Company law, inheritance law, property law all furnish the means by which we are able to pursue the countless activities that constitute social life.

Another major function of the law is the protection of property. Rules identify who owns what, and this, in turn, determines who has the strongest right or claim to things. Not only does the law thereby secure the independence of individuals, it also encourages them to be more productive and creative (generating new ideas that may be transformed into intellectual property, protected by patents and copyright).

The law seeks also to protect the general well-being of the community. Instead of individuals being compelled to fend for themselves, the law oversees or coordinates public services that would be beyond the capacity of citizens or the private sector to achieve, such as defence or national security.

Another dimension of the law that has assumed enormous proportions in recent years is the protection of individual rights. For example, the law of many countries includes a bill of rights as a means of seeking to protect individuals against the violation of an inventory of rights that are considered fundamental. In some cases a bill of rights is constitutionally entrenched. Entrenchment is a device which protects the bill of rights, placing it beyond the reach of simple legislative amendment. In other jurisdictions, rights are less secure when they are safeguarded by ordinary statutes that may be repealed like any other law. Almost every Western country (with the conspicuous exception of Australia) boasts a constitutional or legislative bill of rights.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 5 minutes.

1. _____ is an essential prerequisite of a society that aspires to safeguard the well-being of its members.

2. Without ____, society is barely conceivable.

3. The pursuit of justice must lie at the heart of any legal system _____ (True/False).

4. Aristotle argues that justice consists in treating equals equally and 'unequals' unequally, in proportion to their inequality_____ (True/False).

5. 'We are slaves of the law' wrote the great Roman lawyer Augustus, 'so that we may be free'_____ (True/False).

6. Utilitarianism as a theory of justice, is always associated with the famous English philosopher and law reformer _____.

2.4. The sources of law

Unlike manna, the law does not fall from the sky. It springs from recognized 'sources'. This refl ects the idea that in the absence of some authoritative source, a rule that purports to be a law will not be accepted as a law. Lawyers therefore speak of 'authority'. 'What', a judge may ask a lawyer, 'is your authority for that proposition?' In reply, the common lawyer is likely to cite either a previous decision of a court or a statute. A civil lawyer will refer the court to an article of, say, the civil code. In either case, the existence of an acknowledged source will be decisive in the formulation of a legal argument. In addition to these two conventional sources of law, it is not uncommon for the writings of legal academics to be recognized as authoritative sources of law. There are also certain sources that are, strictly speaking, non-legal, including (though it may be hard to believe) common sense and moral values.

i. Legislation

The stereotypical source of law in contemporary legal systems is the statute enacted by a legislative body that seeks to introduce new rules, or to amend old ones – generally in the name of reform, progress, or the alleged improvement of our lives. Legislation is, however, of quite recent origin. The 20th century witnessed an eruption of legislative energy by law-makers who frequently owe their election to a manifesto of promises that presumes the existence of an unrelenting statutory assembly line.

In most advanced societies, it is not easy to think of any sphere of life untouched by the dedication of legislators to manage what we may or may not do.

Statutes are rarely a panacea; indeed, they not infrequently achieve the precise opposite of what their draftsmen intended. Moreover, language is seldom adequately lucid or precise not to require interpretation. The words of a statute are rarely conclusive; they are susceptible of different construction – especially where lawyers are concerned. Inevitably, therefore, it falls to judges to construe the meaning of statutes. And when they do so, they normally create precedents that provide guidance for courts that may be faced with the interpretation of the legislation in the future.

A number of technical 'rules' have developed to assist judges to decode the intention of law-makers. A classic example that demonstrates the various approaches to the legislative interpretation is a hypothetical statute that prohibits 'vehicles' from entering the park. This plainly includes a motor car, but what about a bicycle? Or a skateboard? One solution is to adopt the so-called 'literal' or 'textual' approach which accords the text in question its ordinary everyday meaning. Thus the definition of a 'vehicle' would not extend beyond an automobile, a truck, or a bus; bicycles and skateboards are not, in any ordinary sense, vehicles. Where, however, the plain meaning gives rise to an absurd result, its proponents concede that the approach runs into trouble, and the words or phrases in issue will need to be interpreted in a manner that avoids obvious illogicality.

A second approach seeks to discover the purpose of the legislation. In our example, we may conclude that the purpose of the provision is to secure the peace and quiet of the park. If so, we are likely to find it easier to decide what is the real intention of the legislation, and hence to distinguish between a car (noisy) and a bicycle (quiet). This approach also permits judges to consider the wider purposes of the legal system. Where either the narrow or broader purpose suggests an interpretation different from the literal meaning of the language, the purposive approach would prefer a liberal to a literal interpretation.

It is an approach that holds sway in several jurisdictions. Courts in the United States routinely scrutinize the legislative history of statutes in order to resolve ambiguity or confi rm their plain meaning. A similar approach is evident in Canada and Australia. And under the European Communities Act of 1972, a court is required to adopt a purposive approach in construing legislation that implements European Community (EC) law. Indeed, since EC legislation tends to be drafted along civil law lines – expressed in fewer words than common law statutes, but with a high degree of abstraction – a purposive approach is unavoidable, and broad

social and economic objectives are frequently considered by the courts. The European Court of Justice also tends to favour a purposive approach.

Another difficulty intrinsic to the legislative process is that law-makers cannot be expected to predict the future. Legislation designed to achieve a specific objective may fail when a new situation arises. This is especially true when innovative technology materializes to confound the law. Common law one normally associates the phrase 'common law' with English common law. But common laws, in the sense of laws other than those particular to a specifi c jurisdiction, largely in the form of legislation, are not peculiar to England and English-speaking former colonies. Numerous forms of common law have existed, and endure, in several European legal systems, including France, Italy, Germany, and Spain. They developed from Roman roots and achieved their commonality by indigenous reception instead of imposition. In England, however, the judge-driven common law tended to be defined in jurisdictional and remedial terms. But though the common laws of Europe (Germany, France) seem to have transmogrified into national laws, they are not dead. Despite the advent of codification and the doctrine of precedent these – non-English – common laws, though battered and bruised, still survive. And they circulate tirelessly through the veins of various legal systems.

In respect of the common law of England – and those many countries to which it has been exported – previous decisions of courts (judicial precedents) are a fundamental source of law. The doctrine of precedent stipulates that the reasoning deployed by courts in earlier cases is normally binding on courts who subsequently hear similar cases. The idea is based on the principle 'stare decisis' ('let the decision stand'). It is, of course, designed to promote the stability and predictability of the law, as well as ensuring that like cases are, as far as possible, treated alike.

Every common law jurisdiction has its distinctive hierarchy of courts, and the doctrine of precedent requires courts to follow the decisions of courts higher up the totem pole. In doing so, however, the lower court need follow only the reasoning employed by the higher tribunal in reaching its decision – the so-called ratio decidendi. Any other statements made by the judges are not binding: they are 'things said by the way' (obiter dicta). For example, a judge may give his opinion on the case, which is not relevant to the material facts. Or she may pontificate on the social

context in which the case arose. In neither case need a subsequent judge regard these utterances as anything more than persuasive.

ii. Other sources

In a perfect world the law would be clear, certain, and comprehensible. The reality is some way from this Utopian vision. Law in all jurisdictions is a dynamic organism subject to the vicissitudes of social, political, and moral values. One influential foundation of moral ideas has already been mentioned: natural law, the ancient philosophy that continues to shape the teachings of the Roman Catholic Church. As we saw, it proceeds from the assumption that there are principles that exist in the natural world that we, as rational beings, are capable of discovering by the exercise of reason. For instance, abortion is regarded as immoral on the ground that it offends natural law's respect for life.

In spite of the caricature of law, lawyers, and courts existing in an artifi cial, hermetically sealed bubble, judges do reach out into the real world and take account of public opinion. Indeed, on occasion courts respond with unseemly alacrity, such as when the media laments the alleged leniency of judges in a certain case or in respect of a particularly egregious offence. Judges may react rashly (dare one say injudiciously?) by flexing their sentencing muscles apparently to placate perceived public opinion.

More prudently, perhaps, courts, much to the gratification of academic lawyers, increasingly cite their scholarly colleagues' views as expressed in textbooks and learned journals. To be quoted in a judgment is recognition, not only that one's works are actually read, but also that they carry some weight.

In the absence of direct authority on a point of law, courts may even permit lawyers to refer to 'common sense' to support an argument. This might include widely accepted notions of right and wrong, generalizations about social practices, fairness, perceptions of the law, and other common conceptions that cynics occasionally represent as foreign to the legal process.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 5 minutes.

1. In the absence of direct authority on a point of law, courts may even permit lawyers to refer to _____to support an argument.

2. The doctrine of _____ stipulates that the reasoning deployed by courts in earlier cases is normally binding on courts who subsequently hear similar cases.

3. It is not uncommon for the writings of legal dramatists to be recognized as authoritative sources of law _____ (True/False).
4. The 20th century witnessed an eruption of legislative energy by law-makers who frequently owe their election to a manifesto of promises that presumes the existence of an unrelenting statutory assembly line_____ (True/False).
5. Law does not fall from the sky. It springs from recognized 'sources'_____ (True/False).

2.5. Law's branches

The abundant branches of the law perpetually proliferate. As social life is transformed, the law is rarely far behind – to invent and define new concepts and rules, and to resolve the disputes that inevitably arise. Thus our brave new legal world continues to usher in novel subjects: space law, sports law, sex law. At the core of most legal systems, however, are the fundamental disciplines that hark back to the roots of law: the law of contract, tort, criminal law, and the law of property. To that nucleus must be added a horde of disciplines, including constitutional and administrative law, family law, public and private international law, environmental law, company law, commercial law, the law of evidence, succession, insurance law, labour law, intellectual property law, tax law, securities law, banking law, maritime law, welfare law, human rights law. To facilitate criminal and civil trials and other practical matters (such as the conveyance of land, the drafting of wills), complex rules of procedure have developed, spawning their own subcategories.

2.5.1. Public and private law

The distinction between public and private law is fundamental, especially to the civil law systems of Continental Europe and its former colonies. Though there is no general agreement as to precisely how or where the line should be drawn, it is fair to say that public law governs the relationship between citizen and state, while private law concerns that between individuals or groups in society. Thus, constitutional and administrative law is the archetypal example of public law, while the law of contract is one of many limbs of private law. Criminal law, since it largely involves prosecutions by the state against offenders, belongs also under the umbrella of public law. (All three branches are described below.).

i. Contract

Agreements are an indispensable element of social life. When you agree to meet me for a drink, borrow a book, or give me a lift to work, we have entered into an agreement. But the law will not compel you to turn up at the bar, return my book, or pick me up in

your car. These social arrangements, while their breach may cause considerable inconvenience, distress, and even expense, fall short of a contract as understood by most legal systems.

One of the hallmarks of a free society is the autonomy it affords its members to strike the bargains of their choice, provided they do not harm others. Freedom of contract may be defended also on utilitarian grounds: by enforcing contracts in accordance with the value placed on things by the market, resources – goods and services – may be bought by those who place the highest value upon them. It is sometimes claimed that this yields a just distribution of scarce resources.

Those who champion the free market consider individuals to be the best judges of their welfare. In the 19th century – especially in England – the law of contract, as the facilitator of the optimum relations of exchange, was developed to a high degree of sophistication (some would say mystification) in pursuit of this cardinal value of commercial and industrial life. It is certainly true that business is unimaginable without rules of contract, but there is an inevitable inequality of bargaining power in any society. In theory, my contract with the electricity company that supplies power to my home regards both parties as being on an equal footing. But this is simply not the case. I am hardly in a position to haggle over the terms of the agreement which is inexorably a standard form contract. A featherweight is engaged in a contest with a squad of heavyweights. The law therefore tempers the hardship of so-called ‘unfair’ terms by consumer legislation and other institutional means that attempt to redress the balance by, for instance, empowering courts to disallow unconscionable clauses and permitting them to enforce only ‘reasonable’ terms.

In order to constitute a binding contract, the law normally requires that the parties to the agreement actually intend to create legal relations. Breaking a promise is almost always regarded as immoral, yet it results in legal consequences only where certain requirements are satisfied, though in certain civil law countries (such as France, Germany, and Holland) a person may be held liable – even before his offer is accepted – for failing to negotiate in good faith.

The common law notionally dissects agreement into an offer by one party and an acceptance of that offer by the other. By making an offer the ‘offeror’ expresses – by word, speech, fax, email, or even by conduct – his readiness to be bound in contract when it is accepted by the person to whom the offer is addressed, the

'offeree'. Thus Adam advertises his car for sale for $1,000. Eve offers him $600. Adam replies that he will accept $700. This is a counter-offer, which Eve is obviously free to accept or reject. Should she accept, there is agreement and, provided the other legal requirements are satisfied, a binding contract. This analysis is a helpful method by which to determine whether agreement has actually taken place, but it is rather artificial; it is often difficult to say who the offeror is and who the offeree is. For example, final agreement may be preceded by protracted negotiations involving numerous proposals and counter-proposals by the parties. To describe the process as constituting offer and acceptance is something of a fiction. Certain 'contracts' are void because they offend 'public policy'. The concept of freedom of contract notwithstanding, the law will not countenance agreements that seek to use the law to achieve immoral or unlawful objectives. They are likely to be struck down by courts as void. But social mores rarely stand still; what was considered immoral a century ago appears tame in today's permissive circumstances. For example, German courts would once routinely negate a lease of premises for use as a brothel. Mistake, misrepresentation, or duress may render a contract voidable. This is because there is, in effect, no genuine agreement.

Under certain circumstances, therefore, the law may allow me to void the contract where there has been a mistake, misrepresentation, duress, or undue influence. For example, if I am mistaken as to the subject of the contract (I thought I was buying a Ferrari, you were, in fact, selling a Ford), or you have misrepresented the Ford as a Ferrari, or you forced me into the sale, I have defences to your claim that I should perform my side of the agreement, and if I can show that there has been, say, fraudulent misrepresentation, the contract may be vitiated.

A court may award damages for breach of contract. Should I fail to perform my obligations under a contract, you may sue me to recover compensation or, in a limited number of cases, compel me to carry out my side of the bargain. If, however, I can show that circumstances have rendered performance impossible or that the purpose of the contract has been frustrated, I may escape liability for breach of contract. Suppose I agree to rent you my villa for a week. You arrive at the door and I refuse to allow you to enter. I appear to have breached our contract and you may want to obtain compensation. But how much? Should the law attempt to place you in the position you were in before you entered into the contract with me? Or should it seek to restore you to the position you would have been in if the contract had been carried out? Or should I

simply be required to return the deposit I took from you in order to secure your booking? What if I refused you access to the villa because a storm had rendered the electricity supply unsafe? Would it make a difference if the storm occurred a month ago or only yesterday?

ii. Tort

Torts (or delicts, as they are called in Continental legal systems) are civil wrongs; they include injuries to my person, property, reputation, privacy, even my peace of mind. Like the law of contract, the law of tort provides victims (or 'plaintiffs') with the right to obtain compensation for their loss. Unlike contract, however, which has as its principal goal the keeping of promises, tort law protects a wide range of interests. The law provides remedies, pre-emptive and compensatory, for conduct that causes harm either intentionally or negligently. The latter have become the principal focus of modern tort law. Accidents will happen, but where they are the consequence of your negligence, I may be able to recover damages to recompense my loss. So, for example, should you run me over in your car, and I can prove that you were driving negligently, I may be awarded damages to cover the cost of my hospital treatment, the money I lost through being away from work, and my pain and suffering.

To succeed, the plaintiff normally has to prove that the wrong was done intentionally or negligently. Most torts are actionable only when they have caused actual injury or damage, though certain torts whose principal purpose is to protect rights rather than to compensate for damage (such as trespass) are actionable without proof of damage. The defendant (known also as the tort feasor in common law systems) is normally the person who is primarily liable, though according to the rules of vicarious liability, one person (e.g., an employer) may be held liable for a tort committed by another person (e.g., an employee).

Torts are sometimes also breaches of contract. For example, the negligent driver of a bus who causes injury to his passengers has committed both the tort of negligence and a breach of the contract to carry the passengers safely to their destinations. They may recover damages either in tort or for breach of contract, or both. The bus driver may also have committed a crime (e.g., dangerous driving).

While the protection of the interests in property and bodily security are reasonably straightforward, the courts of many jurisdictions have encountered difficulties when it comes to compensating

victims whose loss is not physical, but either purely economic or emotional. Suppose, as occurred in an English case, the defendants negligently damage an electrical cable while carrying out construction work near the plaintiff's factory. As a result, the production is severely harmed and the plaintiff suffers financial loss. The physical loss (the damage to the materials) was clearly recoverable, but since the cable was not the plaintiff's property the loss was 'purely economic'. Can he recoup it? The common law, after some twists and turns by English courts, answers in the negative. The fear seems to be that allowing recovery will open the floodgates of litigation, a frequent concern expressed by judges, especially in England. In France, on the other hand, no distinction is drawn between physical and economic loss.

Comparable judicial trepidation attends the question of emotional distress. Where the injury consists of psychiatric illness as a result of physical harm, the courts look for some degree of 'proximity' between the plaintiff and the victim. The complexity of this calculation is tragically illustrated by a House of Lords decision in 1992. A crush in a sports stadium resulted in the death of 95 football fans, and more than 400 were injured. The police acknowledged their negligence in allowing too many spectators into an already overcrowded ground. The match was to have been televised live. In the event, vivid images of the disaster were broadcast. The disturbing pictures were seen by some of the plaintiffs who knew that their friends or family were present in the stadium. Two of the plaintiffs were spectators in the ground, but not in the stands where the disaster occurred; the other plaintiffs learned of the disaster through radio or television broadcasts. All the plaintiffs lost, or feared they might have lost, a relative or friend in the calamity. They failed in their claim for compensation for emotional distress because they did not satisfy one or other of the control mechanisms used by the law when damages for psychiatric injury are claimed by plaintiffs who were not directly threatened by the accident but learned of it through sight or hearing. These limiting factors are:

1. There must be a close tie of love and affection between the plaintiff and the victim.
2. The plaintiff must have been present at the accident or its immediate aftermath.
3. The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not by hearing about it from somebody else.

This requirement of 'proximity', as well as the other tests, have attracted considerable criticism, and calls for reform of the law in

some jurisdictions. Problems also arise in circumstances where the injury falls short of a recognized mental affl iction, and consists of the grief and distress that normally attends the loss of or injury to a loved one.

The law of tort not only attempts to recompense victims, it seeks also to deter persons from engaging in conduct that may injure others. Furthermore, it is said to 'shift' or 'distribute' the losses incurred in the case of negligent injury. To put the matter simply, where you are at fault in causing my injury, the law shifts the loss to you. Why should I have to bear the loss that you have negligently caused? You will see at once that this apparently facile question conceals a host of difficult issues about the nature of negligence: what is 'fault', what constitutes a 'cause', and so on. In the modern world dominated by insurance, the issue tends to alter from blame to burden: instead of asking 'who is at fault?' the question becomes 'who can best bear the cost?' And the answer is often the insurance company, with whom there is normally a compulsory liability insurance policy.

iii. Criminal law

Crime is irresistible – and not only to criminals. It is the stuff of popular culture. Think of the numerous – mostly American – movies such as The Godfather, Taxi Driver, Pulp Fiction, Scarface, Reservoir Dogs, and countless others, or the many popular television series portraying various aspects of crime and its detection, including Law and Order, NYPD Blue, Hill Street Blues, The Sopranos, to name only a few. We seem to revel in observing the criminal process unfold.

Typically the criminal law punishes serious forms of antisocial behaviour: murder, theft, rape, blackmail, robbery, assault, and battery. Yet governments deploy the law to criminalize a host of minor forms of misbehaviour relating, in particular, to health and safety. These 'regulatory offences' occupy a sizeable proportion of modern criminal law. As with the law of tort, the concept of fault is central to the criminal law. Broadly speaking, most countries proscribe conduct that generates insecurity, causes offence, and harms the efficient operation of the government, the economy, or society in general.

Virtually every system of criminal law requires evidence of fault – intention or negligence – to convict a person of an offence. So, for example, the American Model Penal Code defines a crime as 'conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests'. Criminal

liability thus has three basic components: conduct, without justification and without excuse. To amount to a crime, 'conduct' must inflict or threaten substantial harm to individual or public interests. In sum, therefore, criminal liability requires a person to engage in conduct that inflicts or threatens substantial harm to individual or public interests without justification and without excuse.

One of the primary functions of the criminal law is to authorize the punishment of convicted offenders. This may be justified on any of a number of (often competing) grounds. First, punishment is thought, sometimes correctly, to act as a deterrent both to the convict and to others. Few criminals, however, imagine they will be apprehended; the effectiveness of deterrence is thus questionable. Second, there are those who believe that through punishment, especially imprisonment, the offender will come to see the error of his ways and emerge a reformed individual. Unhappily, the evidence in support of this benevolent attitude is meagre. It is argued, third, that the real purpose of punishment is retribution or desert: making the wrongdoer suffer for his crime: 'an eye for an eye …'. An extreme example is Islamic Sharia law, under which, according to most interpretations, the punishment for serious theft is the amputation of hands or feet (though for first offenders only one hand is cut off).

The state, by assuming responsibility for chastising the criminal, reduces the risk of victims of crime 'taking the law into their own hands'. Fourth, by locking up an offender, he is removed from society, thereby protecting the rest of us. Finally, especially in the case of minor offences, the criminal may be required to make amends through 'community service'. This form of punishment is then justified as a form of 'restorative justice'.

iv. Property

Ownership is at the epicentre of social organization. The manner in which the law defines and protects this exclusive right is an important marker of the nature of society. And the law always has something to say on this subject, whether it is to confer absolute rights of private property, recognize collective rights, or adopt a position in between. Specifically, the law of property determines, first, what counts as 'property'; second, when a person acquires an exclusive right to a thing; and, third, the manner in which it protects this right.

To the first question there is general agreement that property includes land, buildings, and goods. The common law

distinguishes between real property (land as distinct from personal or movable possessions) and personal property. Civil law systems distinguish between movable and immovable property. The former corresponds roughly to personal property, while immovable property corresponds to real property. But property is what the law declares it to be: a ten dollar bill is a piece of paper with no intrinsic value; the law imparts value to it. In a similar fashion, the law may create property, as it does in the case of intellectual property (which includes copyright).

The second issue, who is the owner, is generally determined by discovering who has the strongest long-term right to control the thing in question. And this right will normally include the right to transfer ownership to another. In the case of land, however, I may not know whether the seller is the legal owner. Most legal systems therefore have some form of public land registration which enables prospective buyers to establish who the genuine owner is.

Third, the law may be called upon to settle a contest between the owner and the possessor of a thing. The former is, as we have seen, the person with the strongest long-term claim to the possession of a thing. But suppose I rent my villa to you for a year. You currently possess the property, and while I have an ultimate right to possess it, some legal systems favour the right of the tenant (at least for the duration of the lease) over the owner; others prefer the owner.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 5 minutes.

1. _____ (or delicts, as they are called in Continental legal systems) are civil wrongs; they include injuries to my person, property, reputation, privacy, even my peace of mind.

2. In order to constitute a binding contract, the law normally requires that the parties to the agreement actually intend to create legal relations _____ (True/False).

3. The civil law notionally dissects agreement into an offer by one party and an acceptance of that offer by the other _____ (True/False).

4. Typically the common law punishes serious forms of antisocial behaviour: murder, theft, rape, blackmail, robbery, assault, and battery_____ (True/False).

5. One of the hallmarks of an authoritarian society is the autonomy it affords its members to strike the bargains of their choice, provided they do not harm others_____ (True/False).

2.6. Constitutional and administrative law

Whether or not it is in written form, every country has a constitution that specifi es the composition and functions of the organs of government, and regulates the relationship between individuals and the state. Constitutional law analyses the extent to which the functions of government are distributed between the legislative, executive, and judicial branches of government: the 'separation of powers'. Many constitutions incorporate a bill of rights that constrains the exercise of the power of government by conferring individual rights and freedoms on citizens. Such rights typically include freedom of speech, conscience, religion, the right of peaceful assembly, freedom of association, the right of privacy, equality before and equal protection of law, the right to life, the right to marry and found a family, freedom of movement, and the rights of persons charged with or convicted of a criminal offence.

Administrative law governs the exercise of the powers and duties by public officials. In particular, it concerns the control of such powers by the courts who, in many jurisdictions, increasingly engage in reviewing the exercise of legislation and administrative action. This has occurred largely as a consequence of the dramatic expansion over the last 50 years in the number of government agencies that regulate vast tracts of our social and economic lives. It concerns also the review of decisions made by so-called 'quasi-judicial' bodies, like professional disciplinary committees that affect the legal rights of their members. Their rulings are susceptible to 'judicial review' to determine whether they have acted reasonably.

The precise standard of reasonableness to be applied by the court differs in various common law jurisdictions. In the United States, for example, the court asks whether the body's decision was 'arbitrary or capricious' before deciding whether to strike it down. The Canadian test is one of 'patent unreasonableness', while the Supreme Court of India deploys criteria of proportionality and legitimate expectation. English law adopts the standard known as 'Wednesbury unreasonableness' (after a case of this name, in which it was held that a decision would be set aside if it 'is so unreasonable that no reasonable authority could ever have come to it').In France, the Conseil Constitutionel exercises exclusive judicial oversight, including in respect of legislation that fails to attract sufficient parliamentary support. It has the – unappealable – power to nullify the contested bill. The supreme courts (Conseil d'état and Cour de Cassation) seek to interpret the law in a manner consistent with the Constitution. French administrative law recognizes certain 'principes à valeur constitutionnelle' (principles of constitutional value), including human dignity, with which the executive must comply, even in the absence of specific legislative provisions to that effect. The German constitution (the

Basic Law) guarantees judicial review as a check on the tyranny of the majority.

Several civil law countries have special administrative courts. Difficulties tend to arise in respect of determining whether a matter is one for these courts or belongs more properly in the ordinary courts. In France, for example, a special Tribunal of Conflicts decides where the matter should be heard, while in Germany the court in which the case is first pleaded determines whether it has jurisdiction and may transfer cases over which it denies jurisdiction. In Italy, the Court of Cassation is the ultimate authority when such conflicts arise.

2.6.1. Other branches

Family law relates to marriage (and its contemporary equivalents), divorce, children, child support, adoption, custody, guardianship, surrogacy, and domestic violence.

Public international law seeks to regulate the relations between sovereign states. These norms are generated by treaties and international agreements (such as the Geneva Conventions), the United Nations, and other international organizations, including the International Labour Organization, UNESCO, the World Trade Organization, and the International Monetary Fund. The International Court of Justice (sometimes called the World Court), based in The Hague, was established in 1945 under the UN Charter in order to settle legal disputes between states and to issue advisory opinions on legal matters. The International Criminal Court was established in 2002 and also sits at The Hague. It hears prosecutions of alleged perpetrators of genocide, crimes against humanity, war crimes, and the crime of aggression. More than 100 states are members of the court, but neither China nor the United States are among them; the latter expressing reservations about the ability of the court to respect the constitutional rights of American defendants (including trial by jury) and the prospect of the politicization of the court – fears that seem tenuous, and have not troubled the numerous nations that have recognized the court's jurisdiction.

Environmental law is a patchwork of common law rules, legislation, and international agreements and conventions whose chief concern is to protect the natural environment against the depredations of humans, such as carbon emissions that cause pollution and probably global warming. It seeks also to promote 'sustainable development'.

Company law deals with the 'floating' of corporations and other business organizations. The concept of 'corporate personality' (under which a company has a distinct identity independent of its members) is of vital

importance in the business world. It means that a company is a legal person with the capacity to enter into contracts, sue and be sued. Company law stipulates also the rights and duties of directors and shareholders, and is increasingly concerned with rules of corporate governance, mergers, and acquisitions.

Self-Assessment Exercises (SAEs) 4

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. _____ analyses the extent to which the functions of government are distributed between the legislative, executive, and judicial branches of government.

2. German administrative law recognizes certain 'principes à valeur constitutionnelle' (principles of constitutional value), including human dignity, with which the executive must comply, even in the absence of specifi c legislative provisions to that effect _____ (True/False).

3. The German constitution (the Basic Law) guarantees judicial review as a check on the tyranny of the majority _____ (True/False).

4. The International Criminal Court (sometimes called the World Court), based in The Hague, was established in 1945 under the UN Charter in order to settle legal disputes between states and to issue advisory opinions on legal matters. _____ (True/False).

5. Whether or not it is in written form, every country has a _____ that specifi es the composition and functions of the organs of government, and regulates the relationship between individuals and the state.

6. _____ governs the exercise of the powers and duties by public offi cials.

7. _____ relates to marriage (and its contemporary equivalents), divorce, children, child support, adoption, custody, guardianship, surrogacy, and domestic violence.

2.7. Summary

In this unit, it was noted that the basic function of law is the establishment of order and justice. We noted that a major source of law is legislation. One influential foundation of moral ideas has already been mentioned: natural law, the ancient philosophy that continues to shape the teachings of the Roman Catholic Church. The distinction between public and private law is fundamental, especially to the civil law systems of Continental Europe and its former colonies. Law may also be broken into constitutional and administrative law. Constitutional law analyses the extent to which the functions of government are distributed between the legislative, executive, and judicial branches of government: the

'separation of powers'. Administrative law governs the exercise of the powers and duties by public officials.

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2.9. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *Law*
2. *Law*
3. *True*
4. *True*
5. *False*
6. *Jeremy Bentham*

Answers to SAEs 2

1. *'common sense'*
2. *Precedent*
3. *False*
4. *True*
5. *True*

Answers to SAEs 3

1. Torts
2. *True*
3. *False*
4. *False*
5. *False*

Answers to SAEs 4

1. *Constitutional law*
2. *False*
3. *True*
4. *False*
5. *Constitution*
6. *Administrative law*
7. *Family law*

UNIT 3 COURTS

Unit Structure

3.1 Introduction
3.2 Learning Outcomes
3.3 Courts
    3.3.1 What is the judicial function?
    3.3.2 What is a court?
    3.3.3 Sentence
3.4 The politics of the judiciary
3.5 Trial by jury
3.6 Alternative dispute resolution
3.7 Summary
3.8 Further Reading/Reference
3.9 Possible Answer to Self-Assessment Exercises (SAEs)

3.1. Introduction

The ubiquity of conflict among humans necessitates some forum in which they might be amicably resolved. Courts are a prerequisite of all legal systems. They have power, authority – or what lawyers called 'jurisdiction' – over specified criminal, civil, and other matters. This entails that their decisions (which are ultimately supported by force) are accepted as authoritative by the parties, who would be unlikely to do so if they did not trust in the independence and impartiality of the professional judges on the bench. In this unit the court system and its accoutrements shall be discussed.

3.2. Learning Outcomes

At the end of this unit, you should be able to:

- describe the workings of the court system
- Discuss the key elements of the court system.

3.3. Courts

The role of judges is fundamental to the common law; the centrifugal force of the judicial function drives the legal system both in theory and in practice. And though it may be less significant in the codified systems of Continental Europe, the influence of judges cannot be overstated.

The judge is the archetypal legal institution. In his robed and exalted independence, he represents the very apotheosis of justice. The 'social service' that he renders to the community is, in the words of the English

judge Lord Devlin, 'the removal of a sense of injustice'. The neutrality that informs his judgments in the settlement of disputes is nothing short of an article of faith in a free and just society. The dispassionate judge is the quintessence of a democratic system of government. And the ostensible delineation between legislation and adjudication is among its most celebrated hallmarks.

Although this attractive and enduring perception of the judicial function is regarded by cynics as a myth, no amount of scepticism can easily dislodge the image of the judge as keeper of the law, protector and repository of justice. Nor is this to deny that judges are, like all of us, tainted by personal predilections and political prejudices. Yet occasionally it is contended that to acknowledge judicial frailty is, in some sense, subversive, 'as if judges', as the illustrious American judge Benjamin Cardozo put it, 'must lose respect and confidence by the reminder that they are subject to human limitations'.

3.3.1. What is the judicial function?

The judicial enterprise lies at the heart of the legal process. In seeking to unravel the mysteries of how judges decide cases, we are engaged in a quest for the meaning of law itself: a theory of what constitutes law is, of necessity, presupposed in the act of judging, as well as any account of it. The orthodox, so-called 'positivist' model perceives law as a system of rules; where there is no applicable rule or there is a degree of ambiguity or uncertainty, the judge has a discretion to fi ll in the gaps in the law.

This view has been persuasively challenged by Ronald Dworkin, who denies that law consists exclusively of rules. In addition to rules (which 'are applicable in an all-or-nothing fashion'), there are non-rule standards: 'principles' and 'policies', which, unlike rules, have 'the dimension of weight or importance'. A 'principle' is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation …, but because it is a requirement of justice or fairness or some other dimension of morality'. A 'policy', on the other hand, is 'that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community'. When the judge can find no immediately applicable rule, or where no settled rule dictates a decision, the judge is called upon to weigh competing principles, which are no less part of the law for their not being rules. In such 'hard cases', since a judge is not expected to resort to his personal preference in arriving at a decision, he has, contrary to the positivist view, no real discretion. There is always one right answer, and it is the judge's task to find it (in 'hard cases') by weighing competing principles and determining the rights of the parties in the case before him.

This model of adjudication has an obvious appeal to democratic theory: judges do not legislate; they merely enforce those rights that have in the main already been enacted by a representative legislature. Indeed, Dwor kin's thesis springs from a concern to 'define and defend a liberal theory of law' and, in contradistinction to the positivists, to 'take rights seriously'. It is principally an argument from democracy; Dworkin's concern to eliminate strong judicial discretion is premised on the offensiveness of judges, who are generally unelected officials unanswerable to the electorate, wielding legislative or quasi-legislative power.

3.3.2. What is a court?

Courts err. Judges are not exempt from human frailty, and there is thus a need for their mistakes to be rectified. The obvious injustice of a wrongly convicted defendant is assuaged by granting him the right of appeal. Equally, the losing party in a civil case may have legitimate legal grounds upon which to argue that the trial court was mistaken in its interpretation of the law. Appealing to a higher court requires a hierarchy that distinguishes between courts 'of first instance' and appellate courts. Some trial courts operate with a judge and a jury: juries are responsible for making findings of fact under the direction of the judge, who decides the law. This combination constitutes the judgment of the court. In other trial courts, both fact and law are decided by the judge.

Appellate courts in common law jurisdictions review the decisions of trial courts or of lower appellate courts. Their task is generally restricted to considering questions of law: did the trial court, for example, apply and interpret the law correctly? Normally they do not hear evidence of factual issues, though should new evidence have emerged, an appeal court may evaluate it in order to determine whether the case should be remitted to a court of first instance to be retried.

Courts everywhere naturally follow procedures which, in some countries, have grown bulky and Byzantine. In criminal trials, these procedures are broadly differentiated on the basis of the role of the judge. The common law adopts an 'adversarial' system, while civil law countries adopt an 'inquisitorial' (or 'accusatorial') system. While this distinction is frequently exaggerated, the two approaches do differ in a fairly fundamental way. The common law judge acts as a disinterested umpire who rarely descends into the dust of the fray. Civil law judges, on the other hand, play a more active role in the trial.

The Continental jugged' instruction is directly involved in the decision whether to prosecute. The office originated in France, and exists in a number of other European countries, including Spain, Greece,

Switzerland, the Netherlands, Belgium, and Portugal. He is often portrayed as a cross between a prosecutor and a judge, but this is not strictly accurate, for he does not decide whether to lay a charge; that is a matter for the public prosecutor, from whose office he is completely independent. His principal duty is, as the title implies, to investigate the evidence both for and against the suspect, whom he has the power to interrogate. He will also question victims and witnesses. He may visit the crime scene and attend any post-mortem. In the course of his investigation, he may authorize detention, grant bail, and order searches and seizures of evidence.

It is important to note that his job is not to determine the merits of the case, but to examine the evidence in order to decide whether the suspect should be charged. If he rules in the affirmative, the case is transmitted to a trial court with which he has no connection, and which is not bound to follow his decision. His function is thus not wholly unlike common law committal proceedings or the American grand jury, both of which are designed to screen the evidence to establish whether it crosses the threshold of chargeability. Though supervised by a judge, a grand jury is presided over by a prosecutor. It has the power to subpoena witnesses in pursuit of evidence against the suspect.

Both major systems have their virtues and shortcomings. It is generally asserted – especially by common lawyers – that the common law attaches greater significance and value to the presumption of innocence by placing a heavier burden on the prosecution to prove its case 'beyond reasonable doubt'. This is doubtful. A defendant in a French court is afforded essentially the same rights and protections as one in Florida. All democratic states recognize the presumption of innocence; indeed, it is a requirement of Article 6 of the European Convention on Human Rights which applies to the 46 Council of Europe member states.

Criticism of the adversarial system is not confined to civil lawyers. The occasionally grotesque conduct of criminal trials, especially in America, is an embarrassment to common lawyers. The process sometimes descends into burlesque in which lawyers abuse the adversarial process and appear to lose sight of the purpose of the institution. This is particularly evident in high-profile, televised celebrity trials with overpaid lawyers histrionically playing to the cameras and the jury. Many civil lawyers are also astonished by the way in which the common law criminal justice system appears to benefit affluent defendants who are able to afford large legal teams. The trials of O. J. Simpson and Michael Jackson are only the most conspicuous recent examples.

Common law prosecutions are generally pursued by way of a charge or indictment against the defendant in the name of the government, the state,

or, in Britain, the Crown. This normally follows a preliminary hearing of some kind to determine whether the prosecution evidence is adequate. To discharge its burden of proof, the prosecution will call witnesses and present its evidence against the defendant. The defence may then argue that there is 'no case to answer'. If this fails (as it usually does), witnesses and evidence are presented by the defence. Witnesses are cross-examined by the opposing counsel, but the defendant himself has the 'right of silence': he need say nothing in his defence, but should he decide to give evidence, he is required to submit to cross-examination. In the United States this right is protected by the Fifth Amendment to the Constitution. Both sides then present their closing arguments. Where there is a jury, the judge gives them their instructions. Its members then deliberate in private. Some jurisdictions require the jury to return a unanimous verdict, in others a majority suffices.

3.3.3. Sentence

If convicted, the defendant is sentenced. This normally occurs after the court is apprized of his previous criminal record, if he has one, as well as other information about his character. Where he faces the prospect of a custodial sentence, reports may be submitted to the court concerning the defendant's background: his education, family, employment history, and so on. Psychological or medical reports may also be presented, along with evidence, including witnesses to testify to his unimpeachable integrity. This may be followed by a moving plea in mitigation of sentence in which his lawyer attempts to convince the court that the accused is a victim of the cruel vicissitudes and privations of life: poverty, manipulation by others, poor parenting, and other equally powerful forces that were beyond his control and are where the true responsibility for his crime lies. Every jurisdiction will, of course, have a different range of sentences available to a trial court. These may include imprisonment, a fi ne, a probation order, a community service order, or a suspended sentence of imprisonment (the term of imprisonment is suspended for, say, two years; if he commits an offence during this period, it may trigger the original sentence).

It is always open to the convicted defendant to appeal to a higher court, which does not hear the case again, but peruses the record of the proceedings in search of any mistakes that could justify a retrial. In certain circumstances, the prosecution may appeal a sentence that it considers too lenient.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. A _____ is 'a standard that is to be observed, not because it will advance or secure an economic, political, or social situation but because it is a requirement of justice or fairness or some other dimension of morality'.

2. _____ are a prerequisite of all legal systems.

3. Appellate courts in common law jurisdictions review the decisions of trial courts or of lower appellate courts _____ (True/False).

4. The criminal law judge acts as a disinterested umpire who rarely descends into the dust of the fray. Civil law judges, on the other hand, play a more active role in the trial _____ (True/False).

5. The judicial enterprise lies at the heart of the political process _____ (True/False).

6. The _____ is the archetypal legal institution.

7. All democratic states recognize the _____; indeed, it is a requirement of Article 6 of the European Convention on Human Rights which applies to the 46 Council of Europe member states.

8. If convicted, the defendant is _____.

3.4. The politics of the judiciary

Though the US Constitution nowhere explicitly confers on the Supreme Court the power of judicial review, it has, since the seminal case of Marbury v Madison in 1803, asserted the right to strike down laws that it regards as in conflict with the provisions of the Constitution. This, the most muscular form of judicial review, entails a court of appointed judges (albeit with Senate approval) exercising control over democratically enacted laws. In doing so, the Court has effected major social and political transformations by declaring as unconstitutional a wide range of legislation by states on matters as diverse as abortion, contraception, racial and sexual discrimination, freedom of religion, speech, and assembly.

The Supreme Court of India has, with broad public support, exhibited a high degree of judicial activism in a number of areas of social, political, and economic life, including marriage, the environment, human rights, agrarian reforms, and the law governing elections. The judges have frequently described the constitution as more than a political document; it is considered an abiding declaration of 'social philosophy'. And this philosophy is steeped in egalitarian values that represent a commitment to reform a society to correspond to the principles of social justice that inspired the framers of the constitution. One striking feature of the court's

jurisprudence is the concept of public interest litigation whereby the poor obtain access to the courts. The Court has held that legal redress for the deprived should not be encumbered by the restrictions of the adversarial system. Similarly, it has accorded a liberal interpretation of Article 21 of the Constitution which provides that 'No person shall be deprived of his life or personal liberty except according to procedure established by law.' This has engendered a substantial expansion in substantive individual rights.

Under its post-apartheid constitution, the South African Constitutional Court has the power to interpret the constitution and has handed down far-reaching decisions, including declaring capital punishment to be unlawful and upholding the right to housing, the state's constitutional duty to provide effective remedies against domestic violence, and the right to equality.

Strong judicial review is exemplified by the power of the United States Supreme Court, which may impose its judicial interpretations of the Constitution on other branches of government. Weaker forms of judicial review, on the other hand, permit the legislature and executive to reject such rulings, provided they do so publicly. They are increasingly incorporated in constitutions and legislation (such as Britain's Human Rights Act of 1998, the New Zealand Bill of Rights of 1990, and the Canadian Charter of Rights and Freedoms of 1992).

Critics of judicial review consider objectionable the power of judges over democratically elected legislators. But even if our legislative bodies were genuinely representative, the arguments in support of their being in a stronger position than courts to protect and preserve our rights are, at best, doubtful. Not only are the vicissitudes of government and party politics notoriously susceptible to sectional interest and compromise, to say nothing of corruption, but it is precisely because judges are not 'accountable' in this manner that they are often superior guardians of liberty. Moreover, the judicial temperament, training, experience, and the forensic forum in which rights-based arguments are tested and contested tend, I think, to tip the scales towards their adjudicative, rather than legislative, resolution. Indeed, it is hard to see how the latter would operate in practice. Since the rights in question are, by definition, in dispute, what role could elected parliamentarians play?

Unhappily, one's trust in law-makers is rarely vindicated. Though sometimes contentious, certain fundamental rights are best kept off-limits to legislators, or, at least, beyond the reach of normal party political machinations. Would the civil liberties of African Americans have been recognized sooner without the Supreme Court's historic Brown judgment, which held that separate educational facilities for black and white pupils

was 'inherently unequal'? Is the South African Constitutional Court more likely to defend human rights than its new, democratic parliament? Have the judgments of the European Court of Human Rights (which, sitting in Strasbourg, considers complaints concerning alleged violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms committed by States Parties) not enhanced civil liberties in, say, Britain? The Court has ruled against the British government on frequent occasions, requiring it to amend its domestic law on a variety of Convention-protected rights, including the right of privacy, the right against the use of corporal punishment, and the rights of mental health patients.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. Strong judicial review is exemplified by the power of the United States Supreme Court, which may impose its judicial interpretations of the Constitution on other branches of government _____ (True/False).

2. Critics of judicial review consider objectionable the power of judges over democratically elected legislators _____ (True/False).

3. Though the US Constitution nowhere explicitly confers on the Supreme Court the power of judicial review, it has, since the seminal case of Marbury v Madison in 1803, asserted the right to strike down laws that it regards as in conflict with the provisions of the Constitution _____ (True/False).

3.5. Trial by jury

In criminal proceedings, the notion of being tried by a jury of 'one's peers' is frequently regarded as an article of faith in the common law system. And certain civil law jurisdictions also employ juries to determine the guilt or innocence of the accused. In France, for example, the judges sit together with the jury, who are also involved in determining the sentence to be imposed.

Jurisdictions differ in respect of the availability of juries. Some restrict them to criminal, and not civil, trials (e.g., France); others prescribe juries for trials of serious crimes (e.g., Canada); while in some countries (e.g., England and Wales) they are used in criminal cases and limited to a few specific civil cases (e.g., defamation).

Most conspicuous are the jury trials in the United States, where juries are available for both civil and criminal proceedings. More than 60% of jury

trials are criminal trials, the rest are civil and other trials such as family court proceedings.

Among the much-vaunted virtues of the jury trial is the extent to which it operates as a curb on the power and influence of the judge. By involving (usually 12) ordinary citizens in the administration of justice, it is argued, the values of the community may be expressed. A group of randomly selected lay persons, it is claimed, is a more democratic arbiter of guilt than a judge, who is perceived, rightly or wrongly, as an agent of the government.

Critics of the jury, on the other hand, normally express unease about the fact that juries, unlike judges, are not required to give reasons for their decision, thereby opening the door to emotion and prejudice, especially when the race of the defendant may be a factor. Doubt is also voiced in respect of the ability of the average juror to comprehend complex scientific or other technical evidence. Complex commercial trials, for example, generate an enormous quantity of highly specialized information. This has led to controversial proposals in Britain and elsewhere to abolish juries in these trials.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. In criminal proceedings, the notion of being tried by a jury of 'one's peers' is frequently regarded as an article of faith in the _____ system.

2. Among the much-vaunted virtues of the jury trial is the extent to which it operates as a curb on the power and infl uence of the judge _____ (True/False).

3. By involving (usually 16) ordinary citizens in the administration of justice, it is argued, the values of the community may be expressed. _____ (True/False).

4. A group of randomly selected lay persons, it is claimed, is a more democratic arbiter of guilt than a judge, who is perceived, rightly or wrongly, as an agent of the government _____ (True/False).

3.6. Alternative dispute resolution

Dissatisfaction with court-centred resolution of disputes has long been sounded by critics who regard it as, amongst other things, unfair, unduly formal, and exclusive. In the United States, a movement championed alternative dispute resolution (ADR) 'under an umbrella of humanism, communitarianism, and social welfare concerns … objected to the depersonalization, objectification, and distance they associated with courtroom formality and its dependency on legal professionals'. They

advocated more user-friendly, less adversarial procedures. This resulted in legislation facilitating greater use of non-judicial arbitration, especially for the resolution of commercial disputes with an international dimension. The parties submit their dispute to one or more arbitrators by whose decision (called an 'award') they agree to be bound. Among the perceived advantages of ADR are its speed, lower cost, flexibility, and the provision of specialist arbitrators in disputes of a highly technical nature. But delays are not infrequent, and the cost may be enhanced by the requirement that the parties pay for the arbitrators. In some jurisdictions enforcement of arbitral awards is problematic.

Self-Assessment Exercises (SAEs) 4

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. Among the perceived advantages of ADR are its speed, lower cost, fl exibility, and the provision of specialist arbitrators in disputes of a highly technical nature. _____ (True/False).

2. In the United Kingdom, a movement championed alternative dispute resolution (ADR) 'under an umbrella of humanism, communitarianism, and social welfare concerns … objected to the depersonalization, objectifi cation, and distance they associated with courtroom formality and its dependency on legal professionals'_____ (True/False).

3. Dissatisfaction with court-centred resolution of disputes has long been sounded by critics who regard it as, amongst other things, unfair, unduly formal, and exclusive _____ (True/False).

3.7 Summary

In this unit, efforts have been made to examine the court system. it was noted that courts everywhere naturally follow procedures which, in some countries, have grown bulky and Byzantine. In sum, there is the common law which adopts an 'adversarial' system, and the civil law countries adopt an 'inquisitorial' (or 'accusatorial') system. Strong judicial review is exemplified by the power of the United States Supreme Court, which may impose its judicial interpretations of the Constitution on other branches of government. in recent years there has been resort to alternative dispute resolution (ADR) which is seen as more user-friendly, less adversarial procedures.

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3.9 Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *Principle*
2. *Courts*
3. *True*
4. *False*
5. *False*
6. *Judge*
7. *presumption of innocence*
8. *sentenced*

Answers to SAEs 2

1. *True*
2. *True*
3. *True*

Answers to SAEs 3

1. *common law*
2. *True*
3. *False*
4. *True*

Answers to SAEs 4

1. *True*
2. *False*
3. *True*

UNIT 4 LAWYERS

Unit Structure

4.1 Introduction
4.2 Learning Outcomes
4.3 Lawyers
4.3.1. Common lawyers
4.3.2. Civil lawyers
4.3.3. Regulation of the profession
4.3.4. Legal aid
4.4 Summary
4.5 Further Reading/Reference
4.6 Possible Answer to Self-Assessment Exercises (SAEs)

4.1. Introduction

Lawyers are an indispensable – if unloved – feature of every developed legal system. They are vilified, mocked, and disparaged. The humour of a multitude of lawyer jokes springs from their assault on lawyers' venality, dishonesty, and insensitivity. One jibe asks, 'How can you tell when a lawyer is lying?' The answer: 'His lips are moving'. However despite the innuendos lawyers still remain an indispensable part of the judicial system.

4.2. Learning Outcomes

At the end of this unit, you should be able to:

- State the importance of lawyers to the judiciary
- Distinguish the various kinds of lawyers

4.3. Lawyers

It seems futile to attempt to explain the antipathy which rests on a combination of legitimate discontent with and misunderstanding of the legal profession in most countries. It is certainly true that, along with estate agents, lawyers attract little affection. An independent bar is, however, a vital component of the rule of law; without accessible lawyers to provide citizens with competent representation, the ideals of the legal system ring hollow. And this is acknowledged in most jurisdictions by the provision of legal aid in criminal cases. So, for example, legal aid is a right recognized by Article 6 of the European Convention on Human Rights. It requires that defendants be provided with counsel and, if they are unable to afford their own lawyer, one is made available without charge.

4.3.1. Common lawyers

To many, the English legal profession, adaptations of which exist in common law jurisdictions of the former British Commonwealth, appears bizarre – grotesquely anachronistic with its wigs, gowns, and stilted forms of address. Though some of these quaint, archaic features have been eradicated in a few common law countries, they have shown a remarkable tenacity, especially in England. Polls of practitioners and public have proved inconclusive. Wigs on the heads of many barristers and judges seem firmly fixed for some time yet. The origins of the common law profession are, of course, steeped in English history – and logic is thus not necessarily among its justifications. It is divided between two principal species of lawyer: barristers and solicitors. Barristers (often called 'counsel') constitute a small minority of the legal profession (roughly 10% in most jurisdictions) and, rightly or wrongly, are regarded – especially by themselves – as the superior branch of the profession. Recent years have witnessed a number of fairly sweeping changes, many of which have diminished the privileges of barristers (or 'the Bar'). These reforms have largely been animated by political unease concerning the soaring costs of legal services as a result of the restrictive practices of the Bar.

Barristers have minimal direct contact with their 'lay clients'. They are 'briefed' by solicitors, and it is normally a requirement that during meetings (or 'conferences') with clients the solicitor must be present. An exception is, however, made for certain professions, including accountants and surveyors, who may confer with a barrister without the presence of a solicitor. In most cases, however, dealings must be carried out through the solicitor who is responsible for paying the barrister's fees. English barristers are 'called' to the Bar by one of the four Inns of Court, ancient institutions that since the 16th century have governed entry to this branch of the profession. Unlike the overwhelming majority of solicitors, barristers have full rights of audience, allowing them to appear before any court. Generally, solicitors have rights of audience only before the lower courts, though in recent years the position has changed and some solicitors, certified as 'solicitor advocates', may represent their clients as advocates in the higher courts. The traditional separation is gradually breaking down. Nevertheless, two major distinctions between the two categories of lawyer remain. First, barristers are invariably instructed by solicitors, rather than directly by the client, whereas clients go directly to solicitors. Second, unlike solicitors, barristers operate as sole practitioners, and are prohibited from forming partnerships. Instead, barristers generally form sets of chambers in which resources and expenses are shared. But it is now possible for barristers to be employed by firms of solicitors, companies, or other institutions as in-house lawyers.

4.3.2. Civil lawyers

Lawyers in the civil law world differ fundamentally from their common law colleagues. Indeed, the very concept of a legal profession in the major civil law jurisdictions of Europe, Latin America, Japan, and Scandinavia is problematic. In the words of a leading authority on the subject, 'The common law folk concept of "lawyer" has no counterpart in European languages …' Civil law jurisdictions recognize two categories of legal professionals: the jurist and the private practitioner. The former comprises law graduates, while the latter, unlike the position in common law countries, does not represent the nucleus of the legal profession. Instead, 'other subsets of law graduates take precedence – historically, numerically, and ideologically. These include the magistracy (judges and prosecutors) … civil servants, law professors, and lawyers employed in commerce and industry.'

Students in civil law countries typically decide on their future after graduation. And, as mobility within the profession is limited, in many jurisdictions this choice is likely to be conclusive. They may choose to pursue the career of a judge, a public prosecutor, a government lawyer, an advocate, or notary. Private practice is therefore generally divided between advocates and notaries. The former has direct contact with clients, and represents them in court. After graduating from law school, advocates normally serve an apprenticeship with experienced lawyers for a number of years, and then tend to practise as sole practitioners or in small fi rms.

To become a notary usually requires passing a state examination. Notaries draft legal documents such as wills and contracts, authenticate such documents in legal proceedings, and maintain records on, or provide copies of, authenticated documents. Government lawyers serve either as public prosecutors or as lawyers for government agencies. The public prosecutor performs a twin function. In criminal cases, he prepares the government's case; while in certain civil cases he represents the public interest. In most civil law jurisdictions, the state plays a considerably more significant role in the training, entry, and employment of lawyers than is the case in the common law world. Unlike the traditional position in common law countries where lawyers qualify by serving an apprenticeship, the state controls the number of jurists it will employ, and the universities mediate entry into private practice.

There are important differences between the two systems in respect of the organization of legal education. Broadly speaking, in most common law jurisdictions (with the conspicuous exception of England – and Hong Kong), law is a postgraduate degree or, as in Australia, New Zealand, and Canada, may be combined with an undergraduate degree in another

discipline. In the civil law world, on the other hand, law is an undergraduate course. While the common law curriculum is strongly influenced by the legal profession, the state in civil law jurisdictions exercises a dominant function in this respect. The legal profession in most common law countries administers entry examinations, whereas, given the role of universities as gatekeepers, further examinations are generally redundant, and a law degree suffices.

The function of gate keeping in common law countries tends to be discharged by apprenticeship with a private practitioner. So, for example, an aspiring barrister must pass the Bar examinations in order to be called to the Bar. In order to practise at the Bar, he is required to serve two six-month pupillages in chambers, attending conferences with solicitors conducted by his pupil master (a more senior barrister), and sitting in court, assisting in preparing cases, drafting opinions, and so on. Pupillage is usually unpaid, although they may now be funded so as to guarantee the pupil's earnings up to a fixed level. During the second six months of pupillage, the barrister may engage in limited practice and be instructed in his own right. With the exception of barristers, lawyers in private practice operate as members of a firm whose size may vary from a single lawyer to mega-firms of hundreds of lawyers.

4.3.3. Regulation of the profession

Bar Associations, Bar Councils, and Law Societies are among the numerous organizations that supervise the admission, licensing, education, and regulation of common lawyers. The civil law prefers the term 'advocates' (which more accurately describes their principal function, and their counterpart organizations are dubbed Chambers, Orders, Faculties, or Colleges of Advocates). Though their designations differ, they generally share a concern to limit the number of lawyers in practice, and defend their monopoly.

In certain jurisdictions (particularly small ones like Belgium and New Zealand), lawyers are admitted and regulated at the national level. Federal states (such as the United States, Canada, Australia, and Germany) inevitably exercise provincial or state regulation. Italian lawyers are admitted at the regional level.

While regulation in some countries is undertaken by the judiciary and, under its aegis, an independent legal profession, lawyers in other jurisdictions, especially in the civil law world, are subject to government control in the shape of the Ministry of Justice.

4.3.4. Legal aid

Many societies grant legal aid to persons incapable of paying for a lawyer. The right of access to justice rings hollow without the provision of free legal advice and assistance to the poor, especially in criminal cases. Even in respect of civil litigation, however, elementary norms of fairness would be undermined where an impecunious defendant is sued by an affl uent plaintiff or the state. Any semblance of equality before the law is thereby shattered. The cost involved (to both the state and the individual seeking legal aid) generally results in preference being given to assisting those charged with criminal offences, though some jurisdictions supply free legal aid in civil cases. Certain systems of legal aid provide lawyers who are employed exclusively to act for eligible, impoverished clients. Others appoint private practitioners to represent such individuals.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 6 minutes.

1. _____ draft legal documents such as wills and contracts, authenticate such documents in legal proceedings, and maintain records on, or provide copies of, authenticated documents.

2. _____ Barristers are 'called' to the Bar by one of the four Inns of Court, ancient institutions that since the 16th century have governed entry to this branch of the profession.

3. Lawyers are an indispensable – if unloved – feature of a few developed legal system _____ (True/False).

4. A dependent bar is, a vital component of the rule of law _____ (True/False).

5. To many, the English legal profession, adaptations of which exist in common law jurisdictions of the former British UN, appears bizarre – grotesquely anachronistic with its wigs, gowns, and stilted forms of address_____ (True/False).

6. _____, _____ and _____ are among the numerous organizations that supervise the admission, licensing, education, and regulation of common lawyers.

4.4. Summary

In this unit, we noted that the law profession is broken down into civil law lawyers and common law lawyers. The latter steeped in English traditions is divided between two principal species of lawyer: barristers and solicitors. Barristers have minimal direct contact with their 'lay clients'. They are 'briefed' by solicitors, and it is normally a requirement that

during meetings (or 'conferences') with clients the solicitor must be present. The former recognize two categories of legal professionals: the jurist and the private practitioner. The former comprises law graduates, while the latter, unlike the position in common law countries, does not represent the nucleus of the legal profession. Bar Associations, Bar Councils, and Law Societies are among the numerous organizations that supervise the admission, licensing, education, and regulation of common lawyers. The civil law prefers the term 'advocates' (which more accurately describes their principal function, and their counterpart organizations are dubbed Chambers, Orders, Faculties, or Colleges of Advocates).

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4.6. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. *Notaries*
2. *English*
3. *False*
4. *False*
5. *False*
6. *Bar Associations, Bar Councils, and Law Societies*

MODULE 4 POWER AND SOVEREIGNTY

In this Module, the essential nature of the concepts of power and sovereignty will be examined. In this wise there will be philosophical inquiry into these concepts especially in the face of their contested nature.

Unit 1 What is power?
Unit 2 Types of power
Unit 3 What is Sovereignty of the state?
Unit 4 Legal aspects of sovereignty and philosophical definition of sovereignty

UNIT 1 WHAT IS POWER?

Unit Structure

1.1 Introduction
1.2 Learning Outcomes
1.3 What is power?
1.4 Summary
1.5 References/Further Readings/Web Sources
1.6 Possible Answers to Self-Assessment Exercises (SAEs)

1.1. Introduction

Power is everywhere, in every social interaction between individuals, groups, and global actors, and is a critical element of study in many things encompassed by sociology. Have you ever thought about that? Where does power affect your life chances and choices, or your everyday life? Power is one of the most important concepts in political science. In fact, some political scientists see it as a defining element of the discipline. Power affects how resources are distributed, how countries interact, whether peace or war prevails, and how groups and individuals pursue their interests; that is, power affects the myriad of topics studied by political scientists. Ironically, however, power is one of the most difficult concepts to define. What is power? At its most fundamental level, power is an ability to influence an event or outcome that allows the agent to achieve an objective and/or to influence another agent to act in a manner in which the second agent, on its own, would not choose to act. In terms of the first meaning, an interest group, for example, could be said to have power if it succeeded in reaching its financial goals. The sections below will highlight the connections between society, politics, and power.

1.2. Learning Outcomes

At the end of this unit, you should be able to:

- Explain the concept of power.
- describe the differences between power and other forms of social control
- Identify the reason why power is central to political analysis.

1.3. What is power?

One country can be viewed as exercising power over another if it can influence the second country to act in a manner favoured by the first country but not favoured by the second country. These meanings become clearer when you recognize that the word power stems from the older Latin term potere, defined as an ability to affect something else. Thus, for example, a person was said to possess potere if that person had some attribute allowing him or her to cause an effect on someone else. The word power, with its present spelling, has been in use since the fourteenth century. In our two examples, one agent (an interest group or a country) has acted to bring about an effect; thus, both have wielded potere/power, with the interest group affecting its own financial well-being and the country affecting a second country. A closer examination of power reveals that its exercise by an agent involves volition (will or choice). In terms of power as the achievement of an objective, clearly the objective attained must be one that the agent wills or desires; otherwise, the agent is not said to possess power. If, for example, an interest group obtains a benefit but has not sought out this benefit, we would not attribute attaining benefit to the interest group's power. We might attribute it to luck, chance, randomness, charity, or some other fluke. Volition is also central to the second meaning of power, as influence over another agent. For instance, we would not view an interest group as exercising power over a politician if the interest group does not compel the politician to act contrary to the politician's own volition or desire. Similarly, if one country ordered another country to perform an act the second country wanted to do anyway, this would not represent an act of power because the first country has not actually influenced the second country. Clearly, will, desire, and choice enter into the exercise of power when it is exercised by an agent or over an agent.

Power can either be held in reserve or deployed. That is, it can be latent (inactive) or manifest (active). You can imagine how the possession of latent power by one agent can be highly effective in producing changes in a second agent. In such cases, the mere possibility that the first agent will activate power can be feared by the second agent and elicit changes in the second agent's actions. Indeed, this is the idea behind military deterrence: A country's stockpile of weapons may be enough to preclude aggression by its enemies, who know that the weapons can be changed

from a latent power to a manifest power at any time. Political scientists have often tried to sort out the many different forms power can assume. This is useful in allowing us to analyze the implications of using one type of power rather than another. However, in actual political relationships one type of power is rarely found in isolation from other types. In practice, power generally possesses a blended quality, with one type of power blending into another.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. Marx, writing in the mid- to late 1800s, famously analyzed the ways in which power in society was historically restructured based on _____ forces and the relationships between individuals and what he would describe as upper classes.

A. Economic
B. Social
C. Military
D. Market

2. _____ is a form of power that emerges from the acquiescence of individuals and groups based on a sense of legitimacy and obedience or duty.

A. Authority
B. Obedience
C. Interest
D. Coercion

3. The modern democratic state uses _____ in other ways to preserve social order.

A. diplomatic immunity
B. coercion
C. diplomatic isolation
D. diplomatic waiver

4. For _____, power was rooted in formalized social systems such as organizations or bureaucracies, as well as in social institutions such as religion and law.

A. Max Weber
B. Karl Marx
C. Bernard Crick
D. Marx Wilson

5. Political sociologists have revealed the forms and nuances of the abstract notion of power by creating _____ of power.

A. Typologies
B. Liberty
C. Emancipation
D. License
E.

1.4. Summary

This unit examines the concept of power. Power was defined as the ability to affect something else. Thus it was opined that as the achievement of an objective, the objective attained must be one that the agent wills or desires; otherwise, the agent is not said to possess power. Power can either be held in reserve or deployed. That is, it can be latent (inactive) or manifest (active). In practice, power generally possesses a blended quality, with one type of power blending into another.

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1.6. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 2

1. *A- Economic.*
2. *A- Authority.*
3. *B- coercion*
4. *A-Max Weber*
5. *A- typologies*

UNIT 2 TYPES OF POWER?

Unit Structure

2.1. Introduction
2.2. Learning Outcomes
2.3. Types of power
    2.3.1. Metaphors and paradox: sociological tools in the study of power
2.4. Summary
2.5. References/Further Readings/Web Sources
2.6. Possible Answers to Self-Assessment Exercises (SAEs)

2.1. Introduction

If we begin with the idea that politics is "the generalized process by which the struggle over power in society is resolved" (Braungart 1981: 2), at the outset, we can understand that power is at the heart of the work of political sociologists. The goal is to explain the connections between social interactions, social structures, and social processes altered by struggle and resolution. We must define what we mean by power. Defining power is not as straightforward as one might think. Certainly, we all have experienced power in some way, perhaps the influence of a friend who cajoles and pushes us to go to a political meeting, or the force of a mugger who confronts us, taking an iPod at gunpoint. Power is encountered every day and everywhere.

2.2. Learning Outcomes

At the end of this unit, you should be able to:

- Explain the concept of power.
- describe the differences between power and other forms of social control
- Identify the reason why power is central to political analysis.

2.3. Types of power

The works of Karl Marx and Max Weber are foundational to much of the work in political sociology. Marx, writing in the mid- to late 1800s, famously analyzed the ways in which power in society was historically restructured based on economic forces and the relationships between individuals and what he would describe as upper classes. Much of his analysis of power was based on his observations of how the Industrial Revolution was beginning to change social order throughout Europe. Marx established that economic structures like corporations, owners of

financial capital such as banks and financial institutions, and more immediately, the boss represent societal sources of power. The use of wages to influence worker performance or attendance is a significant creation of capitalist society. According to Marx, the relationship between worker, wage, and class interests was the source of alienating individuals not only from pursuing non-work-related self-interests, but also from each other, and from their own labour and the product of their labour. For Marx, power has an economic context rooted in the relationships between and among social classes.

Weber picks up this theme and offers one of the first formal political sociological analyses of power. Max Weber, who also wrote on the massive historical and social changes brought on by the Industrial Revolution, expands the study of power in his work in the early 1900s. Unlike Marx, Weber located power in a variety of social spaces including both economic and noneconomic contexts. For Weber, power was rooted in formalized social systems such as organizations or bureaucracies, as well as in social institutions such as religion and law. Weber differed from Marx in that he argued that power was not simply just about economic relationships, but also a function of social interests, patterns of social organization, and culture. These early approaches to the study of power offer one of the first debates in political sociology about the nature of the society–politics relationship. Weber developed many of the early formal statements about power and politics, defining power as "the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action" (1947: 152). Since Weber's study of power in the early 1900s, social scientists have focused on what is meant by the distribution of power in society, as well as identifying what kinds of resources make some individuals and groups powerful or powerless. Others have extended the notion that politics is inherent in most if not all aspects of social action and expression in human interactions.

Political sociologists have revealed the forms and nuances of the abstract notion of power by creating typologies of power. These various typologies highlight the nature of power in situations or the characteristics of power, as they play a role in the construction of capacity, exchange of resources, and distribution of power in society. These various typologies and conceptualizations of power share the notion that society shapes and is shaped by individuals, groups, organizations, governments, and other societies in a broadly interactive process. The classic and contemporary typologies point to at least three types of power of interest to the study of society and politics:

i. Coercive and dominant power
ii. Authority and legitimate power
iii. Privileged and interdependent power.

Weber launched the sociological analysis by claiming that power existed in two forms: coercion and authority. We turn our focus to three types of power that have been central to the work of political sociology.

i. Coercive and dominant power

When we think of power, we most likely start with metaphors or pictures of coercion and dominance. For instance, coercive power in the form of physical force is clearly exercised as one nation-state invades and conquers another. The resources used to coerce may include brute force, military prowess, and the strength of large armies. Perhaps this type of power is the raw or most pure form. Dominance also reflects the use of resources with consequences for others in society. In this regard, Parenti (1978) reminds us that "To win a struggle is one thing, but to have your way by impressing others that struggle would be futile, that is power at its most economical and most secure" (78). Coercion and dominance share a central tenet of command of resources with immediate and future submission by subjects to this form of power.

War and terrorism have identifiable and unique dynamics as a result of the brute use of dominance and coercion. Hannah Arendt, in The Origins of Totalitarianism (1958), studied the social and cultural influences that gave rise to Nazi Germany. The influence of economic hardship, fear of out groups, control of political party apparatus, use of propaganda and creation of a military state are common to the creation of such regimes. Although totalitarianism as a form of political rule seems to be on the wane, the documentation of coercive forms of power is important to understanding the nature of power in ruling systems.

Since the Al-Qaeda attacks on New York City and the Pentagon in 2001, considerable attention has been given to finding what causes terrorism, especially as a tool designed to advance political demands and fear. The nature of modernday terrorism has ushered in yet another field of study in which questions of coercion and domination through violent excursions or political disruption must be better understood. The use of coercion for political gain or outcome is an important aspect of power not limited to studies of conquering figures in history. The modern democratic state uses coercion in other ways to preserve social order. Marger (1987: 12) equated coercion with force, which is based on "the threat or application of punishment or the inducement of rewards to elicit compliance." Periodically, we are reminded that the police power which we extend to specific agencies of the state is inherently coercive. Police power to control rioting, protests, or dissent is not uncommon, as seen during the civil rights protests of the 1960s or

more recently during the August 2014 riots in Ferguson, Missouri. The coercive nature of police work in a free society can test the paradox between freedom to act and seek changes in the nature of rule through protest while also attempting to maintain a semblance of social order through enforcing the law.

ii. Authority and legitimate power

Authority is a form of power that emerges from the acquiescence of individuals and groups based on a sense of legitimacy and obedience or duty. Individuals and groups within society create order by recognizing the power of law, tradition, or custom. They behave based on the belief that the power of the state protects members of society while preserving community interests. Consider the legitimate power of a police officer in the United States. Police act with authority, which is distinguished in the general population by a uniform and badge. The authority is strong as police officers are one of few agents in the United States who can—with cause—stop free individuals, ask questions, and apprehend. The extent of police power is best symbolized by the fact that police officers carry weapons which can be used to force compliance with the law. The legitimacy of this power is found in the idea of representative lawmaking and the duty to obey as a member of the community. Weber wrote extensively about the nature of authority in an industrial society. In particular, he focused on the authority that would come from individuals and offices in large-scale organizations created to structure interactions based on law and procedures. He identified three types of authority: Charismatic authority emanates from the personality or character of leaders. Weber suggested that charismatic power and influence flow from an individual's heroic status or other achievements. Thus, the people follow swayed by the conviction, style, and projection of the leader. Martin Luther King, Jr was a charismatic leader, and his influence in a time of significant social unrest was important to bringing about changes in civil rights law in the United States. Even though he held no formal political office, he retained national influence in efforts related to social justice for racial-ethnic minorities as well as the poor.

Traditional authority gains its legitimacy through custom and tradition. There is a certain sacred dimension to these traditions or appeals to customs that results in acquiescence to authority. Monarchies are agood example of traditional forms of governance in some societies. The Queen of England, for example, retains authority through appeals to tradition and custom, typically enacted through symbolic and ritualistic dramas that reinforce her authority. Similarly, the Pope, as the leader of the Roman Catholic Church, retains power through appeals to custom and tradition,

holding influence over Church policy. Rational-legal authority is grounded in rules by which people are governed. Legitimacy stems from an appeal to law, commands, and decision-making that is regarded as valid for all in the population. A good example is the constitutional order of the United States. Recall the election in the year 2000, when George W. Bush won the electoral vote, but Al Gore won the popular vote. The outcome of the election was contested in Florida, and legal claims about voting were made by both sides. Eventually, the U.S. Supreme Court made a ruling that resulted in the election of Bush to the presidency. The legitimacy of law and rational-legal authority was seen in this acceptance of the outcome. In societies where there was no rational-legal authority to make such decisions, riots may have broken out, or revolution. Life went on in the United States—order was maintained as a result of the legitimate exercise of power by constitutional authorities. the power of the democratic state is defined by its legitimacy to rule in contrast to authoritarian states. Weber's work marks an important beginning in the study of authority and political rule. Studying this type of power forces us to ask questions about the state, law in everyday life, political socialization, as well as attempts to shape coalitions to legitimize state rule.

iii. Interdependent power

Power can operate in more subtle ways, resulting in dramatic changes in social interactions and the distribution of power in society. Certainly, the typologies that focus on coercion or authority share this view, but a third body of research in political sociology encourages us to dig deeper into power relationships themselves. In many ways, political sociology advanced beyond the simplicity of thinking of power as coercion or authority. As research on power evolved, especially in the 1960s, power came to be understood as quite complex. The idea of interdependent power depicts power relationships between individuals and social groups as reciprocal. That is, power is a two-way street where actors, even though they may think they have no influence, actually do, given the way in which the social system is set up. One insight from this approach explores power that quietly wraps around systems of inequality that constructs differences in who has what, when, and how. Piven (2008) and Piven and Cloward (2005) have brought attention to something they call "interdependent power" and urge political sociologists to consider more fully the role of rule breakers in the study of reciprocal relationships. Their analysis highlighted how most of political sociology has focused on "rulemaking," which emphasizes the role of lawmakers or administrative bodies that create laws or policies to direct social

interactions. Sometimes these rules are challenged. When societies experience protest and challenges to the distribution of power, political authority can be undermined. Challenges by rule breakers may not be coercive but rather, seek to "subvert the dominant paradigm." In other words, the power exercised in certain social contexts is intended to be disruptive to bring attention to claims.

The model of power that Piven and Cloward describe takes current political sociology about power in an alternate direction. Most studies begin with the assumption that power is about the distribution of resources among individuals, groups, and social structures. Piven and Cloward believe that power is more complex than the mere distribution of resources (e.g. wealth, knowledge or skills, property). Their notion of power is based on the idea that power is meaningful in social connections, or "interdependencies." In other words, power derives its significance when individuals exchange resources of many kinds in these interdependencies. Power is in the connections themselves. Complex organizations are stages for seeing power as a function of social interdependencies. For example, a university in many ways is a small social system where each part of the system (e.g. the food service staff, faculty, financial aid office, campus security) contributes to the order of the larger system called a university. Traditionally, models of power would have focused on the distribution of resources to understand who is powerful. For example, students pay tuition which brings in financial resources that help pay the salaries of the vice presidents. The administrators, as the university elite (much like society), hold more wealth in comparison to the food service staff or hall janitors. If the food service staff become angry abouttheir pay, they can go on strike or negotiate for a wage increase. Or, they could walk off the job and most likely be replaced with new employees who might, in fact, be paid a lower wage as they come into entry-level positions. Thus, the distribution of resources would change again. But, what if the entire faculty at a university stopped teaching? Given the shortage of professors in some fields, would the university be able to offer majors or continue to offer degrees? Piven and Cloward would point to this type of leverage in an interdependent system as an example of power not extensively considered in political sociology: People have potential power, the ability to make others do what they want, when those others depend on them for the contributions they make to the interdependent relations that are social life. Just as the effort to exert power is a feature of all social interactions, so is the capacity to exert power at least potentially inherent in all social interaction. And because cooperative and interdependent social relations are by definition reciprocal, so is

the potential for the exercise of power. (2005: 39) Their argument is that protest or challenges to the core purpose of an interdependent relationship (e.g. faculty teaching courses is a core purpose of the interdependencies that constitute the organization we call a university) are where power can be wielded in the social structure. If all middle-class Americans agreed to not pay income taxes for one year as a protest against unethical behaviours in Congress, would they wield power? Piven and Cloward suggest considering these interdependent social connections. Political sociologists can study power under this model by identifying leverage points in social embeddedness, connections that build trust, strengthen relationships, or achieve goals. The focus shifts from who controls the resources in society, who has the most education, and what groups compete for votes, to what power comes from the connections themselves, and what systems collapse or are changed if the connections are severed.

iv. Networked power

Another way of thinking about power is found in the ambitious project outlined by Michael Mann (1986). His historically based study finds that "Societies are constituted of multiple overlapping and intersecting socio-spatial networks of power" (Mann 1986: 1). Rather than seeing power as organized in a linear, hierarchical, or static way, he suggests that power is quite fluid and dynamic, evolving as relationships within social networks constructed at many levels of society—from the localized to the global— change through time: Conceiving of societies as multiple overlapping and intersecting power networks gives us the best available entry into the issue of what is ultimately "primary" or "determining" in societies. A general account of societies, their structure, and their history can best be given in terms of the interrelations of what can be referred as the four sources of social power: ideological, economic, military, and political (IEMP) relationships. These are (1) overlapping networks of social interaction, not dimensions, levels, or factors of a single social totality. (2) They are also organizations, institutional means of attaining human goals. Their primacy comes not from the strength of human desires for ideological, economic, military, or political satisfaction but from the particular organizational means each possesses to attain human goals, whatever these may be. (Mann 1986: 2)The metaphor of networked power focuses on human relationships that at one level include what many would describe as institutional, structural patterns, namely organizations. In other words, Mann teaches that power must be seen as the work of collectives driven by "the ability to pursue and attain goals through the mastery of one's environment" (1986: 2).

Organizations and networks then navigate cooperation, conflict, exchange, and other interactions in sphere he identifies as economic, military networks, as well as networks of the state, parties, and interest groups. Culture, including the ideological, includes the ideas and values that drive the pursuit of particular goals within the society.

Self-Assessment Exercises (SAEs) 2

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

6. Marx, writing in the mid- to late 1800s, famously analyzed the ways in which power in society was historically restructured based on _____ forces and the relationships between individuals and what he would describe as upper classes.

E. Economic
F. Social
G. Military
H. Market

7. _____ is a form of power that emerges from the acquiescence of individuals and groups based on a sense of legitimacy and obedience or duty.

E. Authority
F. Obedience
G. Interest
H. Coercion

8. The modern democratic state uses _____ in other ways to preserve social order.

E. diplomatic immunity
F. coercion
G. diplomatic isolation
H. diplomatic waiver

9. For _____, power was rooted in formalized social systems such as organizations or bureaucracies, as well as in social institutions such as religion and law.

E. Max Weber
F. Karl Marx
G. Bernard Crick
H. Marx Wilson

10. Political sociologists have revealed the forms and nuances of the abstract notion of power by creating _____ of power.

F. Typologies
G. Liberty
H. Emancipation
I. License

2.3.1. Metaphors and paradox: sociological tools in the study of power

Students studying power, politics, and society will find that insights developed thus far come from applications of the sociological imagination. These insights are typically conveyed through the use of metaphors and paradoxes. These are useful tools in sociological thinking. Metaphors are analytical devices commonly used to depict ideas or concepts, especially when we as sociologists are "trying to make sense of mysteries" (Rigney 2001: 3). Rigney finds that sociologists frequently use metaphors, such as models or pictures, to illuminate what are otherwise abstract ideas about social life. Models or pictures are useful in describing how social forces like power influence interactions. For example, recall that functionalists typically describe societies as social systems. A metaphor for a social system might be a car. The car (society) is made up of certain components like the transmission, engine, or electronics (subsystems) that all operate together to make the car (society) move forward. Each subsystem, in turn, has its various parts that are required in order for the whole (car, or society) to move forward. If we think of a society as made up of various components all working together, we create a metaphor for describing the nature of social dynamics. Metaphors have been constructed to explain in detail the nature of power in society. According to Hindess (1996), power has historically been described as a type of capacity for either action or obligation. He argues that action and obligation are central to the role power plays in political processes. The metaphor he uses to understand power as capacity comes from the science of physics. When a series of physical events are put into motion in nature, such as a bowling ball being hurled down the hallway of a college dorm, there will be a number of reactions from this initial force (e.g. the ball hits the resident assistant's door at the end of the hallway and breaks the door, a roommate stumbles into the hallway and his toe is run over by the rolling ball causing great pain, etc.). Using this metaphor, we are prompted to ask what started the ball rolling. The capacity to force a bowling ball through a hallway represents an ability, skill, or wherewithal to set up a series of actions. It also suggests that someone had an interest or desire to roll the ball down the hallway, and command of the resources to get a bowling ball, pick it up, and use it as a way to act on these interests. The metaphor here describes power as capacity to achieve some outcome or act on a particular interest. Capacity for action is distinct from capacity for obligation and duty. Hindess argues that here is where we find the essence of politics and power moving from the individual to the societal level. Obligation is hidden at a different layer of social interaction, and power is not always action on interests or desires, but rather, power is acquiescence or duty.

In democratic societies, social order is achieved through duty to the law. Law is created by the sovereign or in many cases by a legislature or parliament that, in principle, represents the citizenry and their interests. When citizens follow the speed limit, or pay their taxes, or immunize their children before school begins each fall, they may grumble, but for the most part, they oblige the state through compliance. A useful metaphor for describing this second distinction is that of the parent. The state is a parent—it creates, monitors, and enforces rules, including punishing violators to keep things in order. The power of the state or parent derives from the fact that we come to understand the state as legitimate authority; we give it power by agreeing to obey. This dimension of power is perhaps more subtle but nonetheless effective in describing the concept of legitimate power in shaping social patterns.

Another analytical tool used in sociology is paradox (Crow 2005). For political sociology in particular, we find that life in a democratic society is sometimes characterized by contradiction or patterns of power that are contrary to expectations, public opinion, or values about democratic life. Political sociologists grapple with a number of paradoxes about the distribution of power in order to bring attention to important research questions. This analytical tool, much like metaphor, is about explaining contradictions. Consider, for example, a paradox in American political values: are all Americans politically equal as suggested by the Constitution of the United States, or the Declaration of Independence? Voting is a form of power in a democratic system. But are all votes truly equal? Only within the last century have women become more equal as a result of being granted the right to vote in 1920. Women did not have this power in the political system prior to the 19th Amendment to the Constitution. Or consider the argument made by some that the Iowa caucuses give Iowans more influence in the process of selecting a presidential candidate than citizens in states who vote later in the presidential nominating process. Much of this argument rests on the belief that the winner in Iowa gets more media attention, and thus can ride a bandwagon effect (the media call it a “bump” from winning early nomination primaries), resulting in more positive polls and campaign donations. Paradoxically, this means all votes are not equal in the sociological sense, suggesting that early-voting states may have more influence than later-voting states. Identifying paradoxes in social systems, social outcomes, and social interactions is an important analytical goal of political sociology.

What insights are gained from the exploration of metaphors, paradoxes, and the application of the sociological imagination to the study of power and politics? By focusing on the disagreements, mysteries, and contradictions about power in social life, we develop keen insights into the nature of politics in society. Moreover, political sociology makes use

of sociological tools to map out its focus for research. Or, as Lewis Coser (1966) concluded, these tools when used in sociological analysis help to build that branch of sociology which is concerned with the social causes and consequences of given power distributions within or between societies, and with the social and political conflicts that lead to changes in the allocation of power. (1) Many of our perspectives in political sociology are constructed around two elements: power and order/conflict. This definition of political sociology reflects the "state" of sociology in the late 1950s and 1960s. Since then, the field has examined what Coser described as the foundational questions related to (1) attention to the state and institutions, (2) organization of power, (3) competition and order among groups, and (4) development of political associations. The sociological approach stands in contrast to the work of political science, which typically focuses on the nature of the state and its various manifestations. Political sociology casts its analytical net more broadly to capture the nature of the many power-based relationships between social structures, culture, and individuals. And, as we will learn, political sociology today builds on these foundational questions in many ways.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. The word power, with its present spelling, has been in use since the _____ century.

A. Fourteenth
B. Sixth
C. Fifteenth
D. Sixteenth

2. _____ is created by the sovereign or in many cases by a legislature or parliament that, in principle, represents the citizenry and their interests.

A. Power
B. Popularity
C. Obligation
D. Law

3. The power of the state or parent derives from the fact that we come to understand the state as _____ authority.

A. Legitimate
B. Rational
C. Legal
D. Right

4. Power can either be held in reserve or deployed. That is, it can be _____ or _____.

A. privileges or rights
B. intricate or manifest
C. latent or active

D. latent or manifest
5. The word power stems from the older Latin term potere, defined as an ability to affect something else _____ (True/False).

2.4. Summary

This unit builds upon these ideas which are intricately part of the sociological imagination found in political sociology. With this brief introduction to power in mind, this unit has described in more detail the ways in which political sociology has defined power and the typologies (metaphors) constructed to help understand the forms of power studied. The second portion of the unit presented the three theoretical traditions (metaphors) that have evolved in political sociology. These traditions and others that are now developing tackle head-on the paradoxes that generate the questions and work for the field of political sociology. These theoretical approaches to understanding power are taking new forms as a result of debates and controversies in how power is understood in contemporary society.

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2.6. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. A- fourteenth
2. D- Law
3. A- legitimate
4. D- latent or manifest
5. True

Answers to SAEs 2

6. A- Economic.
7. A- Authority.
8. B- coercion
9. A-Max Weber
10. A- typologies

Answers to SAEs 3

1. A- German
2. C-1648
3. C- French
4. D

UNIT 3 WHAT IS SOVEREIGNTY OF THE STATE?

Unit Structure

3.1. Introduction
3.2. Learning Outcomes
3.3. What is Sovereignty of the state?
3.3.1. The divine right of kings
3.4. Types of sovereignty
3.5. Summary
3.6. References/Further Readings/Web Sources
3.7. Possible Answers to Self-Assessment Exercises (SAEs)

3.1 Introduction

Sovereignty is an idea of authority embodied in those bordered territorial organizations we refer to as 'states' or 'nations' and expressed in their various relations and activities, both domestic and foreign.1 In the early twenty-first century there are almost two hundred of those organizations around the world, each one responsible for the territory under its jurisdiction and the people who live there. Sovereignty is at the centre of the political arrangements and legal practices of the modern world. The idea originated in the controversies and wars, religious and political, of sixteenth and seventeenth-century Europe. It has existed without interruption and spread around the world since that time, and it continues to evolve.

3.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the concept of sovereignty.
- Describe the different types of sovereignty.

3.3 What is Sovereignty of the state?

The idea that states should be sovereign within their own territory owes much to the writing of French jurist Jean Bodin. After living through the French Wars of Religion (1562–98), a period of civil war fought primarily between Catholics and Huguenot Protestants, Bodin saw the dangers of the complex, overlapping power structures of his time. The Church, the nobility, and the monarch all competed for the allegiance of their subjects, and this struggle often resulted in civil war and disorder. The German theologian Martin Luther—and later thinkers such as English philosopher John Locke and American Founding Father Thomas Jefferson—argued for a separation of Church and state to avoid such conflict. To Bodin,

however, a strong central sovereignty was the key to ensuring peace and prosperity. In his treatise Six Books of the Republic, Bodin argued that sovereignty had to be absolute and perpetual to be effective. Absolute sovereignty would create a stronger central authority over its territory. To avoid conflict, the sovereign should not be bound by laws, obligations, or conditions, either from outside factions or from his own subjects. Bodin's insistence on the need for absolute sovereignty formed an intellectual pillar supporting the rise of absolute monarchy in Europe. He also argued that sovereignty needed to be perpetual. Power could neither be granted to the sovereign by others nor be limited in time, as this would contradict the principle of absolutism. Bodin used the Latin term res publica ("république" in French, or "commonwealth" in English) for matters of public law, and believed that any political society must have a sovereign who is free to make and break the law for the commonwealth to prosper.

3.3.1 The divine right of kings

For Bodin, the source of legitimacy for the sovereign was rooted in natural law and the divine right of kings—society's moral code and a monarch's right to rule both came directly from God. In this, Bodin was opposed to the concept that a sovereign's legitimacy arises from a social contract between ruler and subjects, an idea later developed by Enlightenment thinkers such as French philosopher Jean-Jacques Rousseau. Although Bodin disliked democracy as a form of popular government, he did not agree with the Machiavellian position that a sovereign could act and rule unconditionally. Rulers needed to have absolute power, but they in turn were accountable to God and natural law. The Peace of Westphalia, a series of treaties agreed between European powers in 1648, was based on Bodin's views on the primacy of sovereignty in each territory, and moved Europe from its medieval political system of a local hierarchy to the modern state system. The Westphalian system has been the organizing framework for international relations ever since, based on the principles of sovereign territories' political self determination, mutual recognition, and non-interference in the domestic affairs of other states.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. The _____ theologian Martin Luther—and later thinkers such as English philosopher John Locke and American Founding Father Thomas Jefferson—argued for a separation of Church and state to avoid conflict.

A. German
B. French
C. Polish
D. American

2. The Peace of Westphalia, a series of treaties agreed between European powers in _____, was based on Bodin's views on the primacy of sovereignty in each territory, and moved Europe from its medieval political system of a local hierarchy to the modern state system.
A. 1647
B. 1642
C. 1648
D. 1640
3. The idea that states should be sovereign within their own territory owes much to the writing of _____ jurist Jean Bodin.
A. Canadian
B. English
C. French
D. Polish

3.4. Types of sovereignty

The five different kinds of sovereignty are as follows: (1) Nominal arid Real Sovereignty (2) Legal Sovereignty (3) Political Sovereignty (4) Popular Sovereignty (5) Deo Facto and De Jure Sovereignty.

i. Nominal arid Real Sovereignty:

In ancient times many states had monarchies and their rulers were monarchs. They wielded absolute power and their senates and parliaments were quite powerless. At that time they exercised real sovereignty. Therefore, they are regarded as real sovereigns. For example, Kings were sovereigns and hence they were all powerful in England before fifteenth century, in U.S.S.R. before eighteenth and nineteenth centuries and in France before 1789. The state of affairs changed in England after the Glorious Revolution in 1688.

Now the King is like a rubber- stamp. The British king has a right to encourage, warn and advise his Ministers or seek any information about the administration. Except these ordinary powers, all other powers of the British king are wielded by his Ministers.

Lowell has summed up the position of the British Sovereign in these words: "According to the early history of the constitution, the ministers were the counsellors of the king. It was for them to advise and for him to decide. Now the parts are almost reversed. The king is consulted but the ministers decide".

ii. Legal Sovereignty:

Legal sovereignty is that authority of the state which has the legal power to issue final commands. It is the authority of the state to whose directions the law of the State attributes final legal force. In every independent and ordered state there are some laws which must be obeyed by the people and there must be a power to issue and enforce these laws. The power which has the legal authority to issue and enforce these laws' is legal sovereignty.

In England, the King-in-Parliament is sovereign. According to Dicey, "The British Parliament is so omnipotent legally speaking…. that it can adjudge an infant of full age, it may attain a man of treason after death; it may legitimize an illegitimate child or if it sees fit, make a man a judge in his own case".

The authority of the legal sovereign is absolute and law is simply the will of the sovereign. Since the authority of the sovereign is unrestrained, reserves the legal right to do whatever he desires. It is the legal sovereign who grants and enforces all the rights enjoyed by the citizens and, therefore, there cannot be any right against him. The legal sovereign is, thus, always definite and determinate.

Only the legal sovereign has the power to declare in legal terms the will of the stale. The authority of the sovereign is absolute and supreme. This authority may reside either in the monarch or in an absolute monarchy or it may reside in the body of persons.

iii. Political Sovereignty:

Dicey believes that "behind the sovereign which the lawyer recognises, there is another sovereign to whom the legal sovereign must bow. Such sovereign to whom the legal sovereign must bow is called political sovereign. In every Ordered state the legal sovereign has to pay due attention to the political sovereign.

According to Professor Gilchrist, "The political sovereign means the sum-total of influences in a State which lie behind the law. In modern representative government we might define it roughly as the power of the people". In other words by political sovereign in the representative democracies, we mean the whole mass of the people or the electorate or the public opinion. But at the same time, it cannot be emphatically asserted that political sovereignty can definitely be identified with the whole mass of the people, the electorate or the public opinion. Political sovereignty is a vague and indeterminate term.

Political sovereignty rests in that class of people under whose influence the mass of the people is or the people are. Political sovereignty rests in the electorate, in the public opinion and in all other influences in the state which mould and shape the public opinion.

In the words of Professor R.N. Gilchrist, "Political sovereign manifests itself by voting, by the press, by speeches, and in many other ways not easy to describe or define. It is, however, not organised and it can becom6 effective only when organised. But the organisations of political sovereignty lead to legal sovereignty. The two are aspects of the one sovereignty of the state". As a matter of fact, legal and political sovereignty are the two aspects of the one sovereignty of the state. But at the same time both the aspects stands poles apart.

Legal sovereign is a law-making authority in legal terms, whereas political sovereignty is behind the legal sovereign. The legal sovereign can express his will in legal terms. But the political sovereign cannot do so. Legal sovereign is determinate, definite and visible whereas political sovereign is not determinate and clear.

It is recognised. Legal sovereignty is vested in the electorate, public opinion and other influences of the state which mould or shape the public opinion. Legal sovereign is recognised by lawyers while political sovereign is not.

Legal sovereign cannot go against the will of the political sovereign whereas political sovereign, though not legally powerful, controls over the legal sovereign. The concept of legal sovereign is clear whereas the concept of political sovereign is vague. Legal sovereign is elected by the political sovereign whereas political sovereign is the electorate or the people. These are the points of difference between the legal sovereign and the political sovereign.

iv. Popular Sovereignty:

Popular sovereignty roughly means the power of the masses as contrasted with the Power of the individual ruler of the class. It implies manhood, suffrage, with each individual having only one vote and the control of the legislature by the representatives of the people. In popular sovereignty public is regarded as supreme. In the ancient times many writers on Political Science used popular sovereignty as a weapon to refute absolutism of the monarchs.

According to Dr. Garner, "Sovereignty of the people, therefore, can mean nothing more than the power of the majority of the electorate, in a country where a system of approximate universal suffrage prevails, acting through legally established channels to express their will and make it prevail".

v. De Facto and De Jure Sovereignty:

Sometimes a distinction is made between the De Facto (actual) sovereignty and De Jure (legal) sovereignty. A de jure sovereign is the legal sovereign whereas a de factor sovereign is a sovereign which is actually obeyed.

In the words of Lord Bryce, de facto sovereign "is the person or a body of persons who can make his or their will prevail whether with the law or against the law; he or they, is the de facto ruler, the person to whom obedience is actually paid". Thus, it is quite clear, that de jure is the legal sovereignty founded on law whereas dc facto is the actual sovereignty.

The person or the body of persons who actually exercise power is called the de facto sovereign. The de facto sovereign may not be a legal sovereign or he may be a usurping king, a dictator, a priest or a prophet, in either case sovereignty rests upon physical power or spiritual influence rather than legal right.

History abounds in examples of de facto sovereignties. For example, Oliver Cromwell became de facto sovereign after he had dismissed the Long Parliament. Napoleon became the de facto sovereign after he had overthrown the Directory. Likewise, Franco became the de facto sovereign after he had dislodged the legal sovereign in Spain. On October 28, 1922 Mussolini's Black Shirts marched on Rome. At that time, Parliament was the legal sovereign. Mussolini became the Prime Minister in the legal manner. He ruled parliament and ruled the country through parliament.

Parliament remained the legal sovereign but he was the actual or de facto sovereign. Hitler also did the same in Germany. He too became the de factor sovereign. He controlled the legal sovereign and became the de facto sovereign. Similarly, Stalin remained the actual sovereign in U.S.S.R. for about three decades.

After the Second World War and before the Egyptian Revolution King Farouk was the legal sovereign. General Naguib's 'coup de'etat' in Egypt and the abdication of King Farouk is another example of de facto sovereignty. Nazib was expelled and Nasser succeeded him in de facto sovereign.

After the death of Nasser, Mr. Sadat succeeded him. After the assassination, Hosni Mubarak became the President of Egypt. Similarly, Ayub became the de facto sovereign after he had staged the military coup in Pakistan. When Ayub was overthrown Yahya Khan Rose to power with the help of the army and became the fe facto sovereign.

After his defeat in 1971 at the hands of Indian army he handed power to Bhutto, who was thrown in July, 1977 by Zia-ul-Haq, who first of all became de facto and later on de jure sovereign. Thus, it is quite clear that the actual or de facto sovereign is the strongest active force in the State and it is capable of making his will prevail. But sometimes, it happens that de facto and de jure sovereignty ultimately coincide.

In this connection, Dr. Garner has very aptly remarked, "The sovereign who succeeds in maintaining his power usually becomes in the course of time the legal sovereign, through the acquiescence of the people or the reorganisation of the State, somewhat as actual possession in private law ripens into legal ownership through prescription".

China and Pakistan are the glaring examples. In Soviet Union, the Communist Government became the de facto government of the successful Bolshevik Revolution of 1917. But in course of time, it became the de jure government also.

Self-Assessment Exercises (SAEs) 3

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

4. The _____ theologian Martin Luther—and later thinkers such as English philosopher John Locke and American Founding Father Thomas Jefferson—argued for a separation of Church and state to avoid conflict.

E. German
F. French
G. Polish
H. American

5. The Peace of Westphalia, a series of treaties agreed between European powers in _____, was based on Bodin's views on the primacy of sovereignty in each territory, and moved Europe from its medieval political system of a local hierarchy to the modern state system.

E. 1647
F. 1642
G. 1648
H. 1640

6. The idea that states should be sovereign within their own territory owes much to the writing of _____ jurist Jean Bodin.

E. Canadian
F. English
G. French
H. Polish

3.4 Summary

In this unit, it was noted that the idea that states should be sovereign within their own territory owes much to the writing of French jurist Jean Bodin. In his treatise Six Books of the Republic, Bodin argued that sovereignty had to be absolute and perpetual to be effective. For Bodin, the source of legitimacy for the sovereign was rooted in natural law and the divine right of kings—society's moral code and a monarch's right to rule both came directly from God. The five different kinds of sovereignty are as follows: (1) Nominal arid Real Sovereignty (2) Legal Sovereignty (3) Political Sovereignty (4) Popular Sovereignty (5) Deo Facto and De Jure Sovereignty.

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3.6 Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

6. A- fourteenth
7. D- Law
8. A- legitimate
9. D- latent or manifest
10. True

Answers to SAEs 2

4 A- Economic.
5 A- Authority.
6 B- coercion
7 A-Max Weber
8 A- typologies

Answers to SAEs 3

5. A- German
6. C-1648
7. C- French
8. D

UNIT 4 PHILOSOPHICAL DEFINITION OF SOVEREIGNTY

Unit Structure

4.1. Introduction
4.2. Learning Outcomes
4.3. Philosophical definition of sovereignty
4.3.1. Sovereignty as a Characteristic of the State
4.4. Summary
4.5. References/Further Readings/Web Sources
4.6. Possible Answers to Self-Assessment Exercises (SAEs)

4.1. Introduction

State sovereignty is a fundamental idea of authority of the modern era, arguably the most fundamental. It stands in marked contrast to ideas of authority of other eras, particularly the preceding medieval period of European history, which revolved around the theocratic and transnational idea of Latin Christendom. Sovereignty also stands in marked contrast to ideas of authority in other parts of the world before Western imperial states intervened and established themselves as a global, and no longer merely a European or Western, system of authority. That worldwide episode was only completed in the nineteenth and twentieth centuries.

4.2. Learning Outcomes

At the end of this unit, you should be able to:

- Describe the nature of sovereignty.
- Explain the issues involved in sovereignty.

4.3. Philosophical definition of sovereignty: the nature of sovereignty

Sovereignty describes the characteristic of the absolute independence of a unit of will from other effective universal decision-making units; positively, we use this to express that the respective unit of will is the highest universal decision-making unit in this particular order of rule. The jurist calls the state a person, an idea that is of course the result of juristic construction. When this construction is seen as a mere fiction, simply "at the discretion of the jurist," we can no longer speak meaningfully of the sovereignty of a state personality. All valid juristic concepts are silhouettes of real social processes. Without constant reference to sociological-empirical fact, jurisprudence loses itself in a broad heaven of concepts. This reference should not of course belie its—incidentally also

sociologically comprehensible— task of turning "pre- scientific" material into precise and practicable legal concepts. But this does not make these social realities either fictions or mere products of juristic method.

Even if everyone in certain relationships seems to be determined by the will of the sovereign lawmaker, state sovereignty only gains its rich life from the wealth of personal acts that constitute it, which is in no way already foreseen by the law, nor can it be. In the entire hierarchy of the will and positive legal rules, the unpredictable will is both indispensable for the sake of positivity as legal certainty, and cannot be excluded juristically for the sake of legal security. In the separation-o f- powers state, and even more so in other state forms, acts with law- creating qualities operate both "beyond the law" [praeter legem] and "against the law" [contra legem]; they can be attributed to the state and yet not to positive legal norms. The fact that there is no law- free space "within the law" [intra legem] is solely due to the fact that, as we are more than aware since the conflict over the Free Law doctrine, every space is constantly filled by the law- creating acts of state institutions. Theoretically even more significant, however, is the existence of law- creating state actions "against the law." If one understands revolution as the process through which originally unlawful acts of will grow into legal validity, then revolution is a phenomenon that can be observed by jurists on pretty much a daily basis, and within which the great problem of the legal force of defective acts of state forms merely a special case. Legal certainty requires that an order once created by an act of state, even if it is unlawful, has to count as a legal order, as long as no objections are raised on the part of those entitled to raise them. The presumption of legality exists not only for the acts of the highest state organs, but also for all acts of state. But while in the lowest institutions, someone with the right to object can regularly raise legal objections to such acts and have them declared ineffective by higher institutions, even this rarely- utilized possibility is not always available for the flawed decisions of the highest institutions.

Even if we overlook the impossibility of juridifying all the acts of the highest institutions, there remains the not at all rare case— think of the development of the English constitution—i n which the communal will's recognition is bestowed upon an unlawful state act. However, not every creation of law by persons integrated into the state, whether implemented "within, beyond or against the law," can be imputed to be a norm in the state legal order. And yet, as York von Wartenburg also argued, it is not just the filling of law-free spaces, but often enough also the breach of law "according to the demands of the case, of the times and of persons" that constitutes the living state will. The fact that the norm formalist cannot come to grips with either phenomenon— except perhaps with a 'norm' of unlimitedly variable content—i s simply a sign that the jurist must imagine at the apex of the state legal system not a dead norm, but a

sovereign, living unit of will. Confronting the impersonal legal order with the sovereign state personality, endowed with will, thus reflects an unavoidable juristic interest. However, deeper juristic insight into the nature of sovereignty can only be expected with an understanding of the specific social function of the state. A theory of the state whose positivism essentially frowns upon the highly positive question of the meaning of the state can reveal neither its own concept of the state body politic, nor the full import of the absolutely unique function of the sovereign state. Through the institution of the 'state,' the interaction of all social acts in a particular territory is ultimately guaranteed. A more comprehensive explanation of this proposition must await another study.

Suffice it here to note that the state function, at times superseded by the Church, consisted in essence of carrying out the ordering tasks that cannot be achieved by custom, morality, interests, and the like. The state at first leaves it to other social orders to deal with the frictions that arise through this interaction, but guarantees those orders, for its part, by holding out the prospect of intervention in case they should fail. Because human life is only possible as ordered communal life, the state aids in both psychological and metaphysical self- preservation. Established traditional societies without a great deal of intercourse require smaller state institutions; growing civilizations, in contrast, growing intercourse and therefore growing areas of friction require increased security and predictability of interaction with neighboring territories. The sovereign state, with its thoroughly rationalized organization, stands before us as a modern product of this need. Aside from some cases of quite secondary importance, self- help has been eliminated for reasons of legal certainty; instead, the regulation of the conditions under which force should be used for purposes of the smoothest possible interaction of residents has been centralized. In the words of Max Weber, it successfully claims a "monopoly of legitimate physical force." This monopoly of force, however, is only the technical side of a phenomenon in which the sovereignty of the modern state is actually rooted, and through which alone its nature can be recognized: the characteristic, belonging only to the sovereign state, of being a universal territorial decision- making unit. The universality of state decision- making is of course only potential, not actual. But the essence of sovereignty can be found in the possibility of finally and effectively deciding any issue involving the unity of social interaction in the territory, even sometimes in opposition to positive law, and of imposing this decision on everyone—not only members of the association, but absolutely all residents of the territory. The unit of territorial decision- making is the dialectical counterbalance to the human variety of social acts on the territory, and thus always the expression of actual power relations. There is quite simply no other social institution that possesses the characteristic of making the ultimate decision in every conflict of interest occurring in its domain. The issue is not only that the

contemporary state does not know the refusal of justice or law. The concept of decision-m aking must be more broadly interpreted and not limited to conflict resolution through the use of existing law. The sovereign state, and it alone, also does not know a refusal to decide. If it does not want to abolish itself, it must in all circumstances ensure, through its decisions and efficacy, the minimal amount of order that is indispensable for the self- preservation of the residents of its territory. The interactions of its residents would be threatened most seriously by any violent conflict unregulated by the center. It is this type of territorial sovereignty, and not the capability of "changing itself . . . substantially (or dissolving itself)," which flatly rules out the claim that the state is "a consubstantial link in the chain of human community."

The sovereign makes decisions about predictable conflicts, first of all through its ordinary and constitutional rules; in a democracy, the people, indirectly through their representatives or directly through referendum; in an autocracy, the autocratic institutions. All state institutions are then directed to decide any cases of conflict that occur within the scope of these supreme legal rules. But all predictable, calculable legal rules refer to the normal case that is amenable to a legal rule. Yet the contemporary state must decide, for the aforementioned reasons of legal certainty, even if no legal rule is available. In fact, it must even decide, weighing the greater against the lesser interest, against law. And these cases are the ones that show us that even today, in some circumstances, the "highest authority" [summa potestas] as a universal decision-making unit is and remains "legally free" [legibus soluta], as long as it is impossible to make people and history fully predictable. To remain for now with decisions "beyond the law," it is most likely readily apparent that a state that refused, in the absence of a legal rule, to make a decision in only a single case would consign those demanding a decision to civil war and would abolish itself. Georg Jellinek, who never tired of emphasizing that state power is "not power per se, but power wielded within legal bounds, and thus legal power," was still too little the formalist not to note at least once that state power does not merge into positive law. Without recognizing the great systematic significance of the problem for the concepts of state, law, and sovereignty, he nevertheless noted, "where extraordinary circumstances themselves disrupt the legal context, or a decision in concrete cases cannot be reached through legal norms, the factual supersedes the legal, and thus itself becomes the basis for the formation of new law."

4.3.1. Sovereignty as a Characteristic of the State

State means a decision-making unit that is universal in a specific territory, and therefore necessarily unique and sovereign. It is possible for two armies to fight over sovereignty on the territory in question, and the jurist must accept the suspension of sovereignty until the outcome of the battle

is decided. But it is impossible to have two sovereign decision-making units on the same territory; this would mean two supreme units of will working against each other would cancel the unity of the state, and would ultimately result in civil war. The concept of the state characterized in this way would need fear no contradiction if, in the middle of the last century, the federal form of organization had not appeared and given our theory of the state a dominant new category that could not be reconciled with our definition of the state— namely, that of the non- sovereign state. It seems completely unnecessary to once again present the literary dispute over the problem of non-sovereign and federal states, which has been reproduced a thousand times, since today it should be clear that the disputing parties have refuted each other in outstanding fashion We should start with the fact, which cannot be doubted today, that in any case the federal state as a whole constitutes a sovereign state that decides universally on its territory. Otherwise, one would have to denature the concept of the state to such an extent that it would be useless as a characteristic of all states that are termed unified states by the dominant theory. Wherever a universal territorial decision-making unit is found, however it may form its unity of will, the term 'state' is in all cases indispensable and to be retained. The problem presented to us should be correctly theoretically formulated thus: can the same concept of the state that is indispensable for the universal territorial decision- making unit be applied to the so-called member states of the federal state? If "only one state can unfold its power" on one and the same territory, then the federal state, composed of a number of 'states,' is in no way, as Georg Jellinek believes, only one of the "apparent" exceptions, but is an actual and completely incomprehensible one. Only a theory of the state whose concept of the state can cover two fundamentally different phenomena and which does not recognize the true meaning of regional authority can reassure itself with the obvious sophism that the member states that unfold their power on the same territory as the federal state contradict "the proposition presented above no more than does the quality of the municipalities as regional authorities." Thus, the member state is by its nature a particular territorial decision- making unit, just like every province and municipality, while the federal state is, like all unified states, by its nature a universal decision- making institution. For political reasons, it can be understood that one would give certain particular territorial units the same names as the universal decision- making units. Theoretically, however, both the state and the sovereignty concepts are distorted if we include the member states and the federal state in the same conceptual category and ascribe sovereignty to both of them. Either the member state is potentially responsible for every decision, without exception, on its territory— then it is not part of "the association of the federal state by which it is ruled," it is a state and is sovereign; or it is at some point subject to the decisions of a different universal unit, in which case it is not sovereign, and the term state has an essentially different meaning for it than for the unit to which

it is subject. We will not go into the fact that the emergence and continued existence of the so- called member states are fundamentally subject to different juristic conditions than they are for the sovereign state. But the member state can possess neither true legislative autonomy nor true constitutional autonomy; its administration must be subject at critical points to Reich oversight of whatever sort, and the justice system, too, must at certain points be centralized beyond its own territory. All these unavoidable structural necessities arise from the nature of the federal state as a unified decision-making institution.

As much as one may try to construe the member states as being coordinated with the supreme state, the attempt will always be recognized as a failure as soon as one realizes that the total constitution standing above both is coherent only because it is filled by a living unit of will, but that the limits of this unit of will are decided in situations of concrete conflict only by a universal decision- making unit and cannot be limited once and for all by a constitution, no matter how carefully calculated. The federal state is only a state because it can make authoritative decisions, whether through its courts or its president or some other federal institution, regarding which party to a conflict is in the right. Therefore, in a federal state, violent action against a state that is not fulfilling its legal duties, whether on the basis of a court or a presidential decision, is always federal execution and never war; but violent insurrection by the member states is always rebellion. An institution that may under no circumstances refuse to make a decision, which has the right, both "within" and "beyond the law" and even "against the law," to at least temporarily give its decisions validity, is always superior to all other institutions on its territory. Nawiasky believes that any use of force by the federation against the member states without a positive constitutional basis, taken by itself, that is, as long as no other norms of federal law oppose it, leads to the same "international law consequences" as force used against an independent state; if this view, which is today incidentally the only existing opinion, were correct, then the federal state would certainly not be a state or a universal decision-making unit. The Swiss federal constitution, for example, does not regulate federal execution.

Self-Assessment Exercises (SAEs) 1

Attempt these exercises to measure what you have learnt so far. This should not take you more than 8 minutes.

1. _____ certainty requires that an order once created by an act of state, even if it is unlawful, has to count as a legal order, as long as no objections are raised on the part of those entitled to raise them.

A. Legal
B. Extra-Legal
C. Legal-ordinary

D. Legitimate
2. Through the institution of the 'state,' the interaction of all _____ acts in a particular territory is ultimately guaranteed.
A. Legal
B. State
C. social
D. criminal l
3. _____ describes the characteristic of the absolute independence of a unit of will from other effective universal decision-making units.
A. Sovereignty
B. Dependency
C. Despotism
D. Absolutism

4. In the words of _____, the state successfully claims a "monopoly of legitimate physical force."
A. Max Weber
B. Karl Marx
C. August Comte
D. Tom Hanks
5. The sovereign makes decisions about predictable conflicts, first of all through its ordinary and _____ rules.
A. *Constitutional*
B. *Basic*
C. *Mundane*
D. *Legislative*

4.4. Summary

In this unit, the essential nature of sovereignty was discussed. In this respect it was noted that the essence of sovereignty can be found in the possibility of finally and effectively deciding any issue involving the unity of social interaction in the territory, even sometimes in opposition to positive law, and of imposing this decision on everyone—not only members of the association, but absolutely all residents of the territory.

4.5. References/Further Reading

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4.6. Possible Answers to Self-Assessment Exercises (SAEs)

Answers to SAEs 1

1. A- Legal
2. C- social
3. A- Sovereignty
4. A- Max Weber
5. A- constitutional