CHAPTER 6

From contract to status: Durkheim, Duguit and the state

The theme running through the last three chapters has been that practical questions relating to the organization of the public services and especially to trade union rights raised basic questions about the nature and authority of the state. Practical debates and 'high theory' were indissolubly linked, and the nature of the state was rethought at several different levels simultaneously. In the final two chapters the focus of our attention must switch to those writers who engaged with the problem of the state at its highest level of generality: in particular, the two jurists who exerted a commanding influence over French public law theory and legal philosophy, Léon Duguit and Maurice Hauriou.

We have already indicated in chapter 2 some of the reasons for considering legal theory as a major contributor to broader intellectual movements, and it is worth stressing here that any consideration of the history of political theory in France must necessarily accord central importance to the role of jurists. This is certainly true of theories of the state. The contribution of French jurists to political theory has not been accidental, as one might say was the contribution of Austin or Maine or Dicey to British political thought: it was inseparable from their identity as jurists. Duguit himself was perceived by some of his foreign contemporaries not just as a distinguished jurist but as one of the foremost political theorists of their age. Harold Laski, for instance, described Duguit in a letter to Holmes in 1917 as 'without doubt the first of living political thinkers'.[1] He later wrote that Duguit's influence on his generation was comparable to that of Montesquieu's *De l'Esprit des lois* almost two centuries earlier: both disciples and opponents were obliged to reformulate their position in accordance with the new perspective

[1] Mark DeWolfe Howe (ed.), *Holmes–Laski Letters* (London 1953), I, 105.

indicated to them.[2] Moreover, the work of later French political theorists within the juristic tradition – such as Georges Burdeau, Marcel Prélot and Maurice Duverger – has evidently been shaped by reflection on the controversy between Duguit and Hauriou.[3]

But both Duguit and Hauriou were, as we have seen, engaged with the relationship between law and social theory, and it is necessary to preface a consideration of Duguit's theory of the state with an examination of a set of questions which dominated the nascent discipline of sociology.

FROM CONTRACT TO STATUS

We have seen repeatedly that one of the conceptual dualisms that infused the debate on civil servants and the state was the dualism of contract and status: did civil servants stand in relation to the state in a private law relationship, governed by contract, or in a public law relationship, determined unilaterally and authoritatively by the state? In England, where there was no 'public law' in the European sense, this was not a problem: civil servants were to be regarded as the private employees of the crown, bound by a contractual relationship.[4] But in France this was a question of primordial theoretical importance. In the preceding two chapters we have distinguished between the 'public service' school, which held that the sphere of public law was extending its scope, and syndicalists like Leroy, who maintained that it was shrinking and being supplanted by private law and contractual relations.

There are resonances here of an important theme in nineteenth-century social theory: the debate about the extent to which contractual forms were the distinguishing feature of modern societies. Economic liberalism, often deemed unhistorical and unsociological, nevertheless derived nourishment from the socio-historical thesis that the fundamental characteristic of modern societies was that they rested increasingly upon voluntary association rather than upon relations of command and obedience; and a number of leading social theorists expounded dualistic typologies of societies along these lines,

[2] H. J. Laski, 'La Conception de l'Etat de Léon Duguit', *Archives de philosophie du droit* (1932), p. 121.
[3] See, e.g., Georges Burdeau, *Traité de science politique*, 7 vols. (Paris 1949–57), passim.
[4] Siwek-Pouydesseau, *Le Syndicalisme des fonctionnaires*, p. 33.

by no means always in the service of *laissez-faire*. In France, Saint-Simon – often regarded as a precursor of socialism – prophesied that the close of the nineteenth century would see the advent of 'un régime vraiment positif, industriel et libéral' in which the 'military' class would be supplanted by the productive class: 'Les nations qui passent aujourd'hui pour les plus civilisées ne seront réellement sorties complètement de la barbarie qu'à l'époque où la classe la plus laborieuse et la plus pacifique sera chargée de la direction de la force publique et où la classe militaire sera complètement subalternisée.'[5] There would reign 'l'association universelle', in which 'le gouvernement des hommes' would be supplanted by 'l'administration des choses'.

In England variations on this dualism were developed by Herbert Spencer and Sir Henry Maine. Spencer was formed intellectually by English radical provincial dissent of the 1830s and 1840s: this was the climate that nurtured Cobden, too, and here the pacific tendency of commerce was something of a commonplace.[6] Spencer drew on this contrast between militancy and industrialism, which we have seen in Saint-Simon but which in a sense derived from Adam Ferguson and the other 'philosophic historians' of the Scottish Enlightenment. Spencer moulded this into a general theory of social evolution, which, he thought, was characterized by the gradual replacement of the military or 'militant' type of society by the 'industrial' type. Meanwhile Maine, that great exponent of historical jurisprudence, famously developed the thesis that 'the movement of the progressive societies has hitherto been a movement from status to contract', an intellectually subtler version of Spencer's thesis.[7]

The distinction between these two types of social organization made its definitive mark on classical sociology when formulated in 1887 by the German Ferdinand Tönnies in terms of the dualism of *Gemeinschaft* and *Gesellschaft*: an organic community characterized by social solidarity and shared values had given way, on Tönnies' account, to a modern individualistic society. Tönnies read *Ancient Law* in German translation in 1880, and on many occasions he acknowledged the influence of both Spencer and especially 'my teacher' Maine on the development of the ideas expounded in

[5] Quoted in Leroy, *Histoire des idées sociales*, II, 233–4.

[6] J. D. Y. Peel, *Herbert Spencer: the evolution of a sociologist* (London 1971), pp. 56–81.

[7] Maine, *Ancient Law*, p. 174. Spencer acknowledged the affinities in *The Man versus the State* (London and Edinburgh 1892), p. 294.

Gemeinschaft und Gesellschaft.[8] He quoted in full Maine's famous paragraph on status and contract, and discussed that distinction as one of a number of dualisms (land and money was another) which together constituted the overarching dualism of *Gemeinschaft* and *Gesellschaft*.[9]

This type of dualism had a profound impact not just on sociology but also on public argument. In France, Spencer was the chief influence – perhaps even more than Saint-Simon – and exponents of orthodox political economy invoked his distinction between warrior societies and industrial societies to sustain their anti-collectivist polemics.[10] But already by the time Tönnies was writing the plausibility of the dualism was being undermined, insofar as it assumed that the evolution away from 'militant' forms of social organization would continue. By the 1870s and 1880s the German model of industrialization sponsored by a 'militarist' and authoritarian state seemed to challenge the English model in which industrial efficiency went hand-in-hand with freedom;[11] and even in England both Maine and Spencer came to fear the resurgence of 'status' in the one case and 'militancy' in the other.[12]

For Maine and Spencer, this was a deplorable case of regression. But subsequent thinkers perceived in the extension of the social and economic role of the state a more fundamental phenomenon which constituted a refutation of the bipolar reading of social evolution. Thus Maitland's contributions to the 'village community' debate (in which Maine had figured so prominently) in effect turned Maine's dictum on its head and identified progress with the increasing salience of status over contract. E. A. Freeman and J. R. Green had seen the village community as in some sense individualistic as well as communal, and as a prefiguration of the modern world; Maine and Seebohm, in their different ways, had seen it as communistic and archaic. Maitland, by contrast, saw it as lacking true corporateness, and, since he saw the modern world as increasingly peopled by a

[8] F. Tönnies, *Soziologische Studien und Kritiken* (Jena 1925–9), I, 43, 54, 359 and II, 98.

[9] F. Tönnies, *Community and Association*, trans. Charles P. Loomis (London 1955), pp. 211–12.

[10] Notably Yves Guyot, *La Démocratie individualiste*, p. 21; 'Le Collectivisme futur et le socialisme présent', *Journal des économistes*, 6th ser., 11 (1906), 18; and 'Du rôle politique des économistes', *Journal des économistes*, 6th ser., 25 (1910), 176.

[11] Peel, *Herbert Spencer*, p. 198.

[12] J. W. Burrow, '"The village community" and the uses of history in late nineteenth-century England', in N. McKendrick (ed.), *Historical Perspectives: studies in English thought and society in honour of J. H. Plumb* (London 1974), p. 273.

multiplicity of corporate personalities, regarded the village community as *both* archaic *and* individualistic – indeed, almost as archaic *because* individualistic.[13]

The other great legal historian of Maitland's generation in England, the *émigré* Russian liberal Sir Paul Vinogradoff, took a similar view. Writing in 1923, he expressed reservations as to the truth of Maine's famous dictum:

> There are, in fact, strong currents in modern social evolution which bring about legal situations that cannot in any way be subordinated to notions of free agreement and call for a revision of the view that the law of status has ceded its place to voluntary agreements.[14]

Vinogradoff cited French *jurisprudence*, and in particular the Conseil d'Etat's rejection of the demands of Winkell and Rosier, to substantiate his case. As Vinogradoff interpreted the *arrêt*:

> The *Conseil d'Etat* rejected their demand that the ministerial decree should be annulled, on the ground that they had forfeited the privileges of the status conferred on employees by the law when they threw over their duties and jeopardized the performance of the public service from which their privileged status was derived.[15]

The supposed contractualism of modern society was the subject of lively debate in France too, where Spencer's works were devoured voraciously and where Maine was also known. Already in the 1870s and 1880s the solidarist philosopher Alfred Fouillée, accepting Spencer's teaching as to the growing salience of contract in modern society, argued that Spencer was mistaken in seeing a stark antagonism between contract and the state.[16] Fouillée's numerous works were devoted to the creation of a synthesis of the ideas of contract and organism, a reconciliation of sociology with the liberal individualism that was so distant from the concerns of Comte; and he depicted the state as a 'contractual organism'. 'Loin de nous paraître opposées', he wrote, 'les théories du contrat volontaire et de l'évolution organique nous paraissent inséparables: la vraie société humaine doit en montrer l'unité.'[17]

[13] Ibid., pp. 283–4; cf. also F. W. Maitland, 'Moral personality and legal personality', *Collected Papers*, III, 315, where Maitland explicitly takes on Maine's dictum.

[14] Paul Vinogradoff, 'Rights of status in modern law', *Canadian Bar Review*, June 1923; reprinted in *The Collected Papers of Paul Vinogradoff* (Oxford 1928), II, 232. Vinogradoff's library, bequeathed to the University of Oxford, contained several of Duguit's works.

[15] Ibid., II, 236.

[16] For example Alfred Fouillée, *La Science sociale contemporaine* (Paris 1880), p. 52 n. 1.

[17] Ibid., p. xii.

Much the most important contribution to this debate was made by Emile Durkheim. Durkheim had read and absorbed Maine's *Ancient Law*[18] and he also cited Fouillée, but his chief sparring partner in *De la Division du travail social* (1893) was Spencer, who was cited far more frequently than any other author (Marx was mentioned once). Contractualism, as we have seen, had been used by Spencer and others for 'economistic' objectives: from this perspective, politics was depicted as an increasingly outmoded form of activity. Durkheim objected to this perspective, not because he had much concern for 'the political' as such, but because he shared the widespread concern in the 1890s at the moral anarchy (*Anomie* was his term) of modern industrial society. As a convinced republican, he was not willing to allow the 'counterrevolutionary' (for instance, Social Catholic) interpretation that modern 'individualism' was to blame for the lack of shared values in modern society: in order to refute that interpretation, it was crucial for him to argue that a genuine kind of solidarity, compatible with a respect for the rights and dignity of the individual, was possible in modern society. To do this, he had to distinguish his own version of the solidarity of modern society ('organic solidarity') from Spencer's 'contractual society'. As Durkheim summarized it, Spencer's view was that in higher societies men would depend upon the group only in proportion to their dependence upon each other, and they would depend upon each other only through freely concluded conventions. Social solidarity would be reducible to the spontaneous accord of individual interests: to private contracts, in other words. 'The typical form of social relation would be the economic relation stripped of all regulation.'[19] This, in Durkheim's view, was no kind of social solidarity at all: it was a sociological monstrosity which, if it were a true depiction of modern industrial societies – those 'dont l'unité est produite par la division du travail' – would fully justify the 'reactionary' attack.[20] Economic interest could only provide a fleeting bond between men:

> Car, si l'intérêt rapproche les hommes, ce n'est jamais que pour quelques instants; il ne peut créer entre eux qu'un lien extérieur. Dans le fait de l'échange, les divers agents restent en dehors les uns des autres et, l'opération terminée, chacun se retrouve et se reprend tout entier. Les consciences ne

[18] George Feaver, *From Status to Contract: a biography of Sir Henry Maine 1822–1888* (London 1969), p. 58.

[19] Dominick LaCapra, *Emile Durkheim: sociologist and philosopher* (Chicago and London 1985), p. 129.

[20] Emile Durkheim, *De la Division du travail social* (Paris 1893), p. 222.

sont que superficiellement en contact; ni elles ne se pénètrent, ni elles n'adhèrent fortement les unes aux autres. Si même on regarde au fond des choses, on verra que toute harmonie d'intérêts recèle un conflit latent ou simplement ajourné. Car, là où l'intérêt règne seul, comme rien ne vient refréner les égoïsmes en présence, chaque moi se trouve vis-à-vis de l'autre sur le pied de guerre et toute trêve à cet éternel antagonisme ne saurait être de longue durée. L'intérêt est en effet ce qu'il y a de moins constant au monde. Aujourd'hui, il m'est utile de m'unir à vous; demain, la même raison fera de moi votre ennemi. Une telle cause ne peut donc donner naissance qu'à des rapprochements passagers et à des associations d'un jour.[21]

Durkheim countered with his famous dictum that 'tout n'est pas contractuel dans le contrat'.[22] The contract was not just any agreement between arbitrary private wills; rather, it presupposed a body of publicly determined rules and norms which laid down conditions of validity which any contract had to satisfy if it were to be enforceable. Marriage and adoption, for instance, were originally contracts, but with social development the contractual element had diminished.[23]

It is important to grasp this point: Durkheim held that the growth of public regulations went hand-in-hand with the growth of contractual relationships, rather than varying inversely as Spencer thought. This helps us situate Durkheim in relation to contemporary intellectual debates. His interest in the concept of *solidarité* on the one hand, and his perception of the sociological importance of occupational groups on the other, have led commentators to identify him with solidarism and syndicalism. Yet we have seen in the last chapter how profoundly the syndicalist movement (however wrong-headedly) was indebted to a sort of contractualism. And the solidarist movement too was deeply attached to the language of contract, and justified its abandonment of the doctrines of *laissez-faire* by extending the idea of contract by means of Fouillée's concept of the quasi-contract. Durkheim, by contrast, was critical of Fouillée for unduly extending the concept of contract to include every action not determined by constraint.[24]

Durkheim discussed the question of occupational groups in the preface to the second edition of *De la Division du travail social* (1902), where he gave them a central place as a potential remedy for 'the state of juridical and moral anomy in which economic life is currently

[21] Ibid., p. 222.
[22] Ibid., p. 230.
[23] Ibid., p. 226; also Lacapra, *Emile Durkheim*, p. 130.
[24] Durkheim, *De la Division du travail social*, p. 221, n. 1.

found'. Employing the Spencerian dualism, Durkheim noted that economic functions, which had formerly 'played only a secondary role', were 'now of the first importance': administrative, military and religious functions had become less important. The problem was that the economic world was 'only feebly ruled by morality'. It was in 'the establishment of an occupational ethic and law' that the occupational group had a part to play.

But this role was not to be allocated to the *syndicat* in its current state, for though he acknowledged it as 'a beginning of occupational organization' it was a mere private association, lacking legal authority and hence regulatory power. The occupational groups in which he invested so much hope would not be voluntary associations but public institutions. And this is a key point, for a recurrent theme in this study has been that there is all the difference in the world between aiming to 'privatize' the public sphere (as the syndicalists tended to do) and attributing a public role to institutions formerly regarded as quintessentially private.

In fact Durkheim's views on the relationship between occupational groups and the state were remote from any kind of pluralism, let alone the syndicalist version. It is notorious that a Durkheimian theory of the state was not explicitly formulated at length, but has to be reconstructed from fragments; one of these fragments is his contribution to a debate on the status of public officials organized by Desjardins' Union pour la Vérité. There he took the view 'que tout le monde est, à des degrés divers, fonctionnaire de la société'.[25] He went on to qualify this view by stressing that some are more directly 'fonctionnaires de la société' than others. They – *fonctionnaires* proper – could not be assimilated to private employees:

> Ils ne sont pas au service d'intérêts particuliers mais directement d'intérêts publics. Les autres, au contraire, servent directement des intérêts privés, et, d'une manière indirecte seulement, l'intérêt public. Les premiers participent de l'autorité morale qui est inhérente à la société elle-même, et par suite à l'Etat qui représente la société, qui en est l'expression concrète, et dont ils dépendent immédiatement.[26]

The question of *syndicats de fonctionnaires* raised the question of whether the organization of public officials should be modelled on that of private employees, or *vice versa*. For 'le syndicat, c'est l'organisation que s'est donnée la vie industrielle et commerciale.

[25] *Libres entretiens*, p. 152.

[26] Ibid., pp. 194–5.

Demander qu'on l'étende aux fonctions de l'Etat, c'est donc admettre que celles-ci doivent s'organiser sur le modèle des premières.' This would be a retrograde step, for: 'le progrès semble consister à réclamer, pour l'employé privé, un peu des garanties et de la stabilité dont jouit l'employé public (avec les obligations correspondantes) et non à introduire dans les emplois publics l'anarchie qui règne encore trop dans l'ordre économique'.[27] Or, in other words, 'nous tendons à élever le contrat privé à la dignité du contrat public, et non à rabaisser le contrat public au niveau du contrat privé'.[28]

Durkheim's discussion of occupational groups was logically tied to his understanding of the modern democratic state, though this understanding was worked out after he had established the basic framework of his thought in *De la division du travail social* and in his lectures at Bordeaux, notably those published posthumously as *Leçons de sociologie*.[29] His central problem was one that has permeated the debates examined in this study: what is the proper form of authority in the modern state? The important substantive conclusion he had drawn in *De la division du travail social* was a rejection of Spencer's view that authoritative moral regulation must diminish in modern industrial society. 'Toute société', he insisted 'est une société morale'; and hence 'c'est donc à tort qu'on oppose la société qui dérive de la communauté des croyances à celle qui a pour base la coopération, en n'accordant qu'à la première un caractère moral et en ne voyant dans la seconde qu'un groupement économique. En réalité, la coopération a, elle aussi, sa moralité intrinsèque.'[30] Central to that 'intrinsic morality' of industrial society was a respect for the rights of the individual: a point that emerges most clearly from Durkheim's defence of the *dreyfusard* case against the Catholic apologist Brunetière.[31]

The key point was that for Durkheim (unlike Spencer) moral regulation did not vary inversely with the growth of modern individualism; and in fact the state's role grows together with the advance of organic solidarity. There is, *prima facie*, a problem here, for

[27] Ibid., p. 196.

[28] E. Durkheim, *Textes*, ed. V. Karady (Paris 1975), p. 202. In emphasizing the similarities between the views of Duguit and Durkheim on this question, we follow Evelyne Pisier-Kouchner, 'Perspective sociologique et théorie de l'Etat', *Revue française de sociologie* 18 (1977), 320–4.

[29] Anthony Giddens (ed.), *Durkheim on Politics and the State* (Cambridge 1986), p. 28.

[30] Durkheim, *De la division du travail social*, pp. 249–50.

[31] Emile Durkheim, 'Individualism and the intellectuals', trans. S. and J. Lukes, *Political Studies* 17 (1969), 14–30.

one of Durkheim's theses in *De la division du travail social* had been that the growing importance of cooperative or restitutive law at the expense of penal or repressive law was one of the symptoms of the movement from mechanical to organic solidarity. Was this not another way of saying that authoritative command gives way to contract? No, replied Durkheim, for the state is not essentially coercive in character. This is a difficult point which needs some elaboration.

Durkheim's definition of the state was peculiarly narrow, for, taking the state to be not 'la société politique tout entière' but rather 'une partie seulement de cette société', he insisted on excluding from 'the state' bodies such as the army, the judiciary and the various public services. 'Autre chose est le corps des ingénieurs, des professeurs, des juges, autre chose les conseils gouvernementaux, chambres délibérantes, ministères, conseil des ministres avec leurs dépendances immédiates.'

This was because the essential function of the state was deliberation, not the execution of changes. 'The state' therefore consisted only of those bodies which had some representative function: 'L'Etat, c'est proprement l'ensemble des corps sociaux qui ont seuls qualité pour parler et pour agir au nom de la société.' The various public services, though 'placés sous l'action de l'Etat', did not form part of the state.

One consequence of this 'deliberative' concept of the state was that the state's functions would be greater in more developed societies. In a society characterized by mechanical solidarity, individual thought and action is scarcely independent of *la conscience collective*, which is 'absolument irréfléchie'. In such a society, 'il n'y a point de centre où toutes ces tendances aveugles à l'action aboutissent et qui soit en état de les arrêter, de s'opposer à ce qu'elles passent à l'acte avant d'avoir été examinées et qu'une adhésion intelligente ait été donnée à (la réalisation), une fois l'examen terminé'.[32] In a modern society there is much more scope and need for an organ of reflection in society.

The state was, for Durkheim, 'an organ distinct from the rest of society'; the consequence of which was that 'if the state is everywhere, it is nowhere'. The characteristic feature of democratic societies was not that the people govern or even constitute the state, for that would clearly be impossible on Durkheim's definition. Rather it was 'the

[32] Durkheim, *Textes*, III, 174.

increasing extension of the contacts and ties of the state with other sectors of society'.[33] This did not mean that the state would ultimately 'wither away' or 'merge' with society, or that the 'government of men' would be supplanted by the 'administration of things': rather, in a democratic society state and society would exist in a creative tension, and it was precisely because of its growing contacts with society that the state would be in a position to 'think' for society and to exercise authority. For 'strictly speaking, the state is the very organ of social thought'.

LÉON DUGUIT AND THE STATE

Léon Duguit was the most celebrated exponent of the application of sociological methods in legal studies; he was for a time a colleague and friend of Durkheim at Bordeaux; and it is in the context of the preceding discussion that his ideas need to be understood.

It needs to be pointed out, however, that Duguit's influence on French intellectual life was somewhat restricted by his provincialism and his intense local pride; though it is true that legal thought was less Paris-dominated than history or philosophy.[34] He was born in 1859 at Libourne, a town in the Gironde some twenty miles from Bordeaux, and both his parents were prominent local figures, his father as a barrister and his mother as an active figure in local charities. He was educated at the *collège* of his home town, and was later responsible for founding the Association des anciens élèves du collège de Libourne: this was an expression of that attachment to his origins that led him to spend almost the whole of his academic career in Bordeaux, where he studied from 1876 to 1883 and taught from 1886 until his death in 1928. In the intervening period (1883–6) he taught at Caen, but Paul Duguit supplicated to Louis Liard, the director of higher education at the Ministry of Public Instruction, for the appointment of Duguit *fils* to a chair at Bordeaux at the earliest possible opportunity.[35]

[33] Giddens, *Durkheim on Politics and the State*, p. 8.

[34] See Weisz, *Emergence of Modern Universities*, p. 299.

[35] Liard, a key figure in the promotion of sociology in the universities, had taught at the Bordeaux Faculty of Letters from 1874 to 1880, and had served as Deputy Mayor of Bordeaux: it was presumably in that capacity that he got to know Paul Duguit. Liard then became Rector of Caen University, where he remained until his appointment as Director of Higher Education in 1884; he seems to have got to know Léon Duguit in the academic year 1883–4, when they were both at Caen. See Paul Gerbod, 'Un directeur de l'enseignement supérieur: Louis Liard', in F. de Baecque et al., *Les Directeurs de ministère en France* (Geneva

Duguit was no narrow provincial. On the contrary, he frequently travelled abroad for academic and other purposes.[36] But he did make it clear to the ministry that he had no desire to leave Bordeaux for a post in Paris: in this respect he resembled Hauriou, who remained in Toulouse, but both contrasted starkly with a man such as Saleilles, who repeatedly requested a move to Paris, and was in the end prepared to sacrifice his chair in the History of Law at Dijon to move to the lowly position of *agrégé* at the Paris Law Faculty in 1895.[37] French cultural and intellectual life was (and largely still is) highly centralized, so the decision taken by both Hauriou and Duguit to remain at provincial universities did place limits on the extent of their influence: particularly so given that both were at such a great distance from Paris as to rule out the possibility of commuting from the capital as many provincial professors did. Neither was as central to contemporary controversy as a jurist of much less stature such as Berthélemy, who, benefiting from holding a chair in Paris, was able to play an important role in such opinion-forming organizations as the Société d'études législatives,[38] the Union pour la vérité, and the Société générale des prisons. Conversely, however, it could validly be argued that the fact that the three most creative and internationally renowned French legal scholars of this era – Duguit, Hauriou and Raymond Carré de Malberg of Nancy and subsequently Strasbourg – were all happy to remain in the provinces and turned down opportunities to move to the capital is evidence of a growing attractiveness of the intellectual life of provincial universities. For all their geographical isolation Duguit and Hauriou did exert influence, but the point of this chapter and the next is less to discuss that influence than to examine the theoretical significance of the debates

1976), pp. 107–15. See also Duguit's *dossier* held by the Ministry of Public Instruction in the Archives Nationales F17 26737, esp. letter from Paul Duguit to Louis Liard, 5 Nov. 1885.

[36] In the summer of 1887, for instance, he visited Poland, Russia and Turkey in order to study economic conditions and academic organization. Arch. Nat. F17 26737, Duguit's *dossier*: letter from Duguit to Directeur de l'enseignement supérieur, 29 July 1887.

[37] Arch. Nat. F17 25908: Raymond Saleilles' *dossier*. Though he accepted a lower status, his pay rose; and in any case he was soon appointed to a chair in Paris.

[38] Duguit was a founder member of the Société d'études législatives, and indeed served on its *Conseil de direction* from 1907 to 1910, but he appears not to have attended any of the meetings of the *Conseil*, and we have been able to trace only one appearance by him at a meeting of the society. By contrast, Berthélemy served as an influential member of a high-powered study group on the problem of *le statut des fonctionnaires* in 1912–13. This group, which held its meetings at the Paris Law Faculty, included several other of the *dramatis personae* of this book: Cauwès (the President), Chardon, Esmein, Faure, Cahen and Larnaude: see *Bulletin de la société d'études législatives* 11 (1912), 386.

already discussed by drawing out their entanglement with more abstract debates on the nature of the state.

The main thrust of the account given in chapters 3 and 4 has been to present the public service school as a movement of thought that appealed especially to those who were disillusioned with political partisanship in government, and indeed with parliamentarianism in general. Duguit fits into this context very well. For although some commentators have tried to assimilate Duguit's thought to the solidarist movement, or to Paul-Boncour's project of forging an alliance between Radicals and Socialists, or to both, their attempts to do so are unconvincing.[39] Though he made full use of the language of *solidarité*, Duguit was far removed from the ideological concerns of the solidarist movement, and was vigorous in his repudiation of the contractualism that underlay Bourgeois's solidarism.[40] Such was his concern to dissociate himself from what he regarded as the distortion of the idea of solidarity by politicians that he began to adopt the term 'social interdependence' instead.[41]

Secondly, Duguit was not a Radical, and his work cannot therefore be located in the same context as Paul-Boncour's project of modernizing Radicalism. He was elected to the Bordeaux municipal council in May 1908 on the list of the Union républicaine démocratique; and when he stood, unsuccessfully, as a candidate in the legislative elections in the Gironde in April 1914 the newspapers labelled him 'républicain de gauche' or 'progressiste'.[42]

We know Duguit to have been a committed *dreyfusard*, but he was sceptical of many mainstream republican shibboleths.[43] His contemporaries noted his lack of political partisanship, especially on the religious question.[44] Though himself a freethinker, Duguit was

[39] Hayward, 'Solidarist syndicalism', pp. 17–36, 185–202; 'The idea of solidarity in French social and political thought in the nineteenth and early twentieth centuries', London University Ph.D. thesis, 1958, 2 vols., esp. 1, 541–2; William Logue, *From Philosophy to Sociology: the evolution of French liberalism 1870–1914* (Dekalb, Ill. 1983), ch. 8, pp. 180–204; Weisz, *Emergence of Modern Universities*, p. 299.

[40] Léon Duguit, *Le Droit social, le droit individuel et la transformation de l'Etat* (Paris 1908), p. 8.

[41] Ibid., p. 8; Léon Duguit, *Les Transformations générales du droit privé depuis le Code Napoléon*, 2nd edn (Paris 1920), pp. 26–7.

[42] Marcel Laborde-Lacoste, 'La Vie et la personnalité de Léon Duguit', *Revue juridique et économique du sud-ouest, série juridique* 10 (1959), 106 ff.

[43] A-J. Boyé, 'Souvenirs personnels sur Léon Duguit', *Revue juridique et économique du sud-ouest* 10 (1959), 121 ff.

[44] According to Joseph Barthélemy, 'il englobe, dans une même réprobation, sectaires jacobins et sectaires cléricaux', J. Barthélemy, Review of Duguit's *Traité de droit constitutionnel*, *RDP* 25 (1908), 156.

sympathetic to the Roman Catholic Church in its conflict with the French state: he attacked the 'draconian' régime imposed on the congregations by the 1901 law[45] and though he argued in favour of the separation of Church and state it was on the ground that the Church could benefit more than any other group from freedom of association, since it would be liberated from the long-term ambition of the state to create 'un clergé de fonctionnaires'.[46] He was keen to deny any partisan purpose in his scholarly work, and an interpretation of Duguit in terms of partisan identification is unlikely to succeed.[47] Instead, his work needs to be understood in broader intellectual terms.

We have seen in earlier chapters that one of the main problems confronting the public service school, as we have identified it, was how to reconcile the *étatiste* assumptions underlying their thinking with their unwillingness to use the concept 'state'; an unwillingness that sprang from a deeply-ingrained association between the concepts of state and sovereignty. A similar suspicion of the concept of the state permeated Duguit's whole *œuvre*. It sprang from a basic commitment to philosophical (but not legal) positivism; though according to his own account he had not read Comte when he wrote his first systematic exposition of his doctrine in 1901.[48] His lifelong objective was the elimination from law of all 'metaphysical' concepts: just as Comte had tried to expunge the word 'right' (*droit*) – a 'celestial title' – from political vocabulary, arguing that in the positive polity man should have no other right than the right to do his duty, so Duguit's great bugbear was the legal concept of *droit subjectif*; that is, the concept of legal effects that derive from the intrinsic quality of a will.[49] Sovereignty was one application of this concept; natural rights were another.

In his youthful phase, Duguit was attracted to the organicist theories of Espinas, Spencer and others. After 1901 – having got to know Durkheim as a colleague (in a different faculty) at Bordeaux – he began to draw heavily on Durkheimian sociology, which no doubt attracted him insofar as it bolstered his conviction that his attachment

[45] Duguit, *Droit privé*, p. 76; cf. also Duguit, *Traité de droit constitutionnel*, 2nd edn, I, p. 483, where he refers to '[les] lois spoliatrices de 1901 et 1904 contre les congrégations religieuses'.

[46] Duguit, 'L'Élections des sénateurs', *RPP* 2 (1895), 472–3. After the First World War Duguit became indebted to Aquinas' thought: see *Traité de droit constitutionnel*, 2nd edn, I, p. 52, and contrast with the earlier dismissal of Thomism in *Droit social*, p. 27.

[47] See, for example, Duguit, *Droit privé*, 2nd edn, p. 2.

[48] Duguit, *Droit social*, p. 12.

[49] Auguste Comte, *Système de politique positive*, I, p. 361; Duguit, *Droit social*, pp. 20, 24.

to the values of personal freedom and the importance of justice for the individual did not entail an acceptance of a subjectivist conceptual framework for legal theory. But he never accepted the concept of *conscience collective*,[50] which he dismissed as 'une hypothèse pure' (partly, one suspects, precisely because he wanted to eliminate the concept of will from his theory and hence had little use for the notion of consciousness), and for that reason he cannot properly be assimilated to the Durkheimian school. Indeed, in his mature works he explicitly repudiated deterministic sociology and insisted that 'le grand facteur des relations sociales est avant tout l'homme même, être conscient de lui-même, de ses aspirations et de ses besoins'.[51]

This is the fundamental reason why Duguit was unable to follow Durkheim in deploying a 'strong' concept of the state. Whereas Durkheim could describe the state as the 'brain' of society, 'un organe de réflexion', 'l'intelligence mise à la place de l'instinct obscur',[52] Duguit insisted that the word 'state' should be used simply as a shorthand expression: 'Je parlerai de l'Etat pour faciliter l'exposition, mais que le lecteur veuille bien se rappeler que, pour moi, l'Etat ce sont les gouvernants.'[53]

In an important sense, then, Duguit was a methodological individualist. He held that the rule of conduct, which for him constituted the foundation of law, could apply only to beings endowed with consciousness and will; and that, for Duguit, meant individuals and *not* collectivities. Hence, for Duguit, the foundation of constitutionalism, of the *Rechtsstaat*, lay not in the subjection of the state as a legal personality to legal rules, but rather in the fact that 'la règle de conduite s'impose à ces plus forts, à ces gouvernants, avec la même rigueur qu'aux faibles, aux gouvernés'.[54]

This concern to establish that the state is subject to law was in fact one of Duguit's foremost preoccupations throughout his career. He scornfully dismissed the concept of the *Rechtsstaat* expounded by German positivists such as Jellinek, whose theory of the self-limitation of the state maintained that the foundation of the state's subjection to law was the state's voluntary acceptance of the rules which it itself

[50] See Duguit, *L'Etat, le droit objectif et la loi positive* (Paris 1901), p. 92, where Duguit argues that the *règle de conduite* is individual in the sense that it can only exist in the individual consciousness. 'Ici nous nous séparons complètement des doctrines sociologiques généralement admises. La prétendue conscience sociale nous paraît une hypothèse pure.'

[51] Duguit, *Traité de droit constitutionnel*, 1st edn, I, p. 17. [52] Durkheim, *Textes*, III, 174.

[53] Duguit, *Traité de droit constitutionnel*, 2nd edn, I, p. 547.

[54] Duguit, *L'Etat, le droit objectif et la loi positive*, I, pp. 93, 97.

laid down. A voluntary limitation was no limitation at all in Duguit's view.[55] His solution was to reject legal positivism altogether; and this formed part of a still larger enterprise of repudiating the concept of a subjectivist account of law, and notably what he characterized as the 'civilian' system.

In this system, the contract was 'l'acte juridique par excellence';[56] will was regarded as the source of all legal obligation, and since there plainly are non-contractual obligations – notably those arising from statute law, unilaterally imposed by the state – it must be the case that there is something intrinsically superior about the will of the state. For Duguit this was unacceptable, and it was one reason why he sought to reduce *l'Etat* to *les gouvernants*.

Duguit regarded the sociological approach to law as a means of liberating himself from subjectivist systems, and of establishing that society can impose a juridical limitation on the state. If objective social reality, rather than the will of the state, is the source of law, then the state is subject to law in the same way as private individuals are.

In fact Duguit went so far as to deny any distinction between the individual and the collective interest. He followed Durkheim's central assertion that individuality progresses with the growth of social differentiation and interdependence, and inferred from this postulate that the processes of socialization and individualization, far from being contradictory, are in fact logically connected: 'La socialisation augmente en raison directe de la division du travail; mais la division du travail augmente elle-même en raison directe de l'individualisation; de telle sorte que socialisation et individualisation ne s'excluent point, mais que l'une procède de l'autre.'

Hence there is no opposition between individual and collective interest:

> un point nous paraît certain, et il est capital: le degré d'intégration sociale dépend du degré d'individualisation; il n'y a pas d'intérêt collectif opposé à l'intérêt individuel, et l'intérêt collectif n'est que la somme des intérêts individuels; en d'autres termes, l'intérêt collectif sera sauvegardé quand tous les intérêts individuels le seront, et d'autant mieux sauvegardé que les intérêts individuels seront mieux protégés.[57]

[55] Duguit, *Traité de droit constitutionnel*, 2nd edn, I, p. 33.
[56] Duguit, *Droit privé*, 2nd edn, p. 32.
[57] Duguit, *Traité de droit constitutionnel*, 2nd edn, I, pp. 48–9.

The result was that Duguit professed himself sceptical of the distinction, fundamental in French law, between public and private law. He insisted that there must be a public law, in the sense that the state – or rather *les gouvernants* – must be subject to law; and this was an important element in his critique of German legal positivism.[58] But, just as Max Weber perceived that 'this conceptual separation [between public law and private law] presupposes the conceptual separation of the "state", as an abstract bearer of sovereign prerogatives and the creator of "legal norms", from all personal "authorizations" of individuals',[59] so Duguit saw that his denial of the personality of the state led him to deny the 'absolute' distinction between public and private law which he associated with jurists such as Hauriou, Larnaude and Michoud. For, in the absence of such a collective personality it is impossible to conceive of

> une règle s'appliquant aux rapports d'une prétendue personne collective souveraine avec des sujets subordonnés à la volonté, l'existence d'une règle distincte, par son fondement et par son objet, de celle qui s'applique aux rapports entre simples particuliers... La règle de droit qui s'impose aux gouvernants est la même que celle qui s'impose aux gouvernés.[60]

If the state is not the source of law, then public and private law cannot have different foundations. The spirit in which the two branches are studied must be the same, namely the spirit of justice; and both, as branches of social science, must employ the same method, namely the method of observation combined with the deductive hypothesis.[61] The distinction was, he thought, artificial: it served simply to furnish a formal justification for 'les actes arbitraires du pouvoir politique'.[62] Nonetheless, Duguit was prepared to accept the need for a minimal distinction between public and private law, even if only for the purposes of exposition; and he argued that they could be distinguished according to the *mode of sanction* available.[63]

There are thus strong *prima facie* grounds for assimilating Duguit's position to that of Leroy and the syndicalists, who held that the distinction between public and private law was in the process of collapsing. And yet this will not do. For Leroy and the syndicalists, the historical trend was for public law to be modelled increasingly on

[58] Ibid., I, pp. 33, 488; also Duguit, 'The law and the state', *Harvard Law Review* 31 (Nov. 1917), 6.

[59] Max Weber, *Wirtschaft und Gesellschaft*, in H. H. Gerth and C. Wright Mills (eds.), *From Max Weber* (London 1970), p. 239.

[60] Duguit, *Traité de droit constitutionnel*, 2nd edn, I, pp. 525–6.

[61] Ibid., I, pp. 526–7.

[62] *L'Etat*, I, pp. 270.

[63] Ibid., I, pp. 539–40.

private law; and, in particular, to become more contractual in character. And the consequence was that they were hostile *in principle* to the great practical embodiment in the French legal system of the conceptual distinction between public and private law, namely the existence of a separate administrative jurisdiction. For Leroy, the existence of a separate administrative jurisdiction was plainly an *étatiste* and therefore illiberal institution. If the *jurisprudence* of the Conseil d'Etat was becoming more liberal, it was liberal *malgré lui*. Duguit sharply dissented from this point of view. He was critical of the 'Anglo-Saxon' assumption (classically expounded in Dicey's contrast between *droit administratif* and the rule of law in chapter 12 of his *Law of the Constitution*) that 'the individual can be protected against the administration only by giving wide competence and strong organization to the ordinary courts of justice'.[64] He noted that from 1828 (the date of a famous article by the Duc de Broglie in the *Revue Française*) until 1872 the abolition of the administrative jurisdiction was a fundamental element in the French liberal programme; but he went on to give an account of its failure which very much stressed its theoretical inadequacies. One reason was the survival in the public mind of 'a strong feeling that every administrative act is a manifestation of executive power and that the ordinary courts cannot be permitted to interfere with the actions of the government'.

It is to be presumed that Duguit was less than sympathetic to this feeling; but his second intellectual explanation was no doubt one that evoked more of his sympathy: 'The close connection between administrative action and the management of the public service was coming to be realized, and there was increasing unwillingness to permit the ordinary courts to interfere with this management.'[65] That is, the very emergence of the concept of public service – whose central place in *la doctrine* Duguit helped consolidate – was one of the crucial reasons why the administration could not be made subject to the ordinary courts.

Yet scholars have often presented Duguit as a syndicalist theorist – no doubt partly because he himself used the term *syndicalisme* in a commendatory sense. In particular, it has been argued that his

[64] Duguit, 'The French administrative courts', p. 385. Contrast this account with Friedmann's view that Duguit, like Kelsen, agreed with Dicey's view of *droit administratif*, since 'both distrust the arbitrariness of authority disguised under the special status of public law': W. Friedmann, *Legal Theory* (London 1944), pp. 160–1. Friedmann is right about Kelsen but wrong about Duguit. [65] Duguit, 'The French administrative courts', pp. 391–2.

sociological analysis of the state led him to support the claims of *le syndicalisme de fonctionnaires*.[66] But an analysis of Duguit's position in the debate on *syndicats de fonctionnaires* hardly bears this out. Initially he was resolutely hostile to public officials' claim to the right to form *syndicats*. When the Proudhonian Aimé Berthod, arguing for the legitimacy of *syndicats de fonctionnaires*, invoked Duguit's assault on 'toute cette métaphysique juridique' concerning sovereignty and the will of the nation, Duguit replied by denying that his rejection of the postulate of the sovereign personality of the state entailed an acceptance of the legitimacy of public service *syndicats*. On the contrary, it was precisely because the state was not a collective person enjoying rights, but rather a social group ('les gouvernants') with a social function – and hence with duties – that *syndicats* could not be permitted in the public services. For the holders of power – *les gouvernants* – were subject to a legal norm which obliged them to perform certain tasks. Now, the strike, though not the sole aim of the *syndicat*, was *one* of its essential aims, so that to allow officials to form *syndicats* would be to allow them to strike. Yet to allow public officials to strike would be a dereliction by *les gouvernants* of the duty imposed on them by the legal norm.[67]

Soon afterwards, Duguit became markedly more sympathetic towards *syndicalisme*, and began to commend men such as Proudhon and Pelloutier, the organizer and inspiration of the bourses de travail, who died in 1900.[68] He insisted, however, that *syndicalisme* must be an instrument of pacification and union rather than of war and social division.[69] Whereas he had formerly held that *syndicalisme de fonctionnaires* was a pathological movement which the government had a duty to suppress, he now held that it was a normal movement with profound roots, and that the legislator would be unable to suppress it.[70]

Nonetheless, it would be a mistake to suppose that his thinking on this question had undergone a revolution in the intervening two

[66] See, e.g., Pierre Birnbaum, 'La Conception durkheimienne de l'Etat: l'apolitisme des fonctionnaires', *Revue française de sociologie* 17 (1976), 254–5.

[67] Aimé Berthod, 'Les Syndicats de fonctionnaires', p. 431; Léon Duguit, 'Les Syndicats de fonctionnaires', *RPP* 48 (Apr.–June 1906), 28–30. See also Duguit, *Manuel de droit constitutionnel* (Paris 1907), p. 422.

[68] Duguit, *Droit social*, p. 123.

[69] Ibid., p. 119.

[70] Ibid., pp. 133–4. Duguit's continuing ambivalence on this question was pointed out by at least one contemporary critic: Th. Ferneuil, 'Le Syndicalisme: réponse à M. L. Duguit', *RPP* 57 (July–Sept. 1908), 52–3. Ferneuil regarded the formation of *syndicats de fonctionnaires* as a pathological phenomenon.

years. His 'mature' view was still hostile to public service strikes; it was just that he now held that the formation of a *syndicat* did not imply the right to strike.[71] The difference in legal capacity between a *syndicat* and an *association* was minimal; but he continued to take the view that it was the latter and not the former which *fonctionnaires* were entitled to form, and indeed one of the reasons he cited for rejecting the distinction between *fonctionnaires d'autorité* and *fonctionnaires de gestion* was that it logically implied the right of the latter to form *syndicats*:

> Enfin et surtout le mouvement syndicaliste, les tentatives de grève qui se sont produites ces dernières années dans le monde des fonctionnaires ont montré clairement que la distinction des agents d'autorité et des agents de gestion conduisait à des conséquences absolument inacceptables, notamment à reconnaître le droit syndical, avec possibilité d'adhérer à la confédération générale du travail, à la presque totalité des fonctionnaires, à leur reconnaître aussi le droit de grève, ce qui était en contradiction avec la notion même de fonction et de service public.[72]

Above all, he vigorously repudiated the right of *associations de fonctionnaires* to federate with private sector *syndicats* (that is, the right to affiliate to the bourses du travail and the CGT); and he recognized that it was this prohibition, associated with the status of the *association* under the law of 1901, which provoked howls of protest from 'tous les éléments révolutionnaires et anarchistes du syndicalisme fonctionnariste'.[73] He was thus opposed to what he acknowledged to be the main practical demand of the *syndicaliste* movement in the public services. It is true that he described himself as arguing 'dans le sens syndicaliste'; but he counted as his allies, not just Leroy, Paul-Boncour, Berthod and Bouglé, but also Chardon, Demartial, and even Hauriou, of whom he wrote: 'M. Hauriou exprime des idées sensiblement analogue aux nôtres; il écrit notamment très justement: "La conception syndicaliste des fonctions publiques n'est point révolutionnaire, mais purement corporative et décentralisée".'[74]

Evidently, then, Duguit deployed a very broad definition of *syndicalisme*. In the 1920s he seems to have become still more resolutely hostile to the claims of *les syndicats de fonctionnaires*, even though the cause was by then practically lost. He explicitly stated that in 1884

[71] *Droit social*, pp. 133–4; *Traité de droit constitutionnel*, 1st edn, I, 512 ff.
[72] Duguit, *Les Transformations du droit public* (Paris 1913), p. 155; *Traité de droit constitutionnel*, I, pp. 429, 522–3, 531.
[73] Duguit, *Traité de droit constitutionnel*, I, p. 532.
[74] Ibid., I, 535.

the legislator had in mind the relationship between *ouvriers* and *patrons* or between *employeurs* and *employés*, and insisted that the relationship between *fonctionnaires* and *Etat* could not be assimilated to this relationship. He even disapproved of the willingness of postwar governments to allow blue-collar civil servants (*fonctionnaires ouvriers*) to form *syndicats*.[75]

Crucial to Duguit's argument – and crucial to his use of the rhetoric of *solidarité* – was his insistence that in the contemporary world the provision of public services such as education, the provision of social welfare and the regulation of working conditions were obligations of the state. The position contrasted with that of jurists closer to economic liberalism, such as Henry Berthélemy, who drew a distinction between the essential and the optimal functions of government – the latter category including education, the postal service, encouragement of the arts and the organization of transport.[76] For Berthélemy, the essential functions were those which could be performed only by the state because they necessarily involved the exercise of public authority; optimal functions were those which could in principle be performed by the private sector. Hence the distinction between essential and optimal functions corresponded to the distinction between *fonctionnaires d'autorité* and *fonctionnaires de gestion*. Duguit rejected both distinctions. Thus he challenged Bourguin's assertion that there was no essential difference between a state employee and a private employee, outside the sphere of so-called 'authoritative' functions: 'Il y a cette différence capitale ... que les professeurs de l'Etat, que ses ouvriers et employés collaborent à un service dont l'accomplissement est considéré comme indispensable à la vie même de l'Etat, à sa vie morale, intellectuelle, économique, à sa sécurité matérielle.'[77]

It was this obligation on the state to ensure the operation of public services that accounted for the prohibition on strikes by *fonctionnaires*: 'Les gouvernants ont une mission obligatoire à laquelle ils ne peuvent se soustraire; pour la remplir, ils instituent des fonctionnaires;

[75] Ibid., 2nd edn, III, pp. 225–7.

[76] Berthélemy, *Traité élémentaire*. This distinction may well have been derived from J. S. Mill. For another instance of this distinction, see H. Baudrillart, 'L'Etat', in Maurice Block (ed.), *Dictionnaire général de la politique*, 2nd edn (Paris, 1884), II, p. 912. Baudrillart, the father of the cardinal, was a prominent member of the liberal school of political economists, at one time a collaborator of Bastiat, and editor of the *Journal des économistes*. He wrote on Mill, so it is probable that he picked up this distinction at first hand.

[77] Duguit, *Manuel de droit constitutionnel*, p. 422.

comme cette mission est obligatoire, il faut que les fonctionnaires institués par eux ne puissent ni faire grève ni se syndiquer.'[78]

These two quotations – especially the first – are formulated in the sort of language which is emphatically not to be expected of an *anti-étatiste*. And, in fact, for all his reluctance to deploy the term *Etat*, Duguit seems to have appealed explicitly to the concept of an essential collective interest in order to define the state. In employing an engineer or a teacher, the state does not act as an industrialist or as the headmaster of a private school. Rather, according to Duguit, it acts as: 'la personne collective obligée par le droit d'assurer le fonctionnement d'un service public, et pouvant employer son autorité pour assurer le fonctionnement des services publics.'

It is not the state as a patrimonial person that is acting here, but rather:

> l'Etat chargé, parce qu'il est l'Etat, d'assurer le fonctionnement des services publics, c'est-à-dire d'assurer l'accomplissement d'une certaine besogne considérée comme touchant aux intérêts essentiels de la collectivité, c'est l'Etat employant sa puissance pour assurer le fonctionnement de ces services. Et c'est pour cela que, quand il nomme les agents nécessaires à leur fonctionnement, aussi bien que quand il en réglemente le fonctionnement, il fait un acte unilatéral ou acte d'autorité.[79]

We have seen earlier that *syndicalisme* appealed to a sort of contractualism – though in a collective rather than an individualistic form. Duguit, in stark contrast, was as critical of the concept of freedom of contract as of that of sovereignty. Indeed, the attacks on the two concepts were logically connected: 'La volonté individuelle exprimée dans un contrat, comme celle exprimée dans un acte unilatéral, n'a de valeur juridique que lorsqu'elle est déterminée par un but de solidarité.'[80]

Duguit's strategy of argument was to take a highly restrictive view of what the concept of contract must require, and then to highlight its inability to explain modern legal evolution.[81] The concept of contract was logically tied to what Duguit labelled the 'civilian system', and the pivotal concept in that system was the concept of the autonomy of the will, that is, 'le pouvoir de l'homme de créer par un acte de volonté une situation de droit, quand cet acte a un objet licite'.[82] The

[78] Ibid., p. 420.
[79] Ibid., p. 433.
[80] Duguit, *L'Etat, le droit objectif et la loi positive*, p. 297.
[81] Restrictive in comparison with both pre-nineteenth-century and later twentieth-century concepts of contract. For this point, see Atiyah, *The Rise and Fall of Freedom of Contract*, passim.
[82] Duguit, *Droit privé*, pp. 52–3.

system rested on four propositions: that each legal subject must be a subject of will; that each act of will of a legal subject is socially protected as such; that it is protected on condition that its object is licit;[83] and that each legal situation is a relation between two legal subjects, one of whom is the active and the other the passive subject.[84]

Duguit proceeded to take apart this system, which he regarded as well adapted to an essentially individualistic society, but ill-equipped to cope with 'les tendances socialistes et associationnistes de notre époque'.[85] The proposition that there can be no legal personality without will was acceptable so long as social activity was exercised primarily by individuals; so long as it was only exceptionally that collectivities possessed legal personality, this personality could be accounted for by means of the theory of fiction developed by Savigny. But the prodigious growth of associational life in Britain, France and Germany in the late nineteenth century placed unbearable strains on the theory of fiction.[86] Duguit wanted to shift attention away from will and towards social function: for him, in order to determine whether the act of an association should be legally protected, we need not ask whether the association possesses personality; rather, we need to ask whether it pursues a goal which is in conformity with the prevailing understanding of social solidarity. The law ought to protect – and was increasingly coming to protect – the goal that determined the juridical act, and not the will itself.[87]

The stretching of the concept of personality by means of the theory of fiction was evidence of the outdatedness of the civilian system; so too was the stretching of the concept of contract. In order to avoid recognizing the emergence of new sources of obligation other than contract and law (*loi*), civilian jurists had forged new concepts such as *contrat d'adhésion*, *contrat de guichet*, *contrat collectif*, and *contrat de collaboration*.[88] But the acts designated by these names did not involve agreements between autonomous wills. To take the example of the collective labour contract (one category of the *contrat collectif*): in reality, this is 'un acte qui... n'est point un contrat, mais établit une règle permanente devant s'imposer à ceux qui dans l'avenir feront des

[83] There is an important distinction drawn by Jhering between the object (*objet*) of a juridical act and its goal (*but*). The object is *what* one wants, whilst the goal is *why* one wants it (or, in other words, the motive). Thus, to take Jhering's own example, if I want to drink a bottle of wine, my object is to drink a bottle of wine; but my goal might be to quench my thirst or to drown my sorrows. Cited in Duguit, *Droit privé*, pp. 97–8.

[84] Duguit, *Droit privé*, p. 57. [85] Ibid., p. 58. [86] Ibid., p. 64.

[87] Ibid., pp. 71–3. [88] Ibid., pp. 120–1.

contrats individuels'.[89] Again, to take another category of *contrats collectifs*, namely franchises in private hands (*concessions de service public*): though their charters do contain clauses of a contractual character (notably the financial clauses), the most important clauses deal with the conditions under which the public utility shall be operated, affecting either employees (safety at work, pensions) or the public (prices). These clauses give the service concerned practically a statutory organization; they have less a contractual than a legislative character.

Whereas English pluralists such as Maitland and Figgis assaulted the concept of sovereignty by affirming the real personality of 'intermediate' groups, Duguit took it for granted that 'real' personality, if it involved autonomy of will, could only belong to individuals, so that the emergence of associations as social forces undermined the civilian system as a whole.[90] The result was a radically duty-based system: Duguit even went as far as to argue that for an act of will to have legal effect it must be determined by 'un but de solidarité sociale'.[91] As critics pointed out, one of the disadvantages of this perspective was that it made nonsense of the proposition that one is permitted to do whatever the law does not forbid. But it does show just what a chasm separated Duguit from a syndicalist theorist like Leroy: whereas Leroy wanted to infuse the public sphere with private sector values (by means of the creation of *syndicats de fonctionnaires*), Duguit sought to construct a legal system upon the basis of 'objective' concepts such as social function. It was in public law that objective concepts were generally recognized to be most readily applicable, whereas private law was dominated by subjectivist concepts: in a sense, then, Duguit sought to reconstruct private law on the public model, which explains why his ideas provoked most controversy when he turned his attention to private law.[92]

In the light of the debates in social theory which we examined at the beginning of this chapter, we can see that in this respect Duguit was a good Durkheimian. He was locating himself clearly in a central

[89] Duguit, *Les Transformations du droit public*, p. 132.

[90] Esmein, oddly, thought that Duguit wanted to accord personality to associations but not to the state: *Eléments de droit constitutionnel*, 6th edn (Paris 1914), p. 41.

[91] Duguit, *Droit privé*, p. 96. See also Duguit, *L'Etat, le droit objectif et la loi positive*, 1, pp. 86–7.

[92] M. Hauriou, 'Les Deux réalismes', *Recueil de législation de Toulouse*, 2nd ser., 8 (1912), pp. 409–10.

debate in social theory when he wrote that 'aujourd'hui la tendance générale certaine est la diminution constante du domaine contractuel'.[93]

Contemporaries seem to have varied widely in their perceptions of Duguit's stance on the problem of *syndicats de fonctionnaires*: a man such as Lefas regarded Duguit as dangerously close to the syndicalist thesis; so too, apparently, did Esmein, who thought that from 1908 onwards Duguit was seduced by neo-Proudhonian ideas.[94] Others, like Duguit's pupil Bonnard, perceived him as hostile to syndicalist claims and found this position paradoxical in view of his theoretical stance: how could Duguit, holding that *loi* does not create or transform social relations but merely exhibits them, at the same time oppose *syndicats de fonctionnaires* and support their statutory prohibition?[95] This raises the question of whether there was any coherent rationale behind Duguit's approach.

In fact there are good reasons for holding that there was more coherence to Duguit's approach than to Leroy's neo-Proudhonian approach. To see this point, we must return to Duguit's reputation as an *anti-étatiste* thinker. That reputation was derived largely from his positivist philosophical outlook. The state was not, as Catholics such as Saleilles and Hauriou maintained, an historically specific form of political society. On the contrary, the state exists, according to Duguit, wherever there exists a developed differentiation between rulers and ruled, *gouvernants* and *gouvernés*; wherever there exists a group of men with the ultimate power to impose their will by force. Duguit sought thus to cut through what he regarded as the metaphysical verbiage to the unadulterated observable truth: 'l'Etat est la hache du bourreau, le sabre du gendarme'.[96] If he appeared thus to endorse Treitschke's dictum that 'Der Staat ist Macht,' it should be noted that whereas Treitschke regarded this as a prescriptive principle, Duguit held it to be true as a matter of fact.[97] Coercive power is necessary to human society, and certain individuals have to exercise that power. It makes no sense to analyse their right to exercise coercion as a right belonging to 'the state'; it is a right which is an intrinsic component of their social status, the status of *gouvernants*.

[93] Duguit, *Droit social*, p. 54.
[94] Lefas, *L'Etat et les fonctionnaires*, p. 140 n. 2; Esmein, *Eléments de droit constitutionnel*, 6th edn, pp. 46–7.
[95] Bonnard, 'Chronique administrative', pp. 304, 307.
[96] Duguit, *Traité de droit constitutionnel*, 2nd edn, 1, pp. 394–6.
[97] Ibid., 1, p. 398.

The role of contract and status in Duguit's thought are clarified by an analysis of his understanding of feudalism, though this is somewhat difficult to elucidate. In public argument 'feudalism' was generally treated as a pejorative term, so that those who identified modernity and progress with the salience of contract regarded feudal society as rooted in status, whereas those who held that contract was giving way to status regarded feudal society as quintessentially contractual. Duguit was different. He unapologetically admired aspects of feudal society, though his references to it were not always favourable.[98] Sharing as he did Durkheim's horror of social disorganization, he commended feudal society for its cohesive character. Feudal society of the thirteenth century was, he wrote, an instance of:

> une société, d'ailleurs très cosmopolite, dont les classes hiérarchisées et coordonnées étaient unies entre elles par un système de conventions, qui leur reconnaissaient une série de droits et de devoirs réciproques, sous contrôle du roi, suzerain supérieur chargé, suivant la belle expression de l'époque, de faire régner 'l'ordre et la paix par la justice', c'est-à-dire d'assurer l'accomplissement par chaque groupe des devoirs que lui imposait sa place dans l'arrangement social.[99]

He regarded *syndicalisme* as an instrument of class harmony, not of class division, and his portrayal of a society founded on *syndicalisme* had striking affinities with his analysis of feudalism. For the *syndicat* was a means of organizing 'les hommes qui accomplissent le même ordre de besogne dans ce vaste atelier qu'est toute société'.[100] An instrument of pacification and union, rather than of war and social division, it was a means of transforming not just the working class but all classes, which it would coordinate 'en un faisceau harmonique'.[101]

We have already seen his use of contractual vocabulary to analyse feudal society – the vocabulary of conventions, of reciprocal rights and duties. And, although he recognized that the concept of *imperium* was never wholly eclipsed by that of *concordia*, he did emphasize that the feudal lord was a party to a contract: 'Le seigneur féodal n'est pas un prince qui commande en vertu d'un *imperium*; il est un contractant qui demande l'exécution des services promis en échange des services qu'il a promis lui-même.'[102]

[98] For a pejorative usage, see Duguit, *L'Etat, le droit objectif et la loi positive* p. 271.
[99] Duguit, *Droit social*, pp. 120–1. [100] Ibid., p. 116. [101] Ibid., p. 119.
[102] Duguit, *Les Transformations du droit public*, p. 4. Laski's introduction to the translation of this work, published as *Law in the Modern State*, trans. Frida and Harold Laski (London 1921), p. xxiv, noted Duguit's debt to the model of feudal society.

In fact it would appear that it was not the contractual character of feudal society that Duguit admired – or, at least, he did not hold that it could be copied in the modern world. In his first major work, written when Durkheim's influence on him was at its height, Duguit explicitly criticized the view of Spencer and Fouillée that with the progress of civilization societies were becoming more contractual:

> non seulement les relations non-contractuelles se développent dans nos sociétés modernes à côté de la division du travail, mais encore le domaine du contrat diminue à mesure que le travail social se divise davantage. Ces échanges de services, par lesquels se réalise surtout la solidarité sociale moderne, tendent de plus en plus à perdre le caractère contractuel.[103]

He agreed with Durkheim that certain branches of law are less contractual than others: constitutional and administrative law being examples of branches which were largely non-contractual. But he pointed out that in feudal society even these branches of law were highly contractual.[104] Rather oddly, at the same time as recognizing that feudal society was characterized by 'une forte intégration des éléments sociaux, fondée sur une hiérarchie des personnes et des terres et réalisée par une extrême division du travail social', he emphasized its contractual character: 'Tous les rapports des hommes entre eux sont considérés comme des rapports contractuels; et au fond les idées modernes de contrat social, d'organisme contractuel ne sont qu'une survivance des idées féodales.'[105]

What is odd is that Duguit identified hierarchy (that is, inequality) as the foundation of social integration in feudal society, and yet also defined that society as contractual in character. Duguit was quite aware that equality of the contracting parties was a prerequisite for a contract: indeed, his reason for refusing to see modern society as contractual was precisely that the postulate of equality was lacking in, for instance, relations between employer and employee.[106]

We have already seen that other (though not all) exponents of the concept of *service public* (Chardon and Demartial, for instance) as well as a vigorous adversary of *le syndicalisme de fonctionnaires* (Berthélemy) endorsed this functionalist conception of the state. This in itself should make us suspect that, regardless of the apparent paradox, there was a logic to Duguit's position. And this logic should be clearer in the light of our preceding remarks. For it is apparent that, just as Duguit's restrictive attitude towards the trade union rights of officials

[103] Duguit, *L'Etat, le droit objectif et la loi positive*, p. 53. [104] Ibid., p. 56.
[105] Ibid., pp. 69–70. [106] Ibid., pp. 54–5.

was rooted in his belief in the increasing importance of status in defining men's rights and duties, so too was his functionalist conception of the state. In other words, it is because *les gouvernants* have a distinct role in society, with a distinct set of rights and duties derived from that social function, that the state can be said to exist. Any society in which there exists a developed differentiation between *gouvernants* and *gouvernés* can be said to possess a state; though as functional differentiation within society progresses, so the state will tend to become more distinct from civil society.

It was not just revolutionary syndicalists who expounded a 'contractarian' socialism. So too did reformist socialists like Célestin Bouglé (a Durkheimian sociologist!) who expressed the repugnance which he thought most *syndicalistes* would feel for Durkheim's ideal of the assimilation of the private employee to the condition of the *fonctionnaire*. What many people found attractive about *syndicalisme* was 'ce sentiment qu'avec une organisation syndicaliste, ils esquiveraient les difficultés d'application que leur paraît présenter, à eux aussi, la solution du collectivisme centralisateur'.[107] Yet Duguit preferred to espouse a radically status-based theory which made him unsympathetic to many syndicalist demands. What is odd about this is that both Duguit and the neo-Proudhonians are generally presented as proponents of pluralist theories of the state. This prompts us to enquire which, if either, can be credited with being 'genuinely' pluralist.

The radical gulf which (for all their superficial similarities) separated Duguit and the neo-Proudhonians may be taken as an illustration of the distinction between two strands in pluralist political theory. The strand represented by Leroy can be traced back to Proudhon, and ultimately, perhaps, to the early seventeenth-century German Calvinist Johannes Althusius;[108] it is characterized above all by the belief that the values of contract and association (or mutuality) are complementary rather than contradictory. In this strand of pluralist doctrine, association is valued above all for its role in dissolving authority; a theme whose prominence we have noted in the work of Leroy. Thus the principles of association and *mutualité* are seen within this tradition as quintessentially egalitarian.

[107] *Libres entretiens*, p. 280.

[108] On Althusius, see Antony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (London 1984), pp. 131–42; and Otto von Gierke, *The Development of Political Theory*, trans. Bernard Freyd (London 1939), passim.

But pluralist political theory is by no means necessarily egalitarian. For Tocqueville – often treated along with Proudhon as the key figure in the evolution of French pluralist theory[109] – free association was valuable precisely as a counterweight to the egalitarian tendencies within modern societies, which Tocqueville considered a threat to liberty. In this tradition, a tension is perceived between the values of contract and association; the latter is regarded primarily as a counterweight to individualism rather than to authority; and authority (a good) is contrasted with naked force. Association does indeed act as a counterweight to naked force, but naked force is seen as characteristic of modern egalitarian society.

The English pluralists – Acton, Maitland, Figgis and the early Laski – shared many of Tocqueville's assumptions, amongst them his hostility to individualism and his rejection of contractarian accounts of society and government. Freedom of contract was not a foundation of pluralism; rather, it went hand-in-hand with the growth of state power.

We may characterize the difference between Leroy and Duguit by saying that, whilst both were in a sense pluralists, Leroy tried to construct pluralism upon freedom of contract (interpreted, however, in a 'collectivist' rather than a 'bourgeois' manner), whereas Duguit sought to root his pluralism in rights of status and in the existence of a variety of increasingly defined status groups. It is true that both focused on the same contemporary developments (for instance, the flourishing of associational life) as historically significant, and that the difference was simply that whereas Leroy labelled these developments as a further move away from *autorité* and towards *contrat*, Duguit saw them as a move away from *contrat* to a more differentiated society. But this difference was important: in effect it meant that they employed quite different conceptual frameworks for the interpretation of contemporary events.

The problem with Leroy's framework was that it is by no means clear that a contractual pluralism is a feasible enterprise. For, as Hegel was well aware, if contract means anything, it is a tightly defined legal form;[110] and insofar as groups are capable of acting contractually, it is by being assimilated to private individuals by means of the concept of civil personality. Contract is thus a levelling

[109] For example Stanislaw Ehrlich, *Pluralism on and off Course* (Oxford 1982), pp. 3–12; Preston King, *Fear of Power: an analysis of anti-statism in three French writers* (London 1967), pp. 17–42.

[110] G. W. F. Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt 1976), p. 370.

force, at least as regards legal status if not as regards economic condition. And it is no accident that there is an historical correspondence between the rise of contract as a legal form and the rise of the state as a political form.

The problem with Duguit's position may be expressed as follows. One can see the logic in his insistence that employees of the public services form a distinct status group, with particular and defined rights and duties associated with that status. But it would appear that he drew a very sharp distinction between public and private functions (though he held that the latter were becoming more like the former) and it is by no means clear why he should adopt such a dichotomous analysis of status groups in society. This can best be explained by the pervasive hold which the distinction between public and private law exercised over French legal thought.

But there is a further problem. We have seen that Leroy's pluralism rested on unstable foundations in that it was based on contract. Leroy tended to reduce all social relations to contractual relations; and contractual relations – based on status – are essentially uniform. Duguit did not face this problem, since he held that social relations were increasingly based on status. But this claim itself rested on unstable philosophical foundations, for Duguit had a strong leaning towards a behavioural approach to law and social science, for which he was vigorously criticized by Hauriou; the thrust of Hauriou's argument being that what he labelled Duguit's 'unilinear determinism' was incapable of providing a foundation for the emergence of a radically distinct status associated with public service.

Duguit in fact denied the accusation of determinism. He maintained that the foundation of law lay not in the sovereign will of the state but rather in 'une règle de conduite s'imposant à l'homme vivant en société'; but he insisted that that rule was not a *causal* law. For man is conscious and human action is voluntary and purposive: this was the fundamental difference between social and physical facts. Duguit declared himself agnostic on the problem of free will versus determinism. It may be, he admitted, that men were under an illusion in considering themselves free; nonetheless the crucial fact was that they do believe themselves to be free.[111] Indeed, in his preface to the French translation of Woodrow Wilson's book on the state, Duguit was critical of Wilson's method, which demonstrated

[111] Duguit, *Traité de droit constitutionnel*, 2nd edn, I, pp. 12–14.

the weakness of pure sociology, namely 'l'impuissance à fonder une morale politique et sociale aussi bien qu'une morale individuelle'. All that could be revealed by such a method was 'une simple limite de fait à l'action du gouvernement, et non point une règle de conduite supérieure, s'imposant, par sa vertu propre, aux détenteurs de la force'.[112] According to Duguit: 'il n'y aura de science politique que lorsqu'on aura trouvé le principe d'une morale politique... ce principe ne peut se trouver dans les contingences d'un prétendu développement social, indépendant des activités individuelles, puisque ce sont celles-ci, et au premier chef celles des gouvernants, qui provoquent et dirigent ce développement'.[113]

In practice, however, it was not clear that Duguit followed his own precepts. Certainly his Catholic contemporaries, including Hauriou, regarded him as an archetypal exponent of naturalism;[114] and it was not just Catholics who suspected that Duguit's principle of 'solidarity' or 'social interdependence' was subject to the same objections which he levelled at Wilson. There was reason to believe that this principle in effect expressed only a *de facto* and not a normative limitation on the powers of the state. Even in denying that he held a materialistic view of history Duguit left himself open to such criticisms. Denying that society could be interpreted merely in terms of conflicts of appetites, Duguit maintained that 'les hommes, par cela même qu'ils font partie d'un groupe social et même de l'humanité tout entière, sont soumis à une règle de conduite qui s'impose à eux'. Men are obliged by the social rule because they are social beings; and, Duguit explained, violation of the rule was liable to provoke 'une réaction sociale', whereas actions in conformity with the rule would receive 'une sanction sociale'.[115]

[112] Duguit, preface to W. Wilson, *L'Etat: éléments d'histoire et de pratique politique*, trans, J. Wilhelm (Paris 1902), I, p. xix.

[113] Ibid., p. xxiv.

[114] For example E. Magnin, *Un Demi-siècle de pensée catholique* (Paris 1937), p. 65; Paul Archambault in George Guy-Grand (ed.), *La Renaissance religieuse* (Paris 1928), p. 42.

[115] Duguit, *Droit social*, pp. 6–7.