

## Chapter X

**T**HERE are now two quite different conceptions of the nature of the state. Many are the works dealing with these opposite conceptions, and some of them present ideas so revolutionary that their authors would have been regarded as dangerous propagandists a generation ago. At no time, not even in Locke's day, were the divisions separating the schools so wide as they are now. To take two representatives of the modern theories of the organization of the state who hold widely different views, such as Léon Duguit and Franz Oppenheimer, the student may at a glance be able to decide which course offers the likelier one for political and legal safety, or which is the one that will lead to social and economic improvement. Duguit, professor of law in the university of Bordeaux, says in his *Law in the Modern State*: "However little we may like it, the evidence conclusively demonstrates that the ideas which formerly lay at the very base of our political systems are disintegrating. Systems of law under which, until our own time, society has lived, are in a condition of dislocation. The new system that is to replace it is built on entirely different conceptions." Few will oppose this notion. Indeed, it is commonplace criticism that the bureaucratic and juristic state is no longer serviceable. It is overgrown, top-heavy, not worth its cost, and, worse, gives no hope at all of producing a statesman who might reform it from within. Under the new system, the will of a statesman will have no "special force in itself," for the "idea of public service" is to replace "the idea of sovereignty." He says: "The state is no longer a sovereign power issuing its

commands. It is a group of individuals who must use the force they possess to supply the public need. The idea of public service lies at the very base of the theory of the modern state. No other notion takes its root so profoundly in the facts of social life."

As an indication of the distance travelled in less than twenty-five years, it is worth while quoting David Ritchie: "The state itself cannot be said, in the strict sense, to have legal duties but only to have legal rights: there cannot be a law-court before which the state in its *sovereign capacity* (the qualification is essential) can be summoned for redress. A government whose proceedings can come before the courts is thereby proved not to be the legal sovereign in that community. By legal sovereign, I mean the body behind which the law and lawyer does not go." But it is Duguit's conception of what the state was founded for that is of importance here. He says: "The right of the state, then, is opposed to the subjective right of the individual. It is a natural right, at once inalienable and imprescriptible. It belongs to the individual by virtue of its humanity. It is a right anterior, even superior, to that of the state. For the state was founded to assure men protection for their individual rights." Here is an illustration of how very old new conceptions can be. But that statement is not as good or as sound as it reads. For Duguit explains and modifies it: "Man as an individual is a mere creation of the intellect. The very idea of right implies the idea of social life. If, then, man has rights, he can have them only from his social environment, he cannot impose his rights upon it." What, then, becomes of the individual "right anterior, even superior, to that of the state"? It is gone. Social life has given it the quietus. The mere creation of the intellect, man, whose inalienable and imprescriptible natural right was established before the state, must leave

his right in the cloakroom before he mixes with his neighbours. So it is when learned men of a great civilization boggle at such terms as "social," "political," and "environment." How far would Duguit have fared in his book if he had realized that man's right is an economic one? Of course, "social environment" may mean almost anything in the way of association; the term might fit nearly every aggregation of individuals from the first village community down to Belgravia. But a united social body is indispensable to the legal sociologist; he cannot make a move without it; not as a family, father, or chief, came the mere creation of the intellect to labour and produce, but as a member of a society, a social trade union, from which he had to get a card before he could get a right. What right? Right to do what? What were the rights he lost, and, when he entered the social environment, regained? Evidently they were of some value, because Duguit says: "The state was founded to assure men protection for their individual rights." To raise so ponderous and massive a thing as the state to protect rights of no value seems strange, though men have done strange things to protect themselves. Not so long ago Western men pretty nearly committed race suicide to protect themselves; undoubtedly, they sacrificed the political and commercial gain of centuries, and did not hesitate to lay future generations under grinding poverty to maintain a decrepit system of nationalism. Duguit's notion of what the state was founded for, and what the state has performed in the civilizations of which there is record, cannot possibly be reconciled. A state assuring men protection for their individual rights, and one concerned chiefly in fulfilling that pledge, has never been heard of. The recognition of individual rights would so limit the functions of a state founded before individual rights were violated, that it would have been scarcely worth while for a

Romulus or a Theseus to bother about political machinery. The trouble is, modern legal sociologists will not define the terms they use. Nowhere in his interesting work does Duguit say what he means when he writes of individual rights. If he means the right to vote he ought to say so. But the right to vote is not necessarily a natural right: that which is inalienable and imprescriptible exists, as Duguit says, before and above the state. But what is it? What is a natural right? Books without number have been written on and about natural rights, and still the term is bandied about by jurists and sociologists, as if they and every schoolboy knew the specific meaning of the term. The proclamation of the Declaration of Rights merely states, it does not define. The right to life, liberty, and the pursuit of happiness reads beautifully, but what does it mean? What is the nature of the right, and why should men have a right? The Virginian Declaration says "that all men are by nature equally free and independent and have certain inherent rights of which, when they enter a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety." This reads as if the conveners determined to give all a fair start, but that could not have been their intention, because there were men whose inherent rights were not recognized, and whose means of acquiring and possessing property were controlled by their owners. In 1790 the state of Virginia contained 200,000 Negroes. Moreover, many men held grants of land from British sovereigns and continued so to hold after Virginia became an independent state. Many states have sprung into existence which by no means assured great numbers of men protection for their individual rights, and it does not help Duguit to quote the old sophistry that slaves are not

men, that they are in a state of nature, because the term natural rights is "inalienable and imprescriptible." These are some of the difficulties to be met with in so many works published in recent years from the pens of well-known lawyers, sociologists, and philosophers. Very often the same difficulty is presented which caused writers of the last century to pour scorn and abuse in lieu of reason upon the irritating term. It was then always popping up in controversies about socialism, fabianism, and humanism until someone thought of a method of putting it away: "Just get rid of the idea altogether!" Then the only "rights" were those conferred by the state, but it was asked: "Is not a man without rights a slave?" Whether the state is based on slavery as an expedient, or based on the natural rights of some exploiting freemen, is a matter of great importance and cannot be lightly set aside; for the time has come when, according to Duguit, "our political systems are disintegrating," and the new is to be "built on entirely different conceptions." Perhaps it would be as well if the builders of the new conceptions took the trouble to find out what was basically wrong with the old before the crash comes.

Turning from the lawyer's notion of the genesis of the state to that of the sociologist set out in Franz Oppenheimer's epitome of his larger works, called *The State*, the student finds an entirely different method of attack. Oppenheimer takes nothing for granted. Every position is to be investigated; no matter how hoary the error or saintly the blunder, it must be submitted to examination. "This treatise regards the state from the sociological standpoint only, not from the juristic—sociology, as I understand the word, being both a philosophy of history and a theory of economics," he says in the first sentence. None of the conventional theories of the state explains its genesis, essence, and purpose, because none treats the state

from the sociological viewpoint. He completely annihilates the notion that "the differentiation into income-receiving classes and propertyless classes can only take place when all fertile lands have been occupied," by showing that every family of five persons in the world might have eighteen and a half acres, and still leave two thirds of the planet unoccupied. From this he moves to the following conclusion: "Since I have shown that, even at the present time, all the ground is not occupied economically, this must mean that it has been pre-empted politically. Since land could not have acquired 'natural scarcity,' the scarcity must have been legal. This means that the land has been pre-empted by a ruling class against its subject class and settlement prevented. Therefore, the state as a class state can have originated in no other way than through conquest and subjugation." Now all states, no matter what convenient term of classification has been applied to each of which there is record of any kind, have had their origin in the removal of landmarks, boundary stones, etc. This may explain the deep desire of ancient jurists and philosophers to discover, before the state came into being, a law anterior to and superior to all positive law, which would lead them back to what has been called natural law: an economic condition based on justice. The question of right, natural right, haunted the minds of the ancient world's greatest philosophers, and since Augustine's City of God all utopias down to More's are efforts to substitute something better than the state, some system in which justice will prevail.

Oppenheimer remarks that his idea is not altogether new, that "philosophers of history have at all times found this contradiction (the opposition of the political means to the economic means) and have tried to formulate it, but no one of the formulæ has carried the promise to its complete logical end."

He loses no time in coming to grips with the real problem and boldly proposes in the discussion "to call one's own labour and the equivalent exchange of one's own labour for the labour of others the 'economic means' for the satisfaction of needs, while the unregulated appropriation of the labour of others will be called the 'political means.'" He lays bare the true meaning of the term "political economy," which has not been clearly understood by modern philosophers. Somewhere Jevons deplores the substitution of the term political economy for economics. The purpose of the state is always the same. "At first," says Oppenheimer, "its method is by exacting a ground rent so long as there exists no trade activity the products of which can be appropriated. Its form in every case is that of dominion, whereby exploitation is regarded as 'justice,' maintained as a 'constitution,' insisted on strictly, and in case of need enforced with cruelty."

He writes of "a literal death of the peoples, caused by the capitalistic exploitation of slave labour," and that "Rome succumbed to the consumption of population caused by capitalistic slave exploitation."

The data collected by Oppenheimer is voluminous; the habitable globe has been tapped in all parts; and the use he makes of this material is as interesting as it is effective. When he has traced the development of the state through all its stages from the primitive to the feudal, he shows how the very purpose of the state, when it becomes constitutional, is defeated by the growth of the city. "The industrial city is directly opposed to the state," he says, because, with other reasons for the antagonism, he believes the city offered the peasant complete liberty before land ownership and legal enclosure at first depopulated the country; later the city lured away the strongest of the remnant of labourers. He calls the ownership

of large estates "the first creation and the last stronghold of the political means." But though the city offers the peasant "complete liberty," Oppenheimer realizes there are constantly two labourers competing for one job, that the labour market is always overstocked, and this condition he attributes to the political means holding large estates.

Not much fault can be found with the historical material from the primitive to the feudal development given in *The State*; generally it is sound. There are many details concerning the application of sociological data to economics which scarcely fit the conclusions reached. But on the whole, the thesis is well laid. It is when Oppenheimer reaches the constitutional state, and gives a sketch of the system to take the place of the state, that he stumbles into an economic morass. As a sociologist, in the first part, he is interesting; in the latter, as an economist, he is obscure. At the beginning of his work he had said that sociology was "both a philosophy of history and a theory of economics." No explanation of a theory of economics is given. What theory of economics could support the following?

Doubtless there is a growing tendency in economic development, whereby the ruin of vast landed estates will be accomplished. The system is their bleeding to death without hope of salvation, caused by the freedom of the former serfs—the necessary consequence of the development of the cities. As soon as the peasants had obtained the right of moving about without their landlord's passport, there developed the chance of escape from the countries which formerly oppressed them. The system of emigration created the competition from oversea, together with the fall on the continent of prices for farm products, and made necessary perpetually rising wages. By these two factors ground rent is reduced from two sides, and must gradually sink to the zero point, since, here too, no counter-force is to be recognized whereby the process might be diverted. Thus the system of vast territorial estates falls apart.



When, however, it has disappeared, there can be no oversupply of "free labourers." On the contrary, two masters will run after one labourer and must raise the price on themselves. There will be no "surplus value" for the capitalist class, because the labourer himself can form capital and himself become an employer. By this the last remaining vestige of the political means will have been destroyed, and economic means alone will exercise sway. The content of such a society is the pure economics of the equivalent exchange of commodities against commodities or of labour force against commodities, and the political form of the society will be the "freeman's citizenship."

In the first place, the ruin of vast landed estates was not accomplished after the freedom of the serfs and the development of the city. Generally in Western Europe and the United States, also, landed estates showed little diminution in area in the nineteenth century; exceptions were in case of bankruptcy with the attendant evils, but even so the rise of plutocrats desiring estates and titles maintained the system at about the same area. Small farmers and small holders of land purchased for themselves made little difference. Since the emancipation of the serfs in the United States, private and company estates have grown enormously. The ruin of vast landed estates in several countries in Europe has been brought about by the crushing burdens of taxation falling on the improvements in and on the land. To use Oppenheimer's term, the "political means" has succeeded in destroying the class for whose benefit the state functioned chiefly. In the United States owners of land face the same fate. So long as the "political means," government, was conducted by astute men who kept expenses low and opposed the growth of the bureaucracy, the "economic means" could be exploited with as little pain as the maintenance of the system permitted. But when the political means was submerged in ever-growing bureaucracies, both the ex-

plotters and the exploited were crushed without the slightest sentimental compunction. If Oppenheimer means that ground rent (supposing ground rent is rent, not interest on capital, improvements) must gradually sink to zero for the owner, because it is taken in taxes, no owner of land will quarrel with him. Still, it may be that rent has risen considerably since the freedom of serfs and the days of great emigration to the United States and Canada. Anyway, the land yields rent, unless it is common or without a tenant, though more of it now is taken in taxes; that the owner of the land does not now enjoy so much rent, that more of it goes into the bureaucratic coffer, means a transference which will gradually make the bureaucracy the estate agent for its members. Many landlords are now at the point where they must decide to keep land and be content with a bailiff's salary, or let the government take it in lieu of taxes. The system of vast territorial estates falls apart, but the oversupply of free labourers shows little falling off. Not yet is the millennium of two jobs for one man. Presumably Oppenheimer's free labourers will till the land and own it when rent disappears, and the vast landed estates are ruined, for he says: "The labourer himself can form capital and himself become an employer." How he can "form" capital, even if such a rosy dream came true as two jobs for one man, is not clear. Under the present system of taxation of wealth, the penalization of effort, what will the bureaucracy leave him as a nest-egg? Capital does not "form" itself. But suppose it will magically "form" itself when there is no longer a capitalist class; who will be the employees when the free labourers are capitalists? And who will be the capitalists who will run after one labourer, when the capitalist class goes down in the wreck of vast landed estates? This floundering in the Marxian morass is not quite the thing for a man of Oppen-

heimer's reputation. More is expected of a Privat-Dozent of Political Sciences in the University of Berlin. Such blundering takes much away from the greatness of his historical survey of the development of the state.

But the colossal error in his economics lies in his misunderstanding of the nature of rent. To him rent seems to be merely an agricultural matter. He makes no distinction between farm and land, between garden and land; all is lumped together in one parcel covered by the undefined term "ground rent." What a castle is built on, and where the materials are drawn from, and by whom, he does not say. Presumably the complete liberty the city offers the peasant is the liberty of learning that the city is built on land. The great landed estates of cities concern him not at all. Moreover, he ignores the rent of mines, quarries, ore fields, oil fields, etc.

The book appeared in Germany in 1908. No doubt some thinkers will urge it is not fair to criticize works of this nature published before the war. It has been said the war upset numbers of theories: economic, commercial, military, naval, and social. It did. But the peace has upset more theories than the war did. It upset the theory that man would learn how to correct some of the old errors; it upset the theory that good would come out of the war. Perhaps the peace has not had time enough to reveal the good, but up to this year neither have the errors been corrected, nor has the good appeared. Complaint is made that men of the same political notions as were held by the war-makers—in some countries the same men—now administer the peace treaties, and that the voters send them to legislatures and parliaments. And all Christendom, not merely one imperial state like Rome, lies prone, done to death by the political means. Sanguine thinkers, such as Oppenheimer, believed before the war there was a chance, just

one, to change conditions and lift the burden off the economic means; the widening of the franchise meant more power for the masses. Now it is obvious to numbers of editors and publicists that there is something wrong with both the political means and the economic means as instruments for bettering conditions. One says it is clear that the people do not yet know how to use the vote. A Dean of Harvard admits: "Capitalism is on trial, and on the issue of this trial may depend the whole future of Western civilization." What should have been obvious to these critics before the war is now the gossip of every Tom, Dick, and Harry with a vote, the makers of present-day legislatures. "Perhaps the vote is not enough," the editor of a great daily suggests. The inference is, the electors do not know how to use it. He makes no suggestion as to the way it should be used. And while editors and publicists are searching everywhere for a solution, the voters give not the slightest sign of desiring to know how the vote should be used, or, indeed, of how to frame a petition calling for reform. It is quite possible that large numbers of voters have lost faith in the vote, that they have learned at last that it really does not matter much which party is elected, for the political means is sure to triumph, and "the same old bureaucracy will sit tight no matter what happens."

Every movement so far in the direction of change has been made by business men and their commercial organizations. The committees protesting against wasteful expenditure and excessive taxation do not include a single trade union representative. Yet the President of a great American railroad, addressing a meeting of business men, said: "Due to unemployment and wage reduction the income of wage earners in private business dropped more than 49 per cent between 1929 and 1931. Salaries dropped 44 per cent, yet in the same period

wages and salaries of government employees increased by 14.37 per cent." The strike against taxes, as a movement, does not yet seem to interest the rank and file of employees. And yet the weekly and monthly magazines regularly now contain articles on revolution. There is no parallel for this crisis. No one talks about rights now. No great economic or political principle seems to be at stake, at least no mention of one appears in the political literature of the day. Probably this is the calm before the storm. A financial authority, the head of a great bank, says the depression will last another thirty months. There is time yet for the question of right, natural and individual, to appear on the scene.