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# THE PHILOSOPHY OF RIGHT

WITH SPECIAL REFERENCE TO THE

PRINCIPLES AND DEVELOPMENT OF LAW.

BY

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*PART SECOND.*

# THE SUBJECTS OF RIGHT.

## CHAPTER I.

### *THE INDIVIDUAL.*

HITHERTO we have had under view the objects of ethics as a whole, considered from the juridical side. This ethical whole is realised by man individually and in society. Man is naturally sociable; and this truth, seen by Aristotle and by the great philosophers of antiquity, has been vainly contested by Hobbes, Rousseau, and their followers. The isolated individual is an abstraction; history presents only families, tribes, races, peoples, or states. Hence we shall consider the individual not as a whole in himself, but as in relation with the whole.

Leibniz was the first to put the principle of continuity into its true light, but Aristotle had already foreshadowed it in his treatise on the soul (*De Anima*). The Stagirite seeks the soul not only in man and the animals, but in the entire world wherever life is manifested, that is to say, in the succession and continuous gradation of the organic forces. He shows it to us on the lowest stage in the plants with a single faculty, that of nutrition; then in the animal, which acts with sensation and locomotion; and lastly in man, in whom it rises to thought and to reason.

Leibniz explains that rest must be considered as a movement which ceases by continually diminishing, and equality as an inequality which vanishes. Inert matter, he says, is the sleep of the representative forces; animal life is the sleep of the monads; and rational life is their awaking. This metaphor of Leibniz is understood in the

literal sense by Schelling, who, in his *System of the Philosophy of Nature*, describes that dynamic process of beings —who are ultimately only one and the same being— which varies to infinity. While Leibniz recognises that the scale of beings is continuous, Schelling tries to convince us that it is homogeneous in its different stages, thus confounding the continuity of law with the continuity of substance. Darwin has given a new and more popular form to the pantheistic hypothesis.

What are the lowest forms of individuality? This question is put by Caro in his book on the Problems of Social Morality.[1] He begins by defining the individual, according to the etymology of the term, as that which cannot be divided (*individuum*), and which forms, as it were, a system of phenomena distinct from every other, with proper characters of its own, and enclosed on every side in space. This is the minimum of individuality; and we perceive it in the inorganic world, beginning with the stars, which are bodies perfectly distinct. In the sky there is a dim region which seems to escape from individuality, namely, the Milky Way; but the telescope has shown that the very nebulæ are resolvable into an infinite number of celestial bodies. Let us take up a mineral, and we shall not be long in discovering a central point around which, in given circumstances, the chemical affinities gather new elements. For example, a crystal of alum immersed in a certain solution increases indefinitely, and when withdrawn from it, it returns to its first state, the elements already aggregated entering into new combinations. Everywhere throughout the mineral kingdom there is revealed a principle of plastic unity, a sort of internal architecture dependent on certain physical and chemical laws, and in consequence a certain mineralogical individuality; but there is not such a determinate and specific form as to separate one body from another, and permit us to distinguish it. Pushing the analysis to

[1] *Problèmes de morale sociale.* Paris, 1876.

its ultimate limits, we find the molecules of simple bodies composed of atoms of ether. Here we have the hardly discernible mineralogical unity, every atom being identical with the rest, from which it differs by its situation in space and its mode of aggregation. These atoms of ether, by uniting, form the molecules of simple bodies, and by means of them, all other compound bodies, in such a manner that the changes of motion among the atoms produce what we call electricity, light, heat, &c.

In the organic world the minimum of individuality is found in the cell of which the vegetable and animal tissues are composed. Cells are little beings, invisible to the naked eye, of a polyhedral form, joined one to the other, and having a proper life or autonomy, which diminishes as the plant or animal rises in the organic scale and acquires greater organic harmony. The plant has life, but does not feel it; it has co-ordinated movements, like the ascent of the sap, but they are all explicable by the laws of mechanics. The animal in a certain way cancels the law of gravitation, which chains it to the soil; it regulates its movements and co-ordinates its functions in order to attain an end. The realm of mechanism is succeeded by that of spontaneity, of which the animal has a vague consciousness called instinct.

Among all the animals, man is the one who thinks himself, and conceives the abstract and the universal. Along with the purely sensible stimuli which impel him to co-ordinate his instinctive movements for a certain end, man by means of reflection is able to call up in himself motives that are entirely rational and independent of the instinctive impulses. Then the intellect creates in us freedom, which is spontaneity liberated from the influence of the impulses and physical fatality, and so we acquire a true personality capable of following the moral law. Thus individuality, which is hardly discernible in the mineral kingdom, acquires in the lower organisms permanence, the feeling of life, and spontaneous movement; and in man it becomes

free personality, which raises him above nature, although he lives in nature.

The term person in its proper signification indicates what is individual, and it serves validly to distinguish one individual from others. In the juridical sense it indicates a being who is sensitive, intelligent, and free, and who is therefore capable of right. *Persona est cujus aliqua voluntas est;* and, as Leibniz says, *cujus datur cogitatio, affectus, voluptas, dolor.* According to positive law, *Persona est homo statu civili præditus.* Hence there cannot be personality without community, seeing that the juridical *ego* is only formed in contra-position to a *thou*, whence the aphorism: "Unus homo, nullus homo." Analysing the human personality, we find three fundamental attributes: equality, liberty, and sociability. Men are equal, because they are of the same nature, not because they have identical faculties or powers; they are free, because they are intelligent, and will and act with full consciousness; and they are sociable, because they tend to an end of which they are cognisant. The first two of these attributes, equality and liberty, are developed in proportion as sociability increases. In the primitive family the head alone was free and equal to the other heads; in the local community equality and liberty extended to the other members of the family; and in the state, after a long course of ages, all the individuals participated in these attributes.

Besides physical persons, there are moral and jural persons, who are collective beings in whom the law recognises rights. They differ from physical persons in that they are not subject to the common fate of death, although they may die juridically when the law withdraws its sanction of the rights it recognised in them. Physical and moral persons have a right to their complete development in so far as they do not interfere with the right of others; and they may be put under forcible obligation, the first directly, and the second when duly represented. As a rule, they

are all capable of contracting; but minors and those under interdict are incapable by the express declaration of law; and married women, emancipated minors, and those who are not invested in their property, are incapable within certain limits.

Consent must be full and entire, and not given in error, impetrated by fraud, or extorted by violence. The error, however, must be in substantials, or it must apply to *essentialia negotii*. The fraud must consist in such relations that the other contracting party would not be obliged without them. The violence must be of such a nature as to make an impression upon a sensible person, and it must inspire a reasonable fear of exposing oneself and one's property to a distinct evil, even when it is directed to strike the person or the goods of a spouse, or a descendant, or an ascendant, or the contracting party. In reference to other persons it pertains to the judge to pronounce on the nullity of the transaction according to the circumstances. Regard will always be given in a fact of violence to the age, sex, and condition of the contracting parties.

What are the individual rights of physical persons in principle? Antiquity had no clear idea of them, as it subordinated the citizen too much to the state. In the sixteenth century the jurist Donellus (Doneau), a worthy rival of Cujacius, found fault with the Roman jurists for having neglected personal rights. In each of us, he says, there are rights inherent in the person and belonging to us essentially; and he tried to show that these rights are superior to other rights, because they are proper to man even when external things may be wanting: *etiamsi desint res coeterae externae*. This jurist reduced the primordial rights to four: *vita, incolumitas corporis, libertas, existimatio*. The enumeration is incomplete; but his putting life and honour on the same level as liberty and personal security clearly manifests the free spirit of the sixteenth century. The writers who founded the school of natural

law in the seventeenth and eighteenth centuries—Grotius, Pufendorf, Vattel, Burlamaqui—developed the general ideas of equality, liberty, and sociability. Blackstone, who drew his ideas from the English constitution, has given a very precise notion of the rights of man. "The rights of persons," he says, "considered in their natural capacities, are of two sorts, *absolute* and *relative*. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other." Other authors use the terms *innate* and *acquired* rights, *original* and *derivative* rights, or similar terms, always to signify that in every political and social organisation it is necessary to safeguard in every way the integrity of the physical and moral person of its component members.

## CHAPTER II.

### *THE FAMILY.*

Down to the middle of this century the origin of man was sought for in the cosmogonies. In 1847 the Society of the Antiquarians of the North gave a commission to a geologist, a zoologist, and an archæologist to explore certain small artificial heaps on the shore of the sea called "kitchen-middens" (*kjoekkenmoeding*, heaps of kitchen leavings), and certain marshes of turf called *skovmosses*. The learned Danish explorers Forchammer, Steentrup, and Worsae found in these heaps shells, remains of fishes, bones of birds and other mammalia, along with utensils, instruments, and arms of stones coarsely carved. Then in the turf they discerned the various geological strata with their respective floras, and from the utensils and arms which they found they reasoned out the various degrees of civilisation attained by these primeval inhabitants. After the first discovery Thompson next distinguished the three epochs of stone, bronze, and iron, to which the name of pre-historic ages was subsequently given. The stone age, which is the most ancient, corresponds to the vegetation of the pine; the bronze age occupies the whole period between the vegetation of the pine and that of the oak; and finally, the iron age, which is the most modern, is contemporaneous with the beech. Other important discoveries were made in the same year, 1847, by Boucher de Perthes in the sand caves at Abbeville, near Paris, where he collected many bits of flint more or

less coarsely worked, but which nevertheless preserved the impress of the hand of man.

The discoveries referred to led to the hypothesis of the existence of fossil man; and Boucher de Perthes had the good fortune to find a human jawbone at Moulin Quignon, which was followed by the discovery of a complete tomb found in 1860 by the engineers of the railway at Cro Magnon, not far from the station of Eyzies. Then came the skulls of Furfooz, &c. Up till now, in about forty places scattered over all Europe, and more especially in the west of the Continent, there have been found about forty heads more or less intact and numerous fragments of skulls. Some human bones mixed with the bones of animals were pointed out by Lund in certain caves of Brazil and in the plain of the Anges in California, but none have been found in any other part of the world.[1]

The French naturalist Quatrefages, in the latest edition of his celebrated work *L'Espèce Humaine*, has analysed and classified all the remains thus discovered. He admits not only quaternary but also tertiary man, for he believes such was found by Capellini in the clays of Monta Perto, near Siena; and he readily allows the possibility of man's having existed in the secondary epoch along with the other mammals. He, however, combats the idea of the man-beast and all derivation of man from the ape, on the ground that in all these remains only purely human characters have been recognised. From the arms, utensils, and bones of animals found he draws inferences as to the social state of some of the primitive populations,

[1] In 1700 Duke Eberhard-Ludwig, when cutting into a Roman *oppidum* at Cannstadt, in the neighbourhood of Stuttgart, found part of a human skull among animal bones; but geology and palæontology were not yet born, and no importance was put on the precious fragment. In 1857 an entire skeleton was found in a cave near Dusseldorf, but the workmen who came upon it, not knowing its value, broke it all to pieces. In 1823 a human bone found in the Grand Duchy of Baden had been presented to Cuvier, but he had given it no attention.

which was not different from that of certain tribes of Red Indians. Incisions and carvings found on fragments of stone or on the handles of arms representing plants and animals, displayed a somewhat advanced artistic taste. In the burying-places various toothless heads were found, which showed an extreme care for old age and the objects most precious to the defunct, which suggest the thought of a resurrection. From the whole aspect of all these things the author concludes that these populations lived by the chase and by fishing, but were already settled and had begun to possess some of the domestic animals; and hence they may rightly be regarded as having been fitted to be the ancestors of the existing races, and as thus filling up the abyss which separates pre-historic man from the Adamitic creation.

The characteristic marks which separate man from the monkey kept Quatrefages faithful also to the single origin (*monogenia*) of the race. Distinguishing accurately the characteristics of species, variety, and race in organic beings, he establishes the unity of the human species on an impregnable basis. The species, he says, is the whole of the individuals which are more or less like each other, and which may be regarded as having descended from a single couple through an uninterrupted and natural succession of families. When the lineament of an individual becomes exaggerated by passing beyond a limit which is not well determined, and constitutes an exceptional character which distinguishes it from those most nearly related to it, this individual forms a variety. And, finally, when the marks proper to a variety become hereditary, we have a race. The race is therefore the sum total of the resembling individuals belonging to the same species which have received, and which transmit by way of specific generation, the characteristic marks of a primitive variety. Hence it follows that the species is the point of departure; the variety is an accident; and when it persists and reproduces itself, it forms a

race. Reproduction of individuals between vegetables and animals of different species, which is very rare and is not durable, produces hybrids; whereas such generation by individuals of different races is entirely natural and produces mixed breeds. The human races, being indefinitely fruitful among themselves, belong to the same species and are descended from a single couple. These facts, although they belong to anthropology, are of the utmost importance in connection with the doctrine of right.

The family is a primordial fact; it is, as it were, the tissue of the social organism. It is composed of the father, the mother, the children, and other relatives; and it has as its basis a patrimony of which slaves and servants were at first a part. It has its origin in marriage, is maintained by means of the paternal power of guardianship, and is perpetuated by succession. We shall treat separately of these three institutions.

I. Marriage was well defined by the Roman jurist Modestinus thus: "Nuptiae sunt conjunctio maris et feminae, consortium omnis vitae, divini et humani juris communicatio." This definition includes the natural element, which consists in the *conjunctio maris et feminae*, the moral element of the *consortium omnis vitae*, and the juridical element in the *divini et humani juris communicatio*.

In order that man and woman may be able effectively to unite with a view to offspring, various conditions are necessary: 1. The age of puberty, which among the Romans was fixed for women at twelve years, and for men at fourteen, and which in the French and Italian Civil Codes is fixed for women at fifteen years and for men at eighteen; 2. That the union shall not take place between near relatives, and this for physiological, moral, and political reasons, which no longer need demonstration. Among the Romans marriage was forbidden in the ascend-

ing and descending line of direct relationship, whether legitimate, natural, or adopted, *ad infinitum;* in the collateral line marriage was forbidden between relatives of the second degree when one of these was descended immediately and the other mediately from a common progenitor; and it was permitted between the children of brothers and sisters. Very close affinity was an impediment to marriage; it was not permitted either with a mother-in-law or with a daughter-in-law, and still less with a sister-in-law or the sister of a wife, or with the widow of the son of a wife, or with the widow of the husband of a mother. The Articles XXXVIII. to LX. of the Italian Civil Code, conformable to the corresponding articles of the French Code, regulate as follows:—In the direct line marriage is forbidden between all ascendants and descendants, legitimate or natural, and between relatives of the same line. In the collateral line marriage is forbidden: (1.) between sisters and brothers, whether legitimate or natural; (2.) between all relatives in the same degree; (3.) between uncle and niece, aunt and nephew. Marriage is prohibited between an adopter, the adopted one, and their descendants; between the adopted children of the same person; between an adopted one and the children born to the adopter; between the adopted one and the spouse of the adopter, and *vice versâ*. Canon Law retains the age established by the Roman Law, and also prohibits marriage in the direct line *ad infinitum* for the relation of affinity. For the collateral line it stops only at the fourth degree even for the relation of affinity, whether legitimate or natural. 3. Finally, the generative power is requisite, offspring being one of the essential ends of marriage, and this condition ought to be *ab initio*, except in the case of old persons, who seek in marriage rather a sort of spiritual union.[1]

1 The Canon Law does not follow the rule of the Roman Law, which was adopted by the French and Italian Civil Codes, namely: *tot*

In order to constitute the moral element of marriage—*consortium omnis vitae*—the consent of the spouses is more than ever necessary; and in order that this consent may be the more enlightened, that of the parents or of those who take their place is usually conjoined with it. The Roman Law required the consent of the persons under whose power the spouses were placed; and hence an emancipated son was exempt from it. With the decline of the *patria potestas*, the maxim was established that the father could not refuse his consent without a just motive, and a constitution of Severus and Antoninus authorised the public authorities to compel the father to give the requisite consent and to settle his daughters.

The French Code maintains the necessity of the consent of the parents to the marriage of sons up to the age of twenty-five years, and to that of daughters up to twenty-one years. Beyond that age the sons were obliged to seek the advice of their parents (or of those who took their place) by three respectful acts at a month's interval up to the age of thirty years, and by a single act thereafter; and the daughters had to do the same by three similar acts up to twenty-five years, and by one from that age onwards (Arts. 148–153). The abolished Neapolitan Civil Law maintained almost the same dispositions, with the addition to them of the obligation on the part of the father to endow his daughters when they had reached the age of majority. The Italian Civil Code no longer requires the consent of parents in the case of sons of twenty-five years of age, or daughters of twenty-one; and it abolishes the respectful acts. Art. 67 allows sons and daughters who have attained the age of majority to apply to the Court of Appeal in case of the refusal of consent on the part of those who take the place of their deceased

*gradus quot generationes.* It establishes the maxim *as many degrees as removes;* so that in the straight line it agrees with the Civil Law because the generations correspond to the removes. But in the collateral line brothers and sisters are in the first degree, and uncle and nephew, as well as cousins, in the second; and so on.

parents—a disposition which is not a little prejudicial to the unity of the family.

It cannot be said that consent has any existence unless it be free; and on this account an action for the nullity of the marriage is allowed on the part of the spouse who has been subjected to any violence. The same holds with reference to error, provided it relates to the person, whether regarding the identity or essential qualities constituting that person. The positive law has been more cautious in the matter of dole, following the ancient adage; *en mariage trompe qui peut.* And, in fact, it is not presumable that any one allows oneself to be deceived in such a solemn act of life.

Among both the ancient and modern European nations one man could not possess more than one wife. Christianity added: "Whom God hath joined together, let not man put asunder." The Roman Church abolished divorce, but Protestantism restored it. The causes of divorce among the Protestant nations are adultery, assaults on life and health, grave injuries or acts of cruelty, criminal condemnation regarded as infamous, voluntary desertion and an insuperable aversion. These causes among Catholics bring about personal separation.

The upholders of divorce say that it is not conformable to the reality of life to maintain the material bond when the moral bond is broken. Why deprive the innocent spouse of the happiness of a new domestic hearth? To all these Gioberti gives what appears to us a triumphant reply in his *Protologia.* "Marriage," he says, "is, according to its ideal, one and indissoluble; and hence it has the greatest possible force. The unity of the marriage corresponds to that of love; its indissolubility expresses the perpetuity, eternity, and immanence of the affection of love. Marriage is love completed; it is the perfection of love internal and external, private and public, domestic and civil, individual and social, profane and religious. That divorce and polygamy are contrary to the idea of

marriage may even be deduced from the nature of love, whether considered physically or morally. But it is above all the love of the heart which demonstrates this. Love is by its nature indivisible and perpetual. The ideas of unity, exclusion, and indissolubility are inseparable from the idea and from the sentiment of true love. Whoever denies it has never loved. Jealousy is even an essential part of love, because there is no love, no union of hearts and of sexes, without unity. Marriage is a harmony; divorce and polygamy are conflicts, disunions, discordances. Love tends to the eternal, and is a feeling which has immanency in it. . . . Divorce is therefore opposed to the nature of love, not less than polygamy and polyandry. It is true that the human heart is inconstant; but this is a vice which has to be curbed, and to it a free hand is not to be given. This curbing is done by marriage. Inconstancy is conquered by the sanctity of true love. It is true that when marriage has been brought about from caprice or interest, or by chance or violence, and not by true love, divorce may appear a minor evil and a sort of necessity; but the fault ought not to be imputed to nature; the fault is man's. In the moral world, as in the physical, one disorder draws a hundred after it; yet one disorder cannot be legitimised because it is necessitated by another voluntary disorder. The law of nature is beautiful, useful, wise, but only when it is observed in all its forms; for the law and virtue are pure. Unity and indissolubility combined form together the dialectical harmony of marriage. Polygamy and divorce are its sophistry; the former is a *venus vaga*, the latter is a palliated adultery."

To these words we gladly add the following equally suggestive remarks by the head of the Positivists, Auguste Comte:—"It is easy to perceive that, for a great number of persons, the great social principle of the indissolubility of marriage has at bottom no other essential wrong than its having been worthily consecrated by Catholicism. . . .

And, in fact, without this sort of instinctive repugnance most thoughtful men would easily understand that the use of divorce could only mark the first step towards the total abolition of marriage."[1]

The *divini ac humani juris communicatio* is attained by the solemn celebration of marriage, and by the effects which spring from it. The celebration of the primitive marriage of the Romans was wholly religious, and it was performed by three acts: *traditio*, *deductio in domum*, *confarreatio*. By the first, the bride was given away by the father, and she abandoned the paternal house. By the second, she was conducted to the house of the spouse, amidst a band of companions singing religious hymns, and preceded by a nuptial torch. This band stopped at the threshold of the house of her husband. There she received water and fire: the first for use in the religious functions of the family, and the second as an emblem of the domestic deity. The bridegroom pretended to seize his spouse, lifting her in his arms without letting her feet touch the threshold. Lastly, the third act began by the spouse being led within to the hearth, where stood the Penates, all the domestic gods and images of the ancestors of the family around the sacred fire. The two spouses then performed a sacrifice, poured out a libation, recited prayers, ate together a cake made of the flour of meal (*panis farreus*), and the marriage was complete.

Afterwards, a wholly civil mode of contracting marriages was introduced, namely, the *coemptio;* that is to say, the fictitious purchase of the wife by the husband. The *confarreatio* seems to have been originally the marriage form of the sacerdotal tribe, while *coemptio* was that of the heroic tribes. "Coemptio vero certis solemnitatibus peragebatur; et sese in coemendo invicem interrogabant: an mulier sibi mater familias esse vellet; illa respondebat: velle. Item mulier interrogabat: an vir

[1] *Cours de philosophie positive*, t. v. p. 687, n.

sibi pater familias esse vellet; ille respondebat: velle. Itaque mulier viro conveniebat in manum, et vocabantur hae nuptiae per coemptionem, et erat mater familias viro loco filiae." Finally, just as objects could be acquired not only by *coemptio* but by *usus*, so the fictitious property of the wife could be acquired by the cohabitation of a year, without the interruption of three nights (*trinoctium*); and this became the most frequent mode of contracting marriage.

Christianity in the Roman Church made the beautiful principle of marriage into a sacrament, but for a long time the law demanded only civil formalities. Into these Justinian, however, introduced important restrictions in favour of religion, and in the ninth century Leo the Philosopher proclaimed the necessity of the ecclesiastical benediction. With a few divergencies, the canonical legislation was enforced throughout the State in the matter of marriage, until the Protestants denied to this most important act of human life the quality of a sacrament, and gradually left its regulation to the civil power. The French Revolution, in the Constitution of 1791, raised a barrier between the Civil and Canonical Law, making the ecclesiastical benediction purely optional; and this principle was adopted in Belgium, Italy, and in almost all the Catholic States. According to the French and Italian Codes, the celebration of marriage takes place before an official of the Civil State, and in the presence of two witnesses. As we have already stated in Part I., Chap. i., we desiderate the addition of the religious sanction, except for atheists and freethinkers, who should make a declaration in a public act.

The rights and duties of the spouses during marriage have been recognised by the loftiest thinkers, and sanctioned by the laws of all people. Plato in the *Symposium* rises to the ideal of love as the impulse to the production of the beautiful in a beautiful body or a beautiful soul; but neither in his *Republic* nor in the *Laws* is he able

to make the application of it to marriage. "Whoever sees this pure, fair, and simple beauty, which is not a vesture of human flesh, of colour, and various ornaments, but is conformable to the divine beauty: such a one does not wish to produce simulacra of virtue, for he touches the truth." Aristotle, more intent on reality, found in the natural antithesis between man and woman an element for harmonising them in behoof of the species. He says in the first *Economics:* "The nature of man and woman destines them, according to a divine determination, for a common life. Their nature differs inasmuch as their strength is not adapted for the same thing, but up to a certain point for opposite things, although tending to the same end. Man has a stronger organism than woman, on account of which she is more cautious and timid, while he by his courage is more fitted for defence; the one acquires without, the other preserves in the house. The mother governs and the father educates the children, so that the spouses complete each other reciprocally by putting into common use whatever is proper to each. Their unification takes place in order that they may be able to live and perfect themselves by means of the co-operation of each other." The great philosopher reaches the pathetic when he describes the wife imploring aid, and as received by the lares in the house of her husband, from which all injustice should be banished, and above all, that of extraneous unions and extra-matrimonial alliances. Few among the moderns rise to this height; if we except Hegel and Gioberti, most of them stop at the view of marriage as a simple contract. We may allude in passing to the utopia of the emancipation of women put forward by Saint-Simon, which John Stuart Mill has endeavoured to make acceptable in his book on *The Subjection of Women.* He makes little of the physiological differences between the two sexes, and attributes the diversity of their aptitudes to education alone. He thus ignores nature and the ethical destiny of the beautiful half of the human race;

and if society were to follow his counsel, we would have the domestic hearth deserted and an always agitated public life. On the other hand, the French and Italian Civil Codes have kept to the observations of the ancient philosophers and the experience of ages, as consigned in the Roman legislation and perfected by Christianity. They formulate the reciprocal rights and duties of the spouses as follows: "Marriage imposes on the spouses the reciprocal obligation of cohabitation, fidelity, and assistance. The husband is head of the family; the wife follows his civil condition, assumes his name, and is obliged to accompany him wherever he believes it advisable to fix his residence. The husband has the duty to protect the wife, to place her near him, and to supply her with all that is necessary for the needs of life in proportion to his substance. The wife ought to contribute to the maintenance of the husband, if he has not sufficient means. . . . . The wife cannot give away or alienate immovable goods, or subject them to hypothec, or contract mutual debts, cede or receive capital sums, or constitute herself security; nor can she transact or enter into a process relative to such acts without the authorisation of the husband. . . . . If the husband refuse such authorisation to the wife, or if the act in question be one in which there is an opposition of interest between them, or, finally, if the wife is legally separated by her fault, or by her fault and that of her husband, or by mutual consent, the authorisation of the civil tribunal will then be necessary."

The constitutive principles of the matrimonial union ought also to regulate the patrimony of the spouses. Universal communion of goods (*communio bonorum*) would reproduce more livingly the moral unity during the marriage; but how would it then be possible to distinguish what belonged to each of the two individuals on the dissolution of the marriage? In some parts of Germany where such a species of communion was in use, the wife succeeded to a third, and sometimes to a half of the goods of her hus-

band. But it was necessary to consider that the goods which the wife brought with her consisted in a valuable outfit and other movable subjects, to which were added the acquisitions (always in movables) made during the marriage. Hence arose in the French consuetudinary rights that species of relative communion in movables and in acquired goods, as well as in the fruits of immovable goods properly so called, which has been retained by the *Code Napoléon*. In this system the husband is absolute master, and the wife cannot oppose herself to any of his acts. "In a word, after having put into the common possession her movables, the fruits of her immovables and of her labour, all the rights of the wife are reduced to the hope of dividing the benefits or utilities thence arising, if there are such."[1] (1.) This arrangement constitutes an association of goods governed by particular rules, of which the following are the principal:—The spouses may put in common all their movable goods, present and future, and the immovables acquired after the marriage. They are also able to include even the immovables acquired previously, but there comes in the clause of mobilisation. (2.) The communion (*communio bonorum*) necessarily commences with the marriage and ends with it, save in the exceptional case of a separation of goods. (3.) The husband is necessarily the administrator of this community, and he can dispose of the common fund as if it were his own property. (4.) In order to restrict this exorbitant right of the husband in the case of an irregular *gestio*, the wife may demand the removal of the incapable administrator and the dissolving and liquidating of the association, in order to save whatever may be possible of her own goods, which she will then administer herself. This process is called separation of goods. (5.) The wife has also the privilege of withdrawing herself from the consequences of a disastrous administration on the part of her husband,

[1] See Locré, tom. vi.: *Exposé de motifs au tribunat, par Berlier.*

if she was not able to stop him in time, by renouncing the communion; namely, by agreeing to lose whatever she intrusted to the husband, on the condition of not contributing to the payment of the debt contracted by him. (6.) She is also able to accept under benefit of inventory; that is to say, to act with reference to the dissolved association in the same way as an heir in reference to an equivocal or doubtful succession. (7.) Lastly, the wife before being married may, by a special favour of law, stipulate to take back freely all that she brings into the matrimonial association; that is, to consider herself an associate if the association prospers, and as bound to nothing if it ruinously fails. (8.) The heirs of the wife enjoy the same right of renouncing the communion, or accepting it simpliciter, or under benefit of inventory.

The arrangement of this communion has much analogy with the mercantile association of *commanditanti* referred to in vol. i. p. 283. The husband is the sole responsible administrator toward third parties, and the wife is an associated *commanditante*, who risks only what she brings, and can also stipulate for special advantages. In every respect this arrangement is a contract of trust: trust of the wife toward the husband, to whom she intrusts the administration and also the free disposition of the goods in communion; trust of the law toward the spouses, who are able together to dispose of all their patrimony; trust of the creditors, who hold under obligation the patrimony of the husband and the goods in communion, and are able also to claim the obligation of the wife in respect of her own goods.[1]

The dotal system has an opposite purpose; it aims at protecting the interests of the wife and the offspring against all possible wastefulness on the part of the husband.

In the most ancient Roman Law no trace is found of

[1] See *Jourdan, Le droit civil français*, p. 417. Paris, 1865.

this system. The father was certainly able and was wont to make a gift to the daughter who was about to be married, but the gift fell into the hands of the husband, like everything which the wife was able to acquire during the marriage. In the XII. Tables no mention is made of the *dos* or *res uxoria*. The introduction of the dowry is usually attributed to the Julian Law (*Lex Julia de maritandis ordinibus*); and it was then distinguished into *dos profetitia*, if it was constituted by the father or by an ascendant, and the *dos adventitia* if it proceeded from the wife or from another person. It did not return to the wife except in case of divorce or of the death of her husband; and on the latter hypothesis a portion of it was also received by her father. The inalienability of the dotal fund was nevertheless recognised, as also the right to demand the restitution of the dos during the marriage, when the husband showed himself an imprudent administrator.

The modern legislations have retained these principles, granting to the husband the usufruct of the dotal goods, so as to provide for the burden of the marriage. The French Code consecrates the inalienability of the dowry, except in very rare cases by the permission of the court; such as to take the husband out of prison, to furnish aliment for the family, to pay the debts of the wife who receives the dowry, or of those who gave it, or to make urgent reparation to the dotal fund. The Italian Code has been broader in its provision, as it permits the alienation of the *dos* under sentence of a court, in case of necessity or of evident utility.

These three legislations all recognise in the married woman the power to have property of her own, or paraphernalia, of which she has the administration and the enjoyment, without being able to alienate them or to defend them in court, except with the authorisation of the husband, or, in case of his refusal, with the authority of the court. The Italian and French Codes admit the

addition to the dotal system of an association for acquisitions that may be hoped for during the marriage; and this would constitute the rational system advocated by Ahrens, with an inalienable reserve secured to the wife, and a just compensation for her co-operation in promoting the well-being of the family.

II. When the family has been constituted by marriage, there is required to preserve it the authority of the parents or those who take their place, and the obedience of the children. The former is called *patria potestas* in the first case, and *guardianship* in the second. When both the parents are alive, the *patria potestas* is exercised by the father; and if the father is dead, by the mother. This authority is established by nature itself in the interests of the children, so long as it is necessary; that is to say, until the children have attained an age when they are able to manage themselves. The parents ought to maintain, educate, and instruct their offspring, and, when they have not sufficient means, this obligation should devolve on the ascendant in the order of proximity. In return for this, the children are to be held bound to supply necessary aliment to their parents, and the other ascendants who are in need; and in certain circumstances also they ought to aid each other mutually, as in the case of brothers and sisters.

The paternal power is reduced in the case of parents to the right of the legal administration of the property of the children with the enjoyment of the usufruct (after having satisfied the above-mentioned obligations, without being bound to render account of them), and to the right of correction; an order being obtainable from the magistrate for the removal of the child from the paternal house, and the placing of it in a house of correction for such time as may be deemed necessary, while supplying it with requisite aliment. The paternal power may cease before the majority of the son, which is fixed by the Italian law

at the completion of the twenty-first year, by the emancipation which ensues as a matter of right upon marriage, and which may be obtained in the eighteenth year from the father or whoever takes his place.

The paternal power, when the parents are wanting, is transmuted into guardianship or tutory. The right of nominating a guardian or tutor belongs to the surviving parent; and otherwise the paternal grandfather, and, failing him, the maternal grandfather, becomes tutor. When these ascendants fail, the tutor is to be nominated by a council of the family, composed of the nearest relatives and presided over by the local magistrate, who in Italy is called the *praetor*. The surveillance of this council is stricter when the guardianship is not exercised by the above-mentioned ascendants, and it extends to the several acts of the administration. A minor who is sixteen years old may take part in the deliberations of the family council, with a merely consultative vote.

Along with the legitimate children, natural children may also be recognised in this connection. The respect due to marriage had led to the lessening of their part in the succession, as we shall immediately see; but they have the right and obligation of aliment against the father who has recognised them, and they also ought to be trained by him for a profession or art. Adulterine or incestuous children have only a right to aliment, which will be assigned to them in proportion to the means of the father or the mother, or the number and quality of the legitimate heirs, whenever the paternity or maternity results indirectly from a civil or penal sentence, or from a marriage declared null on account of bigamy, or on account of a connection of consanguinity or affinity in direct line *ad infinitum*, or in a collateral line in the second degree, or by the explicit declaration in writing of the parents. Some writers would prefer to equalise the juridical condition of all children born out of marriage. Antonio Rosmini, as in other relations, takes a broad

position here too, and we quote his words. "But it is not a little difficult to determine according to rational right the succession of children born out of marriage. Aliment and education are certainly due to them by the father, and, failing him, by the mother: this is a right of blood. But the mother, if she is already married, is not bound to this, because all her property belongs to the family of her husband; and thus the aliment itself ought to be administered in such a way that it shall not prejudice the family to whom it belongs. When not married, or when the sole survivor of the family of the husband, the bond of blood determines the natural succession of the child in the goods possessed by her. If she marries with her accomplice, she enters into the same condition in which the mother of a family stands towards her children. But the man has the same obligation and the same association with the natural child as with the legitimate child. Hence the condition of the woman and of the man in these juridical relations is not equal, seeing that it follows from what has been said that, according to the right of nature, the adulterous mother who introduces a spurious child into the house of her husband injures the legitimate children, but not the adulterous father; and thus, according to the right indicated, he ought to look upon the illegitimate child with the same paternal eye, and to admit it to the same society to which he admits the legitimate children; except that the illegitimate child ought not to participate in the property belonging to the legitimate wife, who has been wronged by the adultery."[1]

The Italian Code has preserved the institution of Adoption, which responds to the human need of perpetuating the individuals, at least fictitiously (*adoptio imitatur naturam*), when there are no legitimate or legitimated descendants, nor the probability of there being any. The adopter must have completed fifty years of age, and be

[1] *Filosofia del diritto*, vol. ii. § 1540 *et seq.*

eighteen years older than the person adopted, to whom in no case he can succeed, so as to remove all idea of interest. Adopted children are assimilated to legitimate children.

Formerly the domestics also constituted a part of the family; but customs have changed, and they can be now considered only as day-labourers, without any lasting connection with the family.

III. The juridical bond which unites the patrimony to the person is a close one, as has been shown in Part I., chaps. iv. and v. Can death break it? Does man leave no trace of himself in external things? The existence of a family alone would prove the contrary, and therefore from the most remote time the patrimony was inherited by the family. "Heredes tamen successores unicuique liberi et nullum testamentum; si liberi non sunt, proximus gradus in possessione fratres, patrui, avunculi."

At Athens the institution of heir by last will was carried out under the form of adoption, as was the custom in Indian law. At Rome the solemn form of the *testamentum in comitiis calatis*, which required the consent and sanction of the people, shows that it was an exception. In the course of time the Curiae only authenticated the expression of the will of the testator as long as he was left free to dispone at pleasure by the last act of his will.

So long as the family was regarded as a religious and political association, the order of succession recognised agnates only, or relatives through the male, or, failing these, the *gentiles*, or members of the gens; but when the family became a natural association, the cognates, or relatives through the female, also participated in it. In Italy the succession is now regulated according to the presumed affection of the deceased, in the following order:—(1.) Descendants; (2.) Parents only, or in combination with brothers and sisters; (3.) Other ascendants only, or in combination with brothers and sisters; (4.)

Brothers and sisters only; (5.) Ordinary collaterals; (6.) Consanguineous or uterine brothers and sisters take the half of germane brothers and sisters; (7.) Natural children receive the half of legitimate children. (8.) The surviving spouse will have in usufruct a portion equal with each of the children among whom it will be reckoned, without being able to exceed the fourth part of the inheritance. In competition with ascendants he will have the third of the property; with collaterals to the sixth degree, two-thirds; and beyond the sixth degree, the whole. This order, adopted by the Italian Civil Code from the 118th Novella of Justinian, is logical and natural. The condition of the parents has been ameliorated by the Italian Code by putting them in the succession on the same level as brothers and sisters, although in no case shall the portion to which they succeed, both or one of them, be less than a third; while the French Code invariably grants the half of the succession to the brothers and sisters if both the parents survive, and three-fourths if one of them has predeceased. The part which, according to the Italian Code, would belong to the parents if alive, devolves, failing them, on their nearest ascendants, whereas by the French Code these are excluded. Only political and economical considerations have led to the extension of the degrees of succession to the tenth in the Italian Code and to the twelfth in the French Code, while the bonds of relationship are hardly recognisable beyond the sixth degree.

May a person dispose by irrevocable donation *inter vivos*, or by a last act of will, of all his property? The laws of the XII. Tables prescribed in an absolute manner: *Uti legassit super pecunia tutelave sua ita jus esto.* It was not long till the testament was assailed as *inofficiosum* when it evidently injured the rights of the family, the testator being regarded as *non compos mentis.* The *quaerela inofficiosi testamenti* was supplemented in the time of Alexander Severus by the *quaerela inofficiosae donationis,* by which the principle was established that no one by an act

*inter vivos* or *causâ mortis* could deprive his descendants and ascendants, or his brothers and sisters, of the fourth which would have fallen to them if they had succeeded *ab intestato*. Justinian fixed this so-called *portio legitima* as the half of the succession if the legitimate heirs were more than four, and as a third if they were fewer. The French Code limits the legitimate portion to a half of the succession for an only child (or for his ascendants), to two-thirds for two children, and to three-fourths for a greater number. The Italian Code, on the other hand, fixes the *legitim* to a half of the succession for descendants, and to a third for ascendants. The *legitim* of the surviving spouse, when there is a will, consists always of the mere usufruct in the proportion above indicated, without ever exceeding the third of the inheritance; for if the deceased intended to benefit the survivor, he could have done it by the will. A natural child takes the half of the legitim which would have fallen to him if he had been born in marriage. The portion due to the spouse and to the natural children does not suffer diminution from the *legitim* which falls to the legitimate descendants and to the ascendants, and it thus has to be subtracted from the disponable part.

It is disputed as to whether the *legitim* represents aliment, or is part of that property which was common to the primitive family. If it represented aliment, it could be reduced to very insignificant proportions. It is, on the contrary, a condition of the existence of the family, along with individual property and indissoluble marriage, and is equally a memorial of the patriarchal times.

The patriarchal state has been held to be primitive even by the Positivist school, as we learn from the works of Sir Henry Sumner Maine: *Ancient Law* and *History of Early Institutions*. This state still exists among certain of the populations of Eastern Europe in regard to the organisation of the family. Professor Bogesic has studied the rural family as it still exists in Servia and among the

Slavs of the South. The community of the rural family, which is called *Zudruga*, is composed of brothers, cousins, and other nearer relatives, with their wives and offspring. The simple rural family, which is called *Inokostina*, comprises the husband, the wife, and the children. By successive restrictions a *Zudruga* may be reduced to an *Inokostina*, but it revives as the number of the persons which compose it increases. These are two phases of the rural family. The spirit of community is so general that if a *Zudruga* has been reduced to an *Inokostina* by successive divisions or death, the rules for the *Zudruga* are brought into force as soon as the number of the component members increases.

An attempt to go a step further has been also made by Bachofen, M'Lennan, and Morgan, and their labours have been summed up and co-ordinated by Giraud-Teulon in a learned monograph entitled *Les Origines de la Famille, questions sur le Antécédents des Sociétés Patriarchales.* The conclusions he reaches are thus expressed: "The first aspect under which the primitive societies present themselves is that of large masses, and not the small patriarchal family. In the bosom of these masses individual parentage is unknown at first; the individuals are assimilated to the group in its totality, or to the entire horde. The child has for father all the fathers of the community, and, what is still more repugnant to our feelings, he does not know one woman as his mother, but all the women of the horde regard him indistinctly as their son. After a dark period, the duration of which cannot be calculated, the human race coming forth as out of a material existence in a diffused and unorganised state, manifests a continuous tendency to individualisation, a tendency which appears to have been its law of development. The masses seem to separate; little groups isolate themselves more and more from the horde, and commence to live a separate existence of their own. At that moment the principle of the family is developed; marriage, that is to say, the more

or less enduring union of a greater or smaller number of individuals, becomes a habit or a necessity in the primitive community. The notion of individual parentage emerges, but limited at first only to the parentage by the women. The first family takes outline and is grouped around the mother, and not the father. In these groups of consanguineous members the maternal uncle often fulfils the office of the patriarch, and the goods held as property pass in direct line from the brother of the mother to the nephew."

The love between father and son, according to these authors, appears rather to be a product of civilisation than an immutable phenomenon in the natural history of the human race. Filiation by the male and the idea of paternity are only manifested after the constitution of separate property. In the Aryan languages, such as the Sanskrit, the father was called *Ganitar* as the generator, and *Pitar* as proprietor. When marriage was established, the two ideas of property and paternity were fused together.

Whence have these authors derived this doctrine? They have deduced it from certain passages in ancient authors and from various observations made by modern travellers among savage peoples, as well as from the principle of evolution which proceeds from the homogeneous to the heterogeneous. We can oppose whole volumes of histories and legends to the passages taken from the ancient writers; and as regards the observation of the travellers we may reply, that these are peculiar facts dependent on the degeneration of the races. As to the principle of evolution, we have expounded the arguments that may be advanced against it in our Prolegomena.

Le Play, endeavouring to give greater stability to the social order, has directed his studies to the family, three types of which he distinguishes. There are two extreme types—the patriarchal family, and the unstable family, and an intermediate one which he calls the family stem. In the patriarchal family, as we have seen, the father is

always surrounded by his children, even when they are married, and he exercises a very extensive authority over them and their offspring. Excepting certain movable objects, things possessed as property remain undivided among all the component members of the family. The unstable family predominates in the case of operatives, as an effect of the new industrial regime, and it is propagated among the rich classes from various causes, among which is the obligatory division of goods. Hence he proposes: (1.) That parents should have liberty to bequeath up to the half of their goods (which provision exists in the Italian Code); (2.) That Arts. 826 and 832 of the French Code (corresponding to Arts. 987, 994, 1048, and 1038 of the Italian Code), should be modified so as to permit the parent to assign a whole property to a certain conjoint heir, whom he may consider better capable of cultivating it, and to compensate the other in a different way; which power we believe to be possessed by ascendants under the conditions established in the two Codes.

We would rather wish to see the suppression of Art. 67, above quoted, and the modification of Art. 63, which does not require the consent of parents for a son who has completed twenty-five years, or for a daughter who is above twenty-one; thus returning to the French system, already mentioned.

The family would also be strengthened by the abrogation of the second part of Art. 900, in which all substitutions, even of the first degree, are declared void of effect; and on the other hand, by bringing into force the French system, which is already enforced in the kingdom of the Two Sicilies, in regard to pupillary substitution.

We dare not invoke the establishment of the principle of disinheritance, which exists in all the codes of the Spanish Peninsula, because it is of difficult application.

## CHAPTER III.

### *THE ORDERS AND CLASSES OF SOCIETY.*

Man cannot unfold all his powers in the family, and hence the association of families which is called a tribe. Tribes arose during the nomadic life, when, under adventitious heads, men lived by the chase and by fishing, and on all that the earth spontaneously produced. But as soon as they began to domesticate the animals, and life became less wandering under the pastoral system, they could not but feel the need of a more stable power, and thus a patriarch was raised to be head of one or more tribes. Others constituted, on account of their age and position, a sort of natural aristocracy around this head or chief; their sons formed the people or the freemen, and the conquered members of neighbouring tribes formed the slaves. Cicero has described this historical evolution with his usual elegance: "Prima societas in ipso conjugio, proxima in liberis; deinde una domus, communia omnia. Id autem est principium urbis et quasi seminarium reipublicae" (*De Off.*, i. 17).

With the progress of agriculture the social relations became more complicated. Some families fell into want, and were reduced to the condition of clients, while certain slaves were attached to the soil, and became cultivators. Hence Vico writes that after the families the clients formed another principle of the State.[1] But he makes the clients originate before the plebeians, representing them as bound to cultivate the fields of the aristocrats,

[1] *De uno universi juris principio et fine uno*, § civ.

to whom they owed their work and homage, of which having at last become tired, they combined their forces and rose against the *optimates.* Taking as his example the history of Rome, Vico pushes its analogies so far as to assimilate the right of the Quirites to the feudal system, because Romulus permitted the patricians to have clients under a double reciprocal condition. The patricians had to train the clients in their civil duties and to defend them in their causes, while the clients on their part were bound to hold the patrons in veneration. This obsequience was, according to Vico, identical with the homage of the feudal right, called by its most learned interpreters *the personal bond.*

On the other hand, a more attentive observation shows us the Greek *Eupatridae,* like the Roman patricians and the German *Adelings,* in possession of the highest public functions, like that of the priesthood. But the freemen formed the real nucleus of the *demos* or nation. They were proprietors and agriculturists, like the *Geomori* in the constitution of Athens in the time of Theseus, the Spartan citizens, the Roman plebeians, and the freemen among the German races. They did not exercise the office of patron, but they could possess slaves. From what has been said above, we perceive persons dependent on the chiefs, such as the Greek Pelati and Teti, the Roman clients, and the German *Liti.* Their protector is called *Prostrates* in Greece, *Patronus* at Rome, and *Mund und Schutzer* in Germany. They formed a part of the nation, but their liberty and their rights were inferior. They exercised manual professions.

Quite different circumstances brought forth the feudal system, the origin of which must be sought in the social organisation of the Germans before the invasions, and in the state of dissolution of the Roman Empire. The Germans had attained to individual property, which they gave under a rule to the cultivators, the slaves being bound to domestic service or astricted to those lands that

were reserved for the daily use of the family. From the bosom of the families bands were formed for engaging in distant expeditions, that the members might not languish in idleness. The Roman Empire was invaded by these bands, who brought with them the organisation of the tribe, there being conjoined with it the bond of military subordination. The chiefs became scattered over vast domains, living together with several companions in arms. These companions soon became divided into two classes. Some received benefices from the chief, and became members of the association of the proprietors; others fell into a condition entirely servile, or into that of husbandmen, subject to military service and to certain prestations.

Under the Roman Empire we find two new juridical institutions: the colony (*colonatus*) and *emphyteusis*. The colonate system was a transformation of slavery, perhaps in order to prevent the diminution of the population, and it was fed both by the slaves who were bound to the soil and by the barbarians introduced into the Empire. The condition of the *colonus* was intermediate between liberty and slavery. As a free man he enjoyed the *jus connubii*, and therefore all the rights of the family. He possessed his property in full ownership, although he could not alienate it without the consent of the patron; while as a slave he was subject to corporal punishment, and, if he fled, to the punishment of the fugitive slave, being considered as the robber of his own person. The patron could not detach the *colonus* from the soil, but he could alienate him along with the property. For the cultivation of the ground the *colonus* had to give a corresponding part of its produce, according to a moderate and unalterable rule.

The origin of *emphyteusis* must be sought in the immense imperial domain, which increased always by means of *delatores*. The lands were let out with difficulty, on account of the imposts with which they were burdened

in the same way as private properties. Hence arose the idea of *emphyteusis*, or of a privileged letting for an annual return, which has much resemblance to property. It became customary to pay for certain public services by lands. They were assigned to the legions stationed on the confines of the Empire (*agri decumati*), and also to some of the patricians under the obligation of erecting palaces at Constantinople. The Church had the privilege to pay off in lands debts of every kind. As a reward for services rendered, lands exempt from imposts were assigned to the veterans, and these they transmitted to their sons only with the obligation of military service. In these concessions, which sometimes take the name of *beneficia*, the idea of the feu or fief is found in germ. There was another juridical institution which had much resemblance to it, namely, the *precarium* which is thus defined: "Precarium est quod roganti alieni gratis conceditur utendum tamdiu, quamdiu is, qui concessit, patiatur" (Dig. § 2, 1).[1]

The feudal system is therefore a Romano-German bastard offspring. We have here to consider it only as a social organisation. The lord was patron of his vassals, cultivators, and serfs, because he was proprietor of the soil on which they lived. He exercised over his lands all powers, legislative, executive, and judiciary; and his rents were composed of products of the land, dues, and certain taxes, which had the appearance of tribute, and were in fact the relics of the Roman imposts. He owed the king military service with all his vassals, and in case of necessity, a supplement in money called the *aid*.

The Church already occupied a privileged position in the Empire and formed part of the feudal aristocracy, which fortunately lacked union and discipline, otherwise the alleged cities and monarchy would not have succeeded together in overthrowing it.

Under the shadow of the towers and convents the oppressed gathered to constitute themselves into a com-

[1] E. Laboulaye, *Histoire de la propriété en Occident.* Paris, 1839.

munity and to inaugurate the municipal order. The lords consented for money, and the king favoured the movement, which, according to Thierry, was principally economical. Wealth being very scarce, labour was terribly taxed; and hence the citizens were not satisfied with surrounding themselves with walls and fortresses, but subdivided themselves into corporations of arts and trades to make a better resistance. In Italy, where the feudal system did not thrive, the cities obliged the gentlemen of the rural districts to enrol in these corporations, which were then called, as elsewhere, the corporations of the greater or minor arts, according to their importance. As the municipal system of right gradually conquered the feudal system, there was formed a third Estate under the name of the citizens, and they completed the three orders of the Middle Ages.

The progress of commerce and industry, and the renaissance of science and art, strengthened the citizens (*bourgeoisie*), while the monarchical centralisation weakened the aristocracy. Even on the fields of battle, where the communal troops had given more than one lesson to the feudal cavalry, the invention of gunpowder and the institution of standing armies made the cities preponderant. Hence the orders could not last as they were constituted, for the aristocracy had remained in possession of all the rights without the correlative duties, and the inhabitants of the cities on the Continent demanded a share in the State such as the political circumstances had assigned to them in England. There the obligation of the small feudatories to follow their lord in arms was commuted almost from the beginning into a special tax, which gradually came to be mixed up with the other taxes. According to Coke, no *escuage* was demanded later than the eighth year of the reign of Edward IV. Personal prestations seemed already antiquated under James I., and they were converted into money by Charles II., so that all the lands were assimilated to the ordinary free properties called *en socage*. Hence

it may be said that the feudal system was abolished in England from 1660.[1]

Things went quite otherwise on the Continent. As it had not been possible to proceed by way of reforms, the Revolution of 1789 broke out, and it made a clean sweep of all the past. A celebrated work of the Abbé Sieyès, composed during the meeting of the Assembly of the Notables and published in the beginning of January 1789, summed up the programme of the time thus: "What is the Third Estate? Everything. What has it been till now in the political order? Nothing. What does it ask? To be something."

The question being badly put, was also badly resolved, for it was not true that the Third Estate represented the whole of society to the end of the past century, nor that it asked to be something. On the contrary, it *was* something, and it was asking to be everything, as has happened. We do not require to pass in review here for the hundredth time the errors of the French Revolution, nor to examine on whom the responsibility for them rests. We must, however, pause for a little over the attempts at reconstruction made by Napoleon and by the Restoration. The former nominated a new nobility, which sought to amalgamate with the ancient nobility and become reconciled with the Church, while taking from it all political influence. The latter created a hereditary peerage, and indemnified those who had emigrated from their country. But neither renounced the system of administrative centralisation carried out by the monarchy and exaggerated by the Revolution. The Government of July began timidly to decentralise with the law of 18th July 1837, but it fell by revolt just because Paris was France. The Second Empire took a step forward with the decrees of 25th March 1852 and 13th April 1861, inspired by the principle that it is possible to govern from a distance, but that it is only

[1] Boutmy, *Developpement de la constitution et de la société politique en Angleterre*, p. 88. Paris, 1887.

possible to administer when near at hand. With these decrees many powers passed from the Ministers to the Prefects, so that, as Batbie suggestively says, "the chain was shortened but not broken." By the laws of 18th July 1866 and 10th August 1871 the departments acquired greater autonomy, as also did the communes by the law of 24th July 1867 and 5th April 1874. The preliminary approval, from being a rule, has become the exception.

Italy is now in an almost identical condition, because the two sister nations derived from Belgium their recent communal and provincial organisation. It is deemed insufficient by some publicists. Thus Giacomo Savarese writes: "But administrative monarchy, when it does not rest on the organisation of the administrative societies, and is not sustained by their representatives, is not a social organisation, although it is a governing organisation; it is a bureaucratic machine destined to safeguard the public service; and it has become a machine destined to exact and distribute, under various pretexts, the impost among the collectors." [1]

The learned author would like to establish a natural connection between society and the State. Starting from the invariable fact in human nature of the inequality of the individual faculties, he makes liberty consist in the full use of the individual's own means and in the full enjoyment of the fruit of his own labour. Political equality rests on provisions which do not change the fact of the natural inequality. Hence he does not fear the name of political privilege given to this proportional equality; for he holds that no immunity nor benefit should be conceded to any one to the exclusion of others of the community. He also considers it objectively as a burden imposed by the very nature of the association, and a common benefit, and subjectively as a requisite produced by the concurrence of those conditions engendered by the capacity of the classes and individuals. In support of this view he refers

[1] *Le dottrine politiche del secolo XIX.*, p. 63. Napoli, 1878.

to Aristotle and to the philosophers, publicists, and legislators anterior to the French Revolution, who, starting from the principle of inequality among men, have distinguished a natural privilege from an artificial privilege, and invoke the aid of the laws in order to make the former prevail over the latter. Starting from this principle, the legislators and publicists anterior to the Revolution considered society as an aggregate of distinct associations, and they limit every interference of the Government and of authority in general to the mere office of guardianship, directed to guaranteeing every one the use of the proper means to attain his end; that is to say, full liberty of action within the limits of its proper sphere. In their view, the State is the association *par excellence*, which is born in the logical and chronological order of human facts, and is formed from the slow and successive aggregation of families, corporations, classes, municipalities, and distinct regions, which it is called not to suppress, but to guard. But if Savarese sees in these associations something which resembles the sovereign power, he does not fail to recognise that there is also implied a popular right, both being necessary conditions for the existence of the association. To the question as to whether the popular right is an individual or collective right, he answers that the popular right in general is the right proper to those composing the association, which having been formed, the right becomes collective, so that the State consists of single associations. By way of example, he cites the constitution of ancient Rome, where the people were called to vote, not by heads, but by curiae, centuries, or tribes. Also in the present day he sees in the circumscription of the electoral bodies an aggregate, an association, because it is not the majority of the individual votes of the inhabitants, but the majority obtained in the separate electorates which determines the election of the deputy.

Savarese concludes that if in the family the exercise of the popular right is competent to the sons, in the municipal

community, which is a federation of families, it should belong to their representatives in it, and in the region it should belong to those only who represent the municipalities. Thus far the induction may be accepted, for what is under consideration is always local interests; but Savarese is not so successful in holding that the State is an aggregate of the regions or provinces which have a later origin (as we shall show in a subsequent chapter), or when he would improperly assign the popular right to the representatives of the provinces. The Dutch States-General, which he cites as an example, are an anomaly in history.

Professor Federico Persico, influenced by consideration of the high ends of the State, corrects what is excessive in the views of Savarese. "It is neither the heads of families nor the enfranchised individuals, as in antiquity," he writes, "any more than the classes and social orders as such, which ought to form the supreme organism, the *caput* of the State of the present day. The individual or the stock of the *gens* was the ancient primitive cell. These cells form ganglia in the Middle Ages, that is to say, the orders, corporations, and classes; and these with the unitarian principle of the monarchy formed the State. But the new citizen communities being generated, the provinces and districts being withdrawn from the feudal regime, and both having become no longer little sovereignties with special prerogatives and privileges, but real and free organs of the common and national life of a single superior and complex being, which is the new State, it is natural that the local and particular organisms of human formation should be themselves represented directly, and then take part in their turn in forming the State as the supreme director of the general life. To leave them outside of the political life, as at present, is strange and unjust."[1]

The distinguished author has set forth the way in which he proposes to make the citizens vote in the communes,

[1] See *Le rappresentanze politiche ed amministrative*, p. 223. Napoli, 1885.

which he would divide into rural and urban, according to their occupations and possessions. In the minor and rural communes, or those in which there would not be 20,000 inhabitants, there would be three electoral groups or colleges: (1.) that of the proprietors and possessors of industries; (2.) a second consisting of the cultivators and labourers of the land and industrial workers; and (3.) one containing all the other arts and civil professions, assigning them, according to the number of the councillors given to the community, a share of the candidates proportioned to the number and quality of those composing each of the three groups. In the cities the groups would be more numerous. One group would contain all the ministers of religion; a second all the civil and military functionaries, to the exclusion of the soldiers; a third all the teachers, artists, journalists, men of letters, &c.; a fourth all the proprietors of immovables situated in the city; a fifth all the doctors of law, advocates, procurators, magistrates, members of the public ministry, chancellors, notaries, &c.; a sixth all the physicians, surgeons, pharmacists and sanitary officials; a seventh all the engineers, architects, and undertakers of public works; an eighth all the heads of industry and of commerce, bankers, manufacturers, and merchants; and a ninth and last containing all the operatives and artisans, divided where it is necessary into sections by the art of building, by shops and manufactures, and by the trade in clothing, movables, victuals, printing, lithography, binding, and such like. To every one of these groups, according to its social importance, there would be assigned a number of representatives to be elected proportional to the number of the councillors of the community. The group of religion would have the right of electing, but priests and ministers of worship would be ineligible for the functions of councillors. The franchise would be refused in the cities to the illiterate. The electors of the province would then be divided into three groups: proprietors of immovable property, manufac-

turers or industrialists, and farmers and tenants of every kind within the bound of the provincial territory. But only the heads of industries, or the proprietors of immovable property in the province, would be eligible. No other electoral condition would be required. At the age of twenty-one every one would be entitled to form part of an electoral group including the class to which he belonged. When an individual belonged by his personal qualifications to several groups, he would have the right of choosing to vote in any one of these. The law would then establish the grounds of incompatibility for these functions from certain personal causes, to avoid the accumulation of charges in the province, in the commune, and in the parliament.

According to Persico, the ruling communes, the cities, and the provinces are the direct matrices of the State; and the communal councils of the cities, of the rural communities, and of the provinces ought to appoint deputies, which right he would also extend to each of the Universities as a centre of culture. This would be the only way of restoring things to a basis of principle in Italy, or to what was practised in England when the representative regime was instituted.

Other distinguished writers had occupied themselves with this question before Savarese and Persico. Thus Benjamin Constant had exclaimed: "When there are only individuals there is nothing but dust, and when the tempest comes the dust becomes mud." Ahrens had taught that the electoral body should be the reflex of the social organism, and should therefore be produced by the large groups of common interests, such as religion, instruction, and commerce. Mohl, developing the theory of Ahrens, proposed three groups of material interests, represented by large and small proprietorship in land, by industry and by commerce, by a group of spiritual interests comprehending the religious professions, science, art, and instruction, and a group of local interests com-

posed of the communities. And even before them Montesquieu had written: "The great legislators have distinguished themselves by their modes of dividing the people, and on such division the duration and prosperity of the democracy depend." [1]

A. Prins simplifies the thesis, subordinating the capacity and concrete intelligence of each group to the interests which predominate. "The companion of the German Mark," he says, "the knight of the English Parliament, the member of the Council of the Flemish city, and the deputy of the plebeian order to the States-General of France, were perhaps incapable in the sense of the present time; but nevertheless they possessed the criterion necessary for prizing their collective interests, and defending them with competency." And elsewhere he says: "Cells that are equal to each other, and are simply placed one on the other, produce the lower being called the fresh-water polyp. In order to construct man, something else is requisite, namely, the grouping of the cells, and then a cellular organisation with the cerebral parts predominant. The same may be said of the State, in which men have to be grouped together in organisms. It is not the supra-position of the individuals, but the co-ordination of the organisms which has given to the social body the feeling of life, in the absence of which the most beautiful institutions prove radically impotent. Now, at present in our society, instead of the resisting bundle of the collective whole, there is only an agglomeration of individuals. And the individual is isolated, suspended in the air, without bond of connection with his fellows, without being linked to any centre whatever, and without action externally. He has unlimited capacity to speak ill of everything, and to find fault with everything, but he is incapable of creating anything. . . . The parliamentary regime is the faithful mirror of this disconnected society." [2]

[1] *Esprit de lois*, liv. ii. ch. iii.

[2] *Essai sur la démocratie et le regime parlementaire*, pp. 197 and 14. Bruxelles, 1884.

We have considered it advisable to premise these ideas as an introduction to the subject of Public Right, with which we are about to deal. We shall return to the discussion when dealing with the composition of the First Chamber and the election of the Second.

## CHAPTER IV.

### *THE LOCAL COMMUNITY OR COMMUNE.*

When the family had several branches, the stem was called γένος, *gens, clan.* Several *gentes* associated formed the φρατρίαι, *curiae,* or *hundreds,* under the presidency of a patriarch, curator, or *hundredes-caldor.* It was not long till several curiae being united gave origin to tribes, which occupied a territory called δήμος, *pagus, Gau,* and then *Mark, Gemeinde, Commune.* Among the Greeks and Latins the fortified *pagus* became the city, or rather the State; and among the Teutons the union of the *Gaus* became the kingdom. The difficult task of modern civilisation consists in reconciling the independence of the city with the unity of the State.

The community is the family grown large. It existed before the State; the political law finds it—does not create it.

It has passed through three stages: the village community, of which the Russian *Mir* is a survival; the sovereign city in the Graeco-Roman antiquity; and a fraction of the State, as in the most of the modern States. We shall pause a little to describe these three types.

The *Mir* is founded on the collective property, which from time to time is distributed anew among the existing families, and on solidarity in reference to the imposts to be paid to the State. All the heads of families assemble in the open air near the church to deliberate on the local interests, and the resolutions are taken by acclamation. The assembly is presided over by the Starost (old man), who is elected for three years, and who has also the execu-

tive power; that is to say, he cares for the maintenance of the streets, the administration of the schools and hospitals, the arrest of malefactors, &c. The administrative unity for the villages, however, is not the *Mir*, but the *Volost*, which is a sort of French *Canton*. The council of a *volost* is composed of all the *starosts* of the villages which form it, and is presided over by a *starchina* (which also signifies an old man), who is elected by the council and confirmed by the Government. He remains in office for three years, and is responsible for the whole cantonal administration. The cities, according to the law of 28th June 1870, have a municipal council elected by the citizens, and it nominates the syndic or president and the magistracy. The choice of the syndic requires the ratification of the governor.

The English *Parish* has succeeded the primitive village community, and, like the *Landes-gemeinde* of some of the Swiss Cantons, it is a curious example of direct popular government. The fundamental principle of such associations is that the power resides in the assembly of all the inhabitants, which meets whenever it may please one of its members to convoke it. The assembly of the English parish, called the *vestry*, from the place where it meets, carries on its administration by means of responsible mandatories, and it is composed of all those who pay poor-rates. The law of 1834 reforming the poor-rates permits parishes to unite into *unions*, and these tend to become a sort of French Canton.

Above the parish there is the *borough* and the *county*. In the *borough* the electors who possess a certain property nominate the municipal councillors, who choose from their midst a magistracy composed of *aldermen* and the *mayor*. The municipal administration comprises the communal patrimony, the local taxes, the urban police, the hospitals, &c. Almost all the important cities of England are constituted into boroughs, in virtue either of traditional customs or of charters obtained from Parliament. On this account their organisation presented the most grotesque variety

until the Municipal Act of 9th September 1835 brought a certain order into them. By an express clause contained in this Act it was freely accepted by various boroughs. The other incorporated urban agglomerations continued to maintain a provisory regime which offered some analogy to the boroughs until 1858, when a Local Government Act specially regulated the various local administrations.

The country districts, under the high sovereignty of the lords, were organised into counties, which were subdivided into centuries (*hundreds*), which have no administrative importance, but form simply judicial and police districts. This organisation goes back to a very high antiquity, for Tacitus writes: "Centeni ex singulis pagi sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est." After the Invasion the official superior was called *comes*, whence comes *comitatus*, county. He also held the government of the *hundred* in time of peace, and he intrusted it to a *vice-comes*, who has been succeeded by the *sheriff*.

The county is now administered by a Sheriff, nominated for a year by the central government, and by an indeterminate number of Justices of Peace, appointed for life by the same government from among proprietors who possess an annual income of more than £100 sterling. The Justices of Peace sometimes act separately, at other times in a general session held quarterly, and they vote the different taxes of the county. This ought not to be surprising, since the local taxes were all at one time imposed on the land, the State having reserved for itself taxes on commodities, the excise, stamps, &c. Some cities are regarded as counties corporate, and are administered in the same way as counties.

The English have introduced their local institutions into the New World. The *parish* became the *township* with its general assembly of citizens, which carries on the administration by means of its delegates. The cities have received their charters and are administered by means of

the common council, the aldermen, and the mayor. In the Southern States the counties predominated, and for a long time the sheriff and the justices of peace were selected by the governor and appointed for life or for a period of seven years. After 1824 these appointments were gradually abandoned to popular election, and this became general after 1850. Not content with this, the Radicals, after the war of secession, set themselves to multiply incorporated boroughs in the South, in order to withdraw the people completely from the influence of the landholders. The Central States have an intermediate organisation, the township existing, but being subordinated in certain relations to the county.[1]

But neither in England nor in the United States of America is the community entirely autonomous, as it is subjected on every side to the general laws of the State, which imposes obligations upon it, and restricts its sphere of action, especially in the matter of taxes and in the alienation of patrimony. In the classical antiquity there were autonomous communities, but they were sovereign States. When they fell under the conquest of Rome, they lost the sovereign prerogatives of making peace and war, as well as the right of legislation and that of imposing taxes. There remained then only one sovereign community, Rome, which ruled over a great number of other communities that had only a civil existence. The municipal regime passed from a political government into a mode of administration, and this revolution was completed under the emperors. In every municipality there was a senate called the *ordo* or *curia*, which administered the city except in some extraordinary cases, when the whole body of the citizens were called upon to take part in the municipal affairs. This *ordo* or *curia* was composed of a determinate number of families inscribed in the *album ordinis* or *album curiae*, and they usually did not exceed two or three hundred. When any of these families became

[1] Jannet, *Les Etats Unis contemporains*. Paris, 1876.

extinct, the *curia* appointed others to take their place. Towards the close of the Empire this municipal power was a burden from which every one sought to withdraw himself. Then was seen the rise of a new magistracy, the *defensor civitatis*, whose mission, indicative of the calamity of the time, consisted principally in defending the inhabitants, and especially the poor, against the violence of the proconsuls, the avarice of the exacting tax-collectors, and the insolence and fraud of the rich and powerful. It had the right to submit illegal acts to the prefects of the praetorium; and its jurisdiction, which at first was very limited and dependent, became equal in importance to that of the ancient magistrates. Justinian granted it the title of *archont*, and empowered it to take the place of the absent governor. He prohibited the proconsuls from judging the causes of competence of defenders which did not exceed in value 300 gold *solidi*. The defenders of the cities were not nominated by the decurions only, but by all the people, including the clergy and the bishops; and as the influence of the latter was always increasing, they were most frequently raised to this office. On the fall of the Empire the bishop became the natural head of the inhabitants in every city, and his election, from the part which the citizens took in it, became the most important affair of the city. It was principally by the clergy that those Roman laws and customs were preserved, which passed afterwards into the general legislation of the modern States. The ecclesiastical municipal regime came in as a transition between the ancient Roman municipal government and that of the communities of the Middle Ages.

After the invasion of the barbarians the social preponderance passed from the cities to the country districts. The barbarian conquerors lived for the most part on their lands and in their fortresses, around which gathered the part of the population given to the cultivation of the fields. These agglomerations prospered by means of industry and commerce, and they became villages, and often cities. The

possessors of the lands, with a view to drawing other people around them, granted favours and privileges; but their frequent abuse of power compelled the population to rise against them.

The rebellious cities, in order to resist their lords, claimed the right to raise troops, to impose taxes in order to carry on war, and to govern themselves by their own magistrates; and thus the sovereignty was restored in the cities, from which it had been driven away by the conquests of Rome. The whole of the inhabitants formed the assembly of the community, which was convoked by sound of bell. The assembly appointed the magistrates, whose number and function varied in the different communal bodies. The magistrates exercised the government almost alone and arbitrarily, without any other responsibility than the danger of having to succumb in future elections or before a popular rising.

The great revolution thus gradually brought about took definite form in Italy in the eleventh century, and in the rest of Europe in the twelfth and thirteenth centuries. In Italy the communes became glorious republics almost wholly independent, as was also the case in Flanders and in some parts of Germany. In France the monarchy showed itself favourable to them, in order to weaken the great vassals; but in the fourteenth century, this object having been obtained, it began to oppose them. The elections were generally abolished in 1691, and the municipal functions were turned into offices; or, in the cities, the king sold to certain inhabitants the right of administering all the rest. Louis XI. had restricted the municipal liberties from fear of their democratic spirit; Louis XIV. destroyed them, without fearing them, for he sold them to all the cities which were able to buy them. In 1764 the Government thought of compiling a law in reference to municipal administration, and it procured memoirs from the superintendent magistrates on the manner in which that administration was conducted. De Tocqueville

consulted these memoirs, and he gives an account of them in his celebrated work, *L'Ancien Régime et la Révolution.* The administration of the cities, he says, was generally intrusted to two assemblies, the first of which was composed of municipal officials more or less numerous according to the localities, and it constituted the executive power of the community, the *corps de la ville.* Its members exercised a temporary power, and they were elected when the king had established their election, or the city had been able to buy its franchise; and they remained in office in perpetuity when the king had established the offices, or had succeeded in selling them. In all cases these municipal officials received no salary, but they enjoyed exemption from taxes and had other privileges. There was no gradation among them; the administration was collective; and the mayor acted as president of the *corps de la ville*, and not as administrator. The second assembly, called the General Assembly, elected the *corps de la ville*, where election was in force, and took part in the principal affairs. But in the eighteenth century it was no longer the people which met in general assembly, but only the notables, some in their own right, others sent by corporations of arts and trades. These latter always became fewer, so that it may be said that the administration of the cities had degenerated into a pure oligarchy. One cannot imagine a sadder condition than the state of the municipal officials; the lowest agent of the central government, the subdelegate, made them comply with his least caprice, and often condemned them to fines and imprisonment.

The attempts to reform the system in 1787 failed, because they did not start with the abolition of privileges, especially in the matter of taxes. The Constituent Assembly proceeded to the territorial reorganisation in 1791, after having proclaimed the equality of all the citizens before the law. It constituted municipal councils elected by all the active citizens, or such as were twenty-one years of age and had suffered no penal condemnation.

It put at the head of the administration commissions instead of the mayor. The Constitution of the year III. substituted cantons for the municipalities; but the Consulate, preserving the canton as a financial, electoral, and judiciary district, re-established the municipalities, and put at their head mayors instead of commissions. All the nominations, including those of the municipal councillors, were put into the hands of the First Consul, and liberty was banished from the institutions which should have served as its basis. In 1837 the appointment of the municipal councillors was left to the people, but their powers were not much extended. "To-day (said Guizot in a speech) we inherit and profit by the great doings of Napoleon; and notwithstanding the vices which nestle in them, despotism may go out of them and liberty enter in; and it enters into them every day. . . . When these institutions were created, only a government strongly constituted could establish social order in France."

Centralisation is so natural to France that all the Governments which have succeeded in it have considered the commune as a fraction of the State. The Second Empire believed that it made a great effort in assigning to the prefects many powers relative to the local administration which formerly belonged to the Minister of the Interior, and it adorned the decree of 25th March 1852 with the title of "Administrative Decentralisation" (*Décret sur la Décentralisation Administrative*). The Third Republic, by the law of 5th April 1884, enlarged the powers of the commune, laying down as its basis that the deliberation of the municipal council would not be subject to the previsory approbation of the superior authority without express provision or law. By Art. 76 it granted the municipal councils the right to choose the mayor and his associates from their midst. It is only at Paris that these officials are nominated by the Government, the functions of the mayor being fused in those of the Prefect of the Seine.

In Italy municipal liberty perished amid the tumults of the public squares, and the lords played the part of the king in France. The consular law of the year VIII., above referred to, was introduced into Italy by the French invasion, and was preserved with a few modifications by the restored Government, except in Lombardy, where in 1816 it was decreed that the ancient Lombard system should be called again into force. The more important communities had a council which was secretly convoked twice a year. In the other communities, which were numerous but very small, the possessors of property enrolled in the census were publicly convoked, there being also included a delegate to represent those who contributed to the personal tax. The institution of these numerous and small communities was conjoined with the institution of the chancellor of the census, who being distributed in all the districts, kept the offices, preserved the archives, and exercised a surveillance which became odious when it passed from dealing with the administrative affairs into the dealings of a feared and hated police.

When Lombardy was united to Piedmont the idea of unifying the municipal administration gave rise to many doubts. The chief point was how to unify the Lombard communities among themselves, and as there was no wish to adopt the two systems (of great communities governed by their councils, and of small communities represented in general convocation), there were two measures to be taken. The first consisted in satisfying the small communities, in order that they might not be condemned to impotence and excessive expense by a uniform law; and the second, in equalising them with the other communities, not taking account of their smallness and of the bond which connected them with the chancellorship of the census for the facilitation of the administration, and the benefit of the taxpayer.

The law of the 23rd October 1859 applied itself to the second measure, but it was a great mistake. It emanated

from the full power granted to the Government in view of the war of independence, and it was almost a literal translation of the Belgian law of the 30th March 1836. Hence it had the same advantages and the same defects; it assigned a large sphere to the communal administration, but it did not distinguish well the executive and deliberative power, which, as De Tocqueville says, forms one of the greatest achievements of our age; and it merged the personality of the mayor in the magistracy. The Parliament corrected these defects, restoring his personality to the mayor; but the law of the 20th March 1865 laid upon the community many expenses which evidently were not within its competence, and did not restore the rural community. The Government Commission created by the Ministry of the 18th March 1876 to compile a new scheme of communal laws protested against *this absolute equality* (of the small with the large communities), *which in our time has too often delayed and hindered the gradual development of free institutions.* "There is no doubt," the report of the Commission to the Minister goes on to say, "that sometimes the small communities are better administered than some of the richer and more populous ones, and that it is desirable that all the citizens should enjoy in equal measure the liberty of looking after their own interests. But whoever will look at the reality of things will find it evident that in the former most of the more cultivated of the taxpayers do not continue to reside permanently in the communal territory, and that the others are scantily furnished with the capacity for taking part in the public affairs, or are prevented from doing so by the care of providing for the more stringent necessities of life; whereas in the greater communities there are very many citizens who live habitually in the communal territory, and who are fitted by their education, their means, and their ambition, and are willing as well as capable, to direct the fates of the community."

The law referred to happily resolved the problem of the

governmental interference and of the guardianship of the communities, assigning the former to the political functionary of the province, and the latter to a local and elective representative body superior to the community and independent of the State. The communal resolutions before being put into execution were communicated to the prefect (and by him to the sub-prefect), in order that they might be examined as to whether they were regular in form, and not contrary to the laws. Within the fixed period of fifteen days these authorities sent them back furnished with their sanction if regular, or suspended their execution if faulty in form. Within thirty days the prefect, after he has consulted the prefectoral council, could pronounce them null. Against the decision of the prefect appeal was open to the Minister of the Interior, who decided after having heard the Council of State. The law referred to was amended on 30th December 1888 in various points, by rendering the mayor elective in the chief towns of the department, district, or province, and in communities having a population of 10,000 inhabitants or more. The election of the mayor is made from among the members of the council. In communities with a population of less than 10,000 inhabitants, the mayor continued to be selected by the Government in the person of a councillor.

Nothing is simpler than that a community should independently administer its own property, enter into contracts of location, and expend its revenues on works and matters of public utility. But it is Utopian to hold that it should likewise be able, without any control, to alienate its property, to impose taxes at will, and to contract debts. The community has no sooner formed part of a larger association than it loses its absolute autonomy. The law referred to subjected to the approval and judgment of the permanent provincial deputation, presided over by the prefect, certain acts of the communal administration, which may be divided into two categories. The one includes the acts which relate to the management

of the patrimony, such as alienations, acquisitions, borrowings, and locations for a long term. The other includes, apart from these acts relating to the patrimony, those which refer to the use and destination of the revenues and administrative life of the commune: such as expenses which bind the budget beyond five years, the classification, opening, and reconstruction of roads, the regulations for management of the communal property, taxes, dues, sanitation, buildings, and local police, and the introduction of taxes. These functions have been assigned by the new law to the administrative provincial committee. Against the decisions of this body the communal councils and the prefects may appeal to the government of the king, which determines by royal decree, the opinion of the Council of State having been previously obtained. The two laws referred to were fused into one by authorisation of Parliament on 10th February 1889.

## CHAPTER V.

### *THE PROVINCE.*

The State no sooner ceases to be a union of communities than there is born a new organ, the Province.

Looking carefully at its origin, we perceive that it is not a primitive, natural association, but is secondary and artificial. In fact, it is lacking in the primary States composed of clans, tribes, and communes, but it appears in the Empire under the name of satrapy and kingdom; and hence the name of king of kings, given to the Persian monarch.

In the West, the province sprang out of the conquests of Rome. The Romans possessed not only the genius of conquering, but also that of assimilating, the peoples. The Latins preserved their laws, their magistrates, and their government. A dignity sustained in their own country obtained for them the title of Roman citizens. They did not pay taxes nor capitation tribute, like the conquered peoples, but a contribution regulated *ex censu*, or they furnished a contingent of soldiers at their own expense. Such was the *jus Latii veteris*, *jus Latinitatis*, which was likewise conceded to the foreign peoples as a first step towards Roman citizenship. The other Italians had obtained less favourable conditions comprehended under the name of the *jus italicum*, such as exemption from the *tributa soli et capitis* and certain privileges of the civil law, namely, the *perfectum dominium*, *alienationes*, *traditiones*, *nexi*, *mancipationes*, and in regard to procedure the *annalis exceptio* and the *jus capiendum*. These two distinctions disappeared after the social war, which extended the right

of Roman citizenship to all Italians from the Straits of Sicily to the Rubicon. The territories subjugated by the Republic out of Italy were divided into three classes: provinces, free or federated countries, and allied or friendly kingdoms. "Provinciae appellabantur, quod populus romanus eas provicit, id est ante vicit," says Festus. The lands belonged at first to the Roman people, and they usually confiscated a part, leaving the enjoyment of the rest to the old proprietors, subjecting them to a tax on the land. "In eo solo (provinciali), dominium populi romani est vel Caesaris: nos autem possessionem tantum et usumfructum habere videmur:" so wrote Gaius in his Institutes. The lands confiscated were put under tribute, or were farmed out for the benefit of the Republic to Italian farmers, to the inhabitants of the place, or to the communities or cities of the province itself, or of another province. The condition of the men was not less precarious than that of the possession of the soil. The province lost its ancient institutions, its magistrates, its tribunals, and was subjected to a *formula* or *lex provinciae*, usually drawn up by the conquering general. The praetor or yearly pro-consul could alter it when he entered on office under the slightest pretext of public utility. The provincials could be imprisoned or put to ransom, and the cities were subjected to extraordinary contributions. The taxes were made more burdensome by the extortions of the publicans, of whom Livy has well said, "Ubi publicanus est, ibi aut jus publicum vanum, aut libertatem sociis nullam esse." This is how the same author makes the Macedonian ambassadors speak to the assembly of Aetolia: "See that Roman praetor from his lofty tribunal dictate his proud sentences; a band of lictors surrounds him, whose fasces threaten your backs and their axes your heads; and every year brings you a new tyrant." The government of the provinces was ameliorated under the Empire. Augustus divided them into two categories by regard to their

external security and internal peace, taking for himself the most exposed and the most turbulent, and intrusting the more friendly of them to the Senate. The Emperor regulated the affairs of the provinces by means of his private council; he nominated and recalled the magistrates, and he judged in the last resort the accusations advanced against his delegates. The other provinces continued to be ruled by the pro-consuls appointed by the Senate, from which they were designated senatorial or pro-consular. These magistrates held the title of consulars, but they exercised only civil functions; whereas the governors of the imperial provinces, although taking the name of praetors, combined with the civil function the military power, and they had the *jus gladii* or the right of life and death over the soldiers. Two useful innovations were the institution of a salary for the governors of the provinces, which put a check on their exactions, and the formation of a list according to which they allotted the persons nominated by the Senate, thus rendering the lot intelligent. By degrees they began to prorogate their functions beyond the year, both in the case of the imperial and the senatorial provinces, a *senatus-consultum* having invested Augustus with perpetual pro-consular power. The sovereignty of the Caesars, which was still republican under Augustus and senatorial under Tiberius, became a pure monarchy, although under good princes like Nerva, Trajan, and his successors, their rule was reconciled with liberty. The government of the provinces was improved by it. Adrian had rendered the praetorian edict perpetual, adopting that which was promulgated by the greatest jurisconsult of the age, Salvius Julian. Marcus Aurelius promulgated the provincial edict, or extended the edict of Julian beyond Italy, and put an end to the odious *formula* or *lex provinciae*. Caracalla enacted the famous Constitution by which all the free inhabitants of the Empire received the right of citizenship.

The government of the free or federated territories was the opposite of that of the provinces, as it had autonomy as its basis, or the right to preserve the ancient laws, and sometimes also to make new ones. The national soil, the magistracies, and the tribunals were respected; the cities administered their own affairs; and when the territory was vast and the people subdivided into cities, certain assemblies, called *conventus* or *commune consilium*, met to manage the general affairs. This administrative autonomy was called *libertas*, and Rome exercised over the allied cities, even when they were situated in the provinces, only a right of patronage. The friendly or allied kings formed a class of great tributaries on which Rome, according to circumstances, had imposed contributions more or less heavy in soldiers and in money. After the Constitution of Caracalla, the ancient political distinctions between Latins, Italians, allies, and subjects lost all signification. What remained was the social distinction between a free man or ingenuus and one born in slavery, a slave or a freed man. The ingenuus was synonymous with a Roman, while a stranger meant a libertus, a slave, or a barbarian.

Diocletian took up the work at the point where Adrian had left it. He associated with himself Maximian, a brave soldier who was sincerely devoted to him, and he established order everywhere. The two emperors resided at different places: Diocletian at Nicomedia, in order to present a front to the East, and Maximian at Milan, in order to give prompt succour to the provinces which were more exposed to the invasions of the barbarians. As one colleague did not suffice, he added other two under the name of Caesars; he took away from the praetorian prefects their exclusive authority, increasing that of the heads of the troops, and he augmented the number of the provinces and appointed sub-prefects (*vicarii*). The multiplication of administrative centres put the governors into more direct relations with the populations and made

them less active in disturbing the public quiet. Not content with perfecting the arrangement of the high administrative power, Diocletian applied himself carefully to assimilate the local administrations. The municipal curiae became so many local senates, which were perpetuated by a special order of citizens. The corporations of arts or trades increased in number and importance, and regulated themselves by special laws. To this period has been traced up the institution of the colonies. The rural population, being in part of servile origin, and having in part fallen by their poverty into slavery, found this institution a refuge against the tyranny of the possessors of the soil. The law took the place of their masters in order to protect the class which nourished the Empire. The slave no longer belonged to an individual, but depended on the soil as an instrument of agriculture, and on the State as security for the payment of the taxes. Constantine made final the duality of the Empire by founding Constantinople, while the four departmental tetrarchies became four praetorian prefectures divested of all military power. The old aristocracy of the conquered peoples was changed into a provincial nobility, carrying on the administration in the curiae or in provincial councils. The flower of the provincial senates entered the senate of Rome, which no longer represented the Latin patriciate, but became a simple assembly of notables, and it lost much of its importance after the creation of another senate at Constantinople. These notables were designated by the name of *illustres, spectabiles, clarissimi, perfectissimi*, according to the public function which they discharged.[1]

An administrative system which was so complicated was therefore also very expensive, but it was not the ultimate cause of the fall of the Empire. A French author has said, "The principle of the government of Rome is the destruction of the individual for the advan-

[1] Amédée Thierry, *Tableau de l'empire romain.* Paris, 1862.

tage of the State, the destruction of the provinces for the advantage of Rome, the destruction of all for the advantage of the Emperor. While the dominant principle of the Roman world was the disappearance of the individual personality before the imperial agent, that of the barbarian world was the right of every individual, even in opposition to the king. In the new society the principle of individuality manifests itself everywhere. From the fifth to the tenth century among the Franks everything is *mall*, council, synod, assembly. In the *mall* the acts of private life are completed, and peace or war is decided. There is the *mall* of the centurion, of the vicar, of the count, of the bishop; and there is the *mall* of the king. Every year the Franks gathered in the fields in March and May, and the bishops assembled in council. For the text of the law, in their sentences, and in the narratives of their great undertakings, the assent of the people is always mentioned."[1]

Nevertheless the Roman administration exercised a certain fascination over the invaders; all the great barbarian chiefs—Ataulf, Theodoric, Clovis, and down to Charlemagne—tried to revive it. The disorder, however, increased on account of the new invasion, and there was no other means of arresting it than by substituting a new territorial aristocracy, both lay and ecclesiastical, in place of the old one. Property was fluctuating, being disorganised by constant changes; and it could only become stable by arranging the society of the proprietors into an organisation. This was attained by changing offices into benefices, and by rendering them hereditary. The king was the first of the feudal lords, and he had to carry on frequent wars with them. With the relative order established by the feudal system the cities began to repair their ruins and to feel the stimulus of independence, as they found an interested ally in the monarchy, which recognised their

[1] Jules De Lasteyrie, *Histoire de la liberté politique en France.* Paris, 1860.

rights in exchange for a contribution in money and a contingent of soldiers. Some feudatories sold franchises to certain cities and villages, especially during the time of the Crusades. But in France the monarchy was not long in betraying its new allies in order to throw its weight equally on all, while in England the cities made common cause with the aristocracy in order to resist the monarchical usurpations; and thus they preserved their liberties.

Hence the origin of the modern province is wholly feudal. The provincial States which became communities in the thirteenth and fourteenth centuries and in the beginning of the fifteenth century were transformations of the feudal assemblies. The bishops and the members of the high aristocracy ruled in them, being members *jure suo,* while the cities were only represented in them by a mayor, alderman, consul, or special deputy. In France the populations were not very favourably disposed towards them, and in the sixteenth century only six provinces out of those united with the crown formed the so-called *countries of the State*, embracing about a fourth of the population of the kingdom. On the other hand, in the fifteenth century the institution of parliaments and justiciary bodies represented the spirit of the citizen class in the provincial constitution. The Third Estate, which had sprung from the revolution of the communes, and had acquired strength in the provincial and national assemblies (States-General), predominated in the Parliament so as even to form an obstruction to the general administration.

In the ancient kingdom of the Two Sicilies the history of the territorial organisation may be divided into three periods. In the first period we see the central government predominantly occupied by the thought and desire to regulate justice and contentious relations; in the second period the predominant interest is the organisation of the finances and the financial administration; and in the third period the main object is to regulate and establish a fixed and permanent military body in place of the military power

of the barons. Under the Normans and the Swabians the provincial administration was concentrated in the hands of the justiciar, who had to travel through the provinces and to decide disputes, almost always in their own locality. General courts or benches were held, composed of the union of the provincial agents, the lords and prelates of the provinces, and deputies from the commune, two or four from each of them, according to their importance. The presidency and the opening of the general courts belonged to the royal or imperial legates sent on extraordinary or express occasion by the prince. They met twice a year, in May and November, in certain appointed cities, and their sessions lasted from eight to fifteen days at most. The object of their meeting was the supervision and control of all the officials of the provinces, whether baronial and communal or royal, and they drew up representations or remonstrances, which were sent closed and sealed directly to the central Government. On the fall of the Swabian power the general courts fell into disuse on the mainland, and the central Government had no other object than to exact tribute until under the viceroys, when the presidents of the provinces had as their principal mission to collect the military forces. The administration of contentious matters or suits was partly left in the hands of the barons and municipal judges, and was partly intrusted to the hands of the royal provincial court, which, the more it increased its power, proportionally isolated the president, and he was not able even to take part in the sittings of the court unless he was a jurist. In the island matters took a different turn, owing to the greater agreement of the population with the barons. The barons themselves were the delegated provincial agents of Sicily, the law being that these offices could only be intrusted to the nobles of the province. The royal delegation was not able to take root even in the midst of the municipality, since the bailiff and the bailiff's court, which had been generally introduced into the municipality on the mainland, became very soon a

municipal office in the island; and it was only in a few places that the monarchy succeeded in establishing a semblance of delegation to represent its authority over the territory.

In England the *shires*, before the Norman conquest, were associations of communities. The Saxons had not established themselves in the villages, but on the estates. In these early times the rural communities, were very extensive, often comprehending whole *hundreds;* they corresponded to the tythings, and contained several villages. Twice a year, at Easter and Michaelmas Day, there met in each shire an assembly (*gemote*) of the wisest men (*wittingten*) under the presidentship of the bishop or the count. The *sheregereva* (sheriff), who was only an assessor, became co-president of the assembly of the county. The thanes (*thegen*) or servants of the king attended in person, and the boroughs that were closed in with walls (*townships*) were represented by their *gereven* and by four free proprietors. The assembly of the county decided disputes between the various districts; and the *sheregerева* raised the taxes, probably with the consent of the assemblies, and imposed fines on those who had committed offences. From this assembly an appeal was permitted to the sovereign.

Time has made but little change on this ancient English constitution. The county is still the seat of public affairs, where the State is represented by certain officials appointed by it. The chief of these are the *Sheriff*, a functionary whose power is more apparent than real, and the *Lord-Lieutenant*, who commands the militia of the county. The administration passed into the hands of the Justices of the Peace—the guardians of the public order—appointed by the Government from among the leading proprietors. They discharged their function individually, or met in session mostly once a quarter (*Quarter Sessions*), assisted by the clerk of the peace, who represents the bureaucratic or traditional element. They arrange

the budget, vote taxes, and regulate the police and the criminal jurisdiction. Their functions are discharged gratuitously, but during sessions they are the guests of the county.

Along with the counties there are also the *counties corporate,* isolated localities erected into counties by royal charters, with autonomy and all the usual powers. In comparison with the counties the boroughs make but a poor figure; they have their Justice of the Peace, but his commission may be recalled as a matter of fact and law, and he is taken from any class, while his jurisdiction is limited to small offences and to simple contraventions of the law. He takes no part in the local affairs, which are managed in the Municipal Council, according to the law of 1835, the aim of which was to put some order into the confused administration of the city, and this law, which is optional, has been gradually adopted by them.

The Local Government Act of 1888 has applied to the counties the principal provisions of the statute for the burghs of 1835.[1]

In Italy the Belgian law of 30th April 1836, as translated and modified in the law of 23rd October 1859, revised in that of 30th March 1865, and made more effective in the single text of 10th February 1889, regulates these relations. The Italian province is a jural body, which has a right to hold property, and it has a special administration which regulates and represents its interests. It is not a simple administrative district, as in absolute Governments, where the action of the central power, by entering into all the spheres of action, absorbs the administration of the local interests. In free States the Government should restrict its action to the administration of the national interests and to the political functions of supervision, inspection, and guardianship;

[1] The provisions of this Act, as well as those of the similar Act for Scotland of 1889, in their creation of County Councils, &c., may be conveniently studied in any of the numerous handbook editions of these Acts.

and therefore it should leave to the province the free administration of that series of local interests which do not separately concern each community specially, but which arise from the aggregation of various communities into a collective unity. If we find it necessary to subject the commune to the Government interference and guardianship, the province ought *à fortiori* to be placed under it, as there are intrusted to it many services of a public order of which the State divests itself because they are too burdensome, but which will not on that account change their nature. The system of interference and guardianship is different in the case of the commune and of the province, seeing that in the former the elective and governing elements both concur in exercising it, although in a different sphere, whereas in the latter the only invested authority is that of the Government, which examines the acts of the provincial administration under both relations. And in fact, not only is the prefect called to examine the resolutions of the provincial council as regards their form, but he approves or disapproves them, as the provincial deputation did with the acts of the commune. The provincial deputation cannot be associated with the prefect in such approbation, because it springs from the provincial council, to which it annually gives account. On the other hand, the prefect is assisted in this examination by the council of prefecture. The prefect examines within twenty days these resolutions as to their conformity with the law, after which date they become effective. The prefect has to approve the deliberations which refer to loans, alienations, and regulations of police which bind the provincial budgets for more than five years, or which create public institutions at the expense of the province. The prefect does not pronounce the suspension of the provincial deliberations, but their annulment according to law. Against the decisions of the prefect appeal may be made to the Minister of the Interior, who determines the question

after hearing the Council of State. According to the present law, the deputation is no longer presided over by the prefect, but by a president elected by the provincial council out of its own members.

The law referred to puts the District as an intermediate division between the commune and the province. At its head stands the sub-prefect, a Government functionary, who watches over the execution of the law, executes the order of the prefect, discharges all the offices committed to him, and facilitates the relations between the capital of the province and the more remote parts. His powers are direct, indirect, and delegated, and they will always be useful so long as the communications between the communes and the capital of the province continue to be attended with difficulty.

The idea which should be formed of the Province is that of a union of Communes, which have become more or less homogeneous from their situation, and from an amalgamation of the local with the general interests. The law becomes the interpreter of these needs when it agglomerates into groups a number of conterminous communes having topographical and economical homogeneity, and when it constitutes the provincial unities as an effective means for transmitting the governmental action from the centre of the State to its periphery, and for creating and consolidating the national unity by means of the power of assimilation, which radiates from each of these secondary centres in the circuit of the respective province. This action of the State would be delayed if it had to deal directly with every commune; and it would find greater opposition the more the State exceeded the narrow confines of its primitive formation.

As the progress of the means of communication lead to the suppression of Districts, so the smallness of the provinces will bring about the extinction of regions. France before the Revolution was divided into thirty-three provinces, with an equality of rights and of special

privileges. This division disappeared on the 22nd December 1789 before another more uniform division into departments, districts, cantons, and municipalities. Louis XVI., who had traced out with his own hand the new division on the map of France, said to the Constituent Assembly in a celebrated sitting on the subject of civil oaths of 4th February 1790: "This just and well-devised subdivision, which, by weakening the old separation of provinces from provinces, and by establishing a general and complete system of equilibrium, unites all the parts of the kingdom much more in the same spirit and in the same interest: this great idea, this salutary design, is entirely due to you. Nothing less was needed than the union of the representatives of the nation, nothing less than their just ascendancy over the general opinion in order to undertake with confidence a change of such great importance, and to overcome in the name of reason the resistance of habit and particular interests."[1] The Constitution of the year III. changed this mode of division, substituting cantons for the districts and municipalities; but the law of the 28th Pluviôse of the year VII., which is still in force, returned to the departments and to the districts (*arrondissements*), reducing the cantons to judiciary circumscriptions and municipalities.

Public opinion protests against this excessive breaking up of localities, and desires cantonal communes, it being reckoned that out of 37,000 communes there are 27,000 with a population under 1000 souls, and 10,000 under 500. There is likewise a desire that the departments be grouped around the more important cities under the name of regions, and that *arrondissements* should be suppressed. To the enlarged communes, departments, and regions there should be conceded the largest powers, leaving to the State the three great services whose national character is unquestionable:— (1.) The public debt and endowments; (2.) The army

[1] Laferrière, *Essai sur l'histoire du droit français.* Paris, 1859.

and the marine; and (3.) Foreign affairs. There would remain in charge of the State the expenses of the mere administration, certain parts of the function of different Ministers, and any great establishment of public interest, such as the Institute of France, the Observatory, the National Library, the Museum of the Louvre, the National Typography, &c., and finally, the Council of State, the offices of the Legion of Honour and of the Court of Appeal.[1]

Italy under the Romans was not reckoned in the number of the provinces; its cities enjoyed the Roman citizenship from the close of the social war, and they were governed by the laws and magistrates of Rome. Adrian divided it into four departments, with four consulars at its head, for whom Marcus Aurelius substituted four judges. Aurelian united it all together under the government of Tetricus, to whom he gave the title of co-rector. Even when the right of Roman citizenship was granted to all the provinces, Italy preserved some privileges, such as exemption from certain imposts. Diocletian took away these privileges, and subjected the Italian soil to taxation. Constantine created the so-called vicariate of Italy, with its seat at Milan, and distinct from the vicariate of Rome. Longinus was the deviser of the small provinces, concerning which Pietro Giannone writes thus:—"Longinius established in all the cities and territories of any importance chiefs, whom he called duces (dukes), appointing judges in connection with each of them for the administration of justice. This minute division of the provinces into so many parts and duchies made the ruin of Italy more easy, and it enabled the Lombards to occupy it with more rapidity." When the Lombard dukes or the counts appointed by the Franks, the last representatives of the fallen tyranny, wished to maintain each in the circle of his own juris-

[1] Elias Regnault, *La province ce qu'elle est, ce qu'elle doit être.* Paris, 1861.

diction, the abhorred severities of the kingdom, the people, at first with the bishops and then with the consuls, rose to assert their liberty, and they began the movement for communal authority. The bond, however, between the urban commune and the commune of the rural districts was not a bond of equality, but a relation of servitude and protection. The urban commune reigned over the latter with more or less domination, according to their compacts of subjection or protection; but unfortunately there was lacking a national authority to curb the municipal autonomy, and thus there were kindled implacable wars of jealousy and of conquest between city and city, and between borough and borough.

The Italian unity as it had been organised by the Roman Empire, was destroyed by the Greeks and Lombards; and it did not rise again as a political, but as a religious unity, taking from the Church its head, who was also a Roman patrician, and making the ecclesiastical hierarchy the foundation of the new society. The first real rural community of the new Italy was the parish; its foremost cities were the seats of the episcopates, and its first king was the Pope; and as long as the Pope, bishop, and clergy combated for civilisation against barbarism, the real Italy, Roman Italy, was with them. On the other hand, the Roman Italy of the laity found neither in the north nor in the centre of the peninsula a united hierarchy to which it could attach itself. The united orders of the ancient empire were destroyed, and those of the new empire were incapable of recovering life in a country which had carried on fierce war with the kingdom, the dukes, the counts, and all the representatives of the feudal hierarchy. Thus the Roman Italy of the laity was not able to rise above a municipal unity until there rose lords to organise it into so many small States. The arts and sciences during the fifteenth and sixteenth centuries adorned these new centres, and the philosophical reform of the eighteenth century consecrated

them. Thus the great province, or rather the region, arose again in Italy, and it was destined to form an integral part of the ultimate organisation of the kingdom.[1]

What functions will this new organisation perform? These may be determined rather by the method of exclusion. To the State will belong the administration of justice, the high police, public works of a national kind, the post-office, the telegraphs, the central academy, a completing institute, with observatory, laboratories, &c., the financial organisation, war, the marine, and foreign affairs; and what remains will fall under the original administration. At the head of the region there will be a governor with a council of lieutenancy, who will discharge the duties of a minister. The governor will have a double quality as delegate of the executive power of the State and head of the executive power of the region. There will be a regional assembly, elected by direct suffrage, and its resolutions will have the force of law after obtaining the sanction of the governor, who will be bound to publish them within fifteen days from the date of their deliberation. Whenever the governor has any reason to refuse his sanction, he will have within the same period of fifteen days to send back to the assembly their decision, and to invite them to consider it anew. If the governor thinks he must persist in his refusal, the conflict will be resolved according to law by the high powers of the State. The assembly will be dissolvable by royal decree. The governor will be responsible only to the central government, which appoints him, and which may recall him at pleasure; whereas his councillors will be responsible to the regional assembly.

These outlines of the constitution of the Region are contained in a Report of the temporary Council of State of Sicily to the pro-dictator Mordini, except the irresponsibility of the governor, which has been suggested by

[1] See Giuseppe Ferrari, *Histoire des révolutions d'Italie*, Paris, 1858; and Giuseppe Montanelli, *Dell' ordinamento nazionale*, Firenze, 1862.

Montanelli. Cavour returned to power in 1860 with the programme *political centralisation* and *administrative decentralisation.* And through the Minister Minghetti, on the 13th March 1861, he presented to the first Italian Parliament a plan of the law for the repartition of the kingdom and of the governmental authorities. The Region was proposed as a constituent part of the system of government. The governor was only a delegate of the Minister of the Interior, having to exercise many offices which could not be abandoned to the prefect. Such were the decisions on appeals, the approval of the regulations, the determination of matters which interested the provinces, and such like, which did not diminish in anything the powers of the prefect. The governor was to be assisted in the conduct of affairs by a committee of delegates from the provincial councils comprised within the region, and in drawing up the budget they were to have a deliberative vote. The Chamber, on deliberation, found the Region, as thus conceived, a useless wheel in the machine of government, and even dangerous in a kingdom whose unity had not yet been cemented by time; and hence it was rejected.

According to the Italian law of 20th March 1865, still in force, the province obtains its revenue from certain direct taxes and its burdens fall on the proprietors. The Neapolitan law of 12th December 1816 was better inspired when, for the public provincial works, it prescribed recourse to communal rates in a ratio compounded of the revenues of the community and of the utility derived from them. If the region were created, the provincial council would have to be assimilated to that of the French *arrondissement.* It would be limited to allotting the taxes in the communes, to expressing their wishes, especially in reference to highways, and to addressing through its president representations to the prefect bearing on the conduct of the public services. The formation of a regional finance is a more difficult problem; for if the State

no longer contributes the greater part of the expenses, its revenues must also be diminished. If taxes were imposed for meeting the regional expenses, there would have to be an account of these kept apart.

The electoral conditions in Italy are at present the same for the provinces as for the communes. For the region the qualification would have to be higher, and the proofs of capacity more pronounced, as we shall have occasion to explain in connection with the subject of political elections.

## CHAPTER VI.

### *THE STATE.*

THE work of individuals and of the lesser associations does not suffice to realise the human ends. In order to realise these ends the work of the State is also required.

The State springs from the union of a number of tribes under a single head, or of several communities under a capital city. It presupposes a people, a territory, and autonomy. It is thus that Pellegrino Rossi, by enlarging it, corrects the definition of Aristotle, who called the State a community of families and of locality for leading a prosperous and happy life, while according to him its matter is the aggregation of its members, and order is its form. Plato taught that in order to attain the good the harmony of our moral faculties was necessary, and that this was attained in the perfect organisation of the State, which he called the complete man—man on the large scale. One's own perfection, according to Plato, cannot be attained without the perfection of others ; and hence it is necessary always to keep before the mind the organic conception of the world, finality. No other task can be assigned to man than to realise the idea of his nature. A task which contradicted the idea of his nature he must either avoid, or he must reject it as evil. Evil is the selfishness which the individual persists in asserting in contradiction to the fundamental ideas of nature ; it is a special side of man, and in it the good finds its stimulus. To take away evil from the world is to take away morality.

The task of the State is to make morality possible and right obligatory. Man completes himself in the State, but

without losing his own individuality. Hence Bluntschli defines the State to be a union of men who compose an organic and moral person under the form of governor and governed; or, more shortly, the State is the politically organised person of the nation in a particular country. Every organism, he says, is the union of corporeal material elements and of vital animated forces—in a word, of soul and body. The organic being forms a whole provided with members which have their function and their powers, and which satisfy various needs of the life of the whole. An organism is developed from within outwardly, and has an external growth. In the State there is a body and a soul, a will served by organs. The body of the State is the constitution of which the public assemblies and the sovereign are the members; and the political function forms the soul of the State and transfigures the person who is invested with it, whether it be king, president, or consul. A notable difference which distinguishes the State and its institutions from the natural organic beings (besides the absence of nutrition and of material reproduction) is that the life of plants and animals ascends and descends by regular stages and periods. The life of the State is more agitated, since external events, a powerful or violent hand, or savage passions, often disturb its regular development or cause its death.[1]

From the most remote antiquity the State was considered as an organism. Thus Plato wrote: "The State is also more perfect the more it resembles man. If one part of the State suffers, the whole body feels it" (Rep. v.). According to Aristotle, man is a political animal by nature, and the State is the product of human nature. The celebrated apologue of Menenius Agrippa concerning the members that rebelled against the stomach, proceeded upon the same idea.

The ancients confounded society and the State, and this confusion has continued to be made among modern

[1] Bluntschli, *Allgemeine Staatslehre.* 1875.

politicians. This is how Rousseau, in his article on Political Economy in the *Encyclopédie*, describes the particular organs of the social body:—"The body politic, taken individually, may be considered as a living organised body, like the body of man. The sovereign power represents the head; the laws and customs are the brain, the centre of the nerves, and the seat of the intelligence, of the will and the senses, and of them the judges and magistrates are the organs; commerce, industry, and agriculture are the mouth and the stomach which prepare the nourishing substance; the public finances are the blood, which a wise economy, performing the functions of the heart, sends forth in order to distribute through the whole body nourishment and life. The citizens are the body and members which make the machine move, live, and work, and which cannot be wounded in any form without the painful impression being immediately carried to the brain, if the animal is in a state of health. The life of the one, as of the other, is the *ego* common to the whole, the reciprocal sensibility, and the internal correspondence of all the parts. If this communication ceases, if the formal unity vanishes, and if the contiguous parts no longer belong to each other except by juxtaposition, then the man is dead and the State is dissolved." Auguste Comte has clearly explained the bond which unites sociology with biology, but he keeps the two sciences divided, while Herbert Spencer would prefer to reduce them to a single science. In his *Principles of Sociology*, Spencer proceeds to examine the social phenomena, and to trace out their laws, which, according to his view, are summed up in evolution; and he finds them identical with the laws of life. Schaeffle, in three large volumes on the "Structure and Life of the Social Body" (*Bau und Leben des Socialen Körpers*), exaggerates the theory *ad nauseam*, gravely describing the social cell or the family, the social tissues, the organs, and the soul of society. Finally, Jaeger, in his *Manual of Zoology*, reckons society among living beings,

and analyses its characters as a naturalist. Thus, for example, he distinguishes the cephalic society from the acephalic, and States formed by generation like Germany from those formed by aggregation like Switzerland and the great American Republic. We shall see farther on the consequences of such theories.

We must, however, distinguish precisely the social organisation from the political organisation. The social organisation precedes, or rather transcends, the political organisation. It consists in those rules which secure the development of society from the usurpations of the individual, and which are comprised under liberty. The political organisation, on the other hand, consists in those rules which determine the constitution of the ruling power and the part reserved to citizens in the sovereignty, and which beget political liberty. We must therefore clearly distinguish what belongs to man and to the citizen, or what is proper to the individual and what is indispensable to the State.

The sphere of social right is enlarged or restricted according to the different stages of the civilisation of the people. At first, both in domestic and in civil society, the wants experienced are so great that the individual is reckoned as of little consequence; but in proportion as civilisation increases the action of the State diminishes and the individual becomes more free. "Now," as Guizot says, "it is apparent to all that as civilisation and reason make progress, the series of social facts which withdraw themselves from external coercion and the influence of the ruling power increases. Society, which subsists by means of the development of the human intelligence and will, extends itself in proportion as man perfects himself." [1]

The distinction drawn between society and the State is mainly due to the economists. Quesnay started from the hypothesis of the state of nature which was common in the eighteenth century. He, however, retained the family

[1] *Histoire de la civilisation en Europe.* 1846.

as a natural fact, the embryo of a larger society, which has its origin in sympathy, mutual wants, and reciprocity of service. The head of the physiocratic school formally denies that the primitive state of humanity was a state of war. So long as human relationships do not pass beyond a very narrow circle, the solidarity of the interests which unite the members of society is evident of itself; it is not perceived so easily when the number of the men who form a particular society is increased beyond measure; but then the advantages of the division of labour, so clearly pointed out by Quesnay, begin to make themselves felt. As inequality increases, the necessity of a power or protecting authority is not slow in manifesting itself. According to Quesnay, force put into the service of justice constitutes government; its duty and its right consist in maintaining individual rights or in protecting liberty and property. Government being limited to the duties of surveillance and repression, there arises the maxim—*not to govern too much;* and this reduces the State to a wholly negative mission, as in the hands of Adam Smith and Say.

The French Liberal school, in its representatives, from Royer Collard to De Tocqueville and Laboulaye, made the most of the distinction laid down by the economists between society and the State. It served as a standard for the general duties of the State, and as a limit to its sphere of action. The State exists only for society, and ought not to interfere except in cases of necessity or subsidiarily. If society is confounded with the State, we shall have despotism, monarchical or democratic. If, on the other hand, it is in opposition with the State, while neither of them has a clear consciousness of its special rights, anarchy will alternate with despotism. Such was the condition of the peoples of the Middle Ages, with their private wars, the rivalry between the spiritual and temporal powers, and the abuses of the feudal system. Quite different is the modern ideal, which consists in the constant harmony of these two great forces, the one purely moral, and the other

at once moral and material. Bluntschli does not properly define society when he represents it as an accidental union of individuals, a variable conjunction of private persons within the limits of the State. Society is the common foundation of ideas, traditions, sentiments, customs, interests, and private rights, which hold all the individuals united under the same authority and the same laws. The State is an emanation from it.

In the first part of our work we pointed out objectively the boundaries between the State and society; now we must indicate the means of subjectively guaranteeing the persons united in society. We shall therefore divide our treatment of the subject of the State into two parts. In the first part we shall treat of the guarantees of individuals in relation to the State, and in the second part we shall deal with the organisation and functions of the State.

## FIRST SECTION.

### GUARANTEES OF THE INDIVIDUALS UNITED INTO SOCIETY IN THEIR RELATION TO THE STATE.

Analysing the human personality, we found it consists of three fundamental attributes—equality, liberty, and sociability. Men are equal, as we have already said, because they are of the same nature, and not because they have identical faculties. They are free, because they have intelligence, are endowed with will, and act with full consciousness; and they are sociable, because they tend to an end of which they are cognisant. What are the juridical institutions which ought to serve as guarantees to these three attributes? We shall commence with equality.

### § 1. **Equality.**

There are three proofs of equality—the physical, the psychological, and the metaphysical. The physical proof is founded on the unity of the human species, of which

the races are mere varieties. The psychological proof is based on the resemblance of the fundamental moral faculties, possessed in a more or less perfect degree by all the races. Finally, the metaphysical proof is drawn from the intuition of creation possessed by all men. There consequently arises in all men the right to a free development of their faculties; but this does not mean that they ought to be developed in an equal manner. The Government has the obligation to protect this free development, or to guarantee civil liberty to all. Hence, in a well-ordered society the public tribunals ought to be accessible to all; and therefore the administration of justice ought to be carried on without privileges and without expense, this being the first advantage of a political association. The judges ought to be appointed beforehand, and the rules of procedure fixed, in order that there may be no ground for supposing that for any given case or for any individual there has been any deviation from the ordinary course of justice. This is equivalent to the maxim that "no one is to be withdrawn from his natural judges." Moreover, every individual who forms a part of a political association ought to have the sacred and inviolable right of having recourse to the constituted authority. These truths have now entered into the consciousness of all, and do not need any lengthened demonstration. But it seems incumbent to consider how the contrary of this position has been able to come about.

We shall commence with the words of Vico, who says: "In the midst of so many doubts and uncertainties, there is this certain, that the world of the nations has been made by men, and that its principles must be sought in the human mind." The arts, sciences, and all ideas separate themselves from the sphere of sense, as right separates itself from violence. The coarsest conceptions of the age which he calls the divine and poetic age, are images of what the philosophers meditated in a more advanced age. Accordingly, the axiom which has been improperly applied to

psychology, *Nihil est in intellectu quod prius non fuerit in sensu*, may be transported into history.

Human society arose at first from the irresistible need of association, and therefore it may be said that right began with it to manifest itself in the social and constitutional law. The first human society was the family; the union of many families, under a single head, gave origin to the tribe; and as the social relations became more extended, government arose in the forms which we are about to describe. Private right gradually detached itself from public right, and the human personality was better secured.

The Roman Law furnishes an example of this; for we see that the important acts of life, such as testaments, &c., were subjected to forms of public law in the same way as in every nascent society. In proportion as civilisation advances, the regulation of the most important acts of life is left to the individuals.

The idea of equality has therefore been applied very slowly both in public law and in private law; for we see at the beginning all right concentrated in the heads of families, the wife and children being subjected to a perpetual guardianship. This has been verified both in the ancient world and in the first beginnings of the modern world. The Germans, before the invasion of the Empire, were arranged in tribes. They frequently formed confederations to resist the Romans; and often there went out armed bands from one of these tribes drawn up freely to go in search of adventures. The German system of right does not differ in general from private Roman law, except in that the Germans were living in a less advanced social state.

The material needs, which were the more pressing in the ancient world on account of the scant development of industry and commerce, gave origin to slavery.

Aristotle expressed the opinion of all antiquity when he wrote: "If the shuttle could weave by itself alone,

one would not know what to do with slaves. . . . The slave is the man of another man. Do there exist men as inferior to other men as the brutes are? If they exist, they are destined to be slaves. There are men who have hardly enough of reason to understand the reason of others, and their corporeal labour is all they can produce; they are slaves by nature."

St. Paul had exclaimed in vain, "There are no longer masters nor slaves, rich nor poor, but all are brethren in Christ Jesus." Slavery continued to subsist, but this wholly spiritual emancipation could not but at length produce material emancipation also. Gregory the Great, on emancipating the slaves of the Church, wrote thus: "Seeing that our Redeemer, the Author of every creature, willed to put on flesh and humanity for the purpose of breaking, by His omnipotence, the chains of our slavery, and restoring to us the primitive liberty, it is a salutary work to restore to civil liberty by means of the benefit of manumission those whom the law of nations had reduced to slavery, but whom Nature had made free."

In the time of Gregory the Great, slavery, properly so called, no longer existed; it had been changed into servitude (serfdom). In the time of Diocletian there had been formed a new class of men who were neither free nor slaves, but who formed a part of the property in the soil. Constantine prohibited their being separated singly from the soil by sale or succession, so that the child might not be disjoined from the father, the brother from the brother, or the wife from the husband. Such remarkable solicitude was evidently inspired in this emperor by Christianity. This is how Salvian describes the origin of this unfortunate class: "Unfortunate persons despoiled of their little possessions or constrained to abandon them, sought a refuge on the lands of the free citizens who were proprietors of them, and thus became the *coloni* of the rich. Having lost the rights of free citizens, they subjected themselves to the yoke of a voluntary servitude,

thus losing not only their patrimony, but also their civil status. . . . They were at first received as *hospites*, but in course of time they became *indigeni* and slaves of the soil. . . . It is not to be wondered at that the barbarians bring us into servitude when we hold our brethren in slavery."

Nor was it only the peasants who were reduced by the hardness of their lot to such utter ruin. The inhabitants of the cities, themselves oppressed by the taxes, were obliged to alienate their goods and their liberty into the hands of some powerful man, to enrol themselves in the number of the colonists, to form unions with female slaves, and to transmit to their descendants a *peculium* dependent on their patron instead of a free patrimony, and their own degraded condition instead of the rights of citizen.

The condition of things in Germany was not much different from this. Tacitus thus describes the lot of the slaves: "Ceteris servis, non in nostrum morem, descriptis per familiam ministeriis, utuntur; suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit, et servus hactenus paret; cœtera domus officia uxor ac liberi exequuntur." When the Germans established themselves finally on the Roman territory, they found almost all the inhabitants of the country districts reduced to the state of *coloni*. They consequently fell into a condition of dependence, economical as well as political, on the new proprietors, by the disappearance of the central power. Under the Romans the *coloni* paid actual service to the proprietor, and a capitation-tax to the emperor. When the sovereignty was fused with the proprietorship in the feudal regime, the overlord, as sovereign, demanded the portion corresponding to the capitation-tax, and also, as proprietor, the prestation of service. In the course of time a central power rose again, and to it the imposts were paid, while the lord obtained only the prestation in labour, and this was changed from

the thirteenth century onwards into a *canon* or proportion of rent. From the year 1266, Bologna, on the proposal of Accursius, generally determined to enfranchise all the serfs in its territory, in order that in the future it should have only free men within it. Florence followed the example in 1288.

In England, where commerce was more developed, servile prestations had almost all disappeared before they were formally abolished by Charles II. in 1660. The condition of the labourers became better, and the villeins or peasants passed from being *corvéables à merci et miséricorde* into *tenants by copy* (*of the court roll*), or, more briefly, *copy-holders*. In the celebrated night of the 4th August 1789 there was abolished in France without indemnity every kind of personal servitude, that is to say, such as were not derived from contracts of infeudation or rent, but to which persons were subject independently of the soil, and which were in substance only a usurpation of the feudal lords. The same abolition followed in all the countries to which the principles of the French Revolution penetrated. In Prussia, on the initiative of the Ministers Stein and Hardenberg, in 1807 servitude was suppressed, first on the lands belonging to the State, and then on those belonging to the lords, the cities, and the corporations. By the cession of a third of the land cultivated by them, the peasants acquired the absolute, free, and disponable proprietorship of the other two-thirds; and there was instituted the successive redemption of certain prestations provisorily maintained, by converting them into rents at a normal rate. In Austria and in the rest of Germany the revolution of 1848 removed every trace of personal servitude. Servitude was not abolished in Russia till 1861.

In spite of Christianity, slavery was introduced anew towards the close of the fifteenth century; not indeed among the white race, but among the red and black races. The Spaniards having landed in America, had reduced

the natives to the hardest slavery; while the Portuguese, the discoverers of the Coast of Africa, organised the trade in negroes. Before the year 1503 a few negro slaves had been sent into the New World; in 1511 King Ferdinand permitted their being transported in greater numbers. It was seen that they were more capable of resisting fatigue and more patient under slavery, while the labour of one negro was equal to that of four Indians. In the space of two centuries and a half, from nine to ten millions of Africans were carried off from their native soil and transported into the colonies, not only of the Spaniards, but of the Portuguese, the Dutch, the English, and the French.

France had the honour to proclaim the abolition of slavery in all its colonies by a decree of 4th February 1794; but in the year 1802 slavery as well as the slave trade was re-established by the law of the 30th Floréal of the year X. The initiative passed to England, and Wilberforce's proposal of abolition obtained the approval of the House of Commons in 1806, but without being able to become law. In the acts of the Congress of Vienna, England caused to be inscribed on the 4th February 1815 a declaration for the abolition of the slave trade, "that scourge which has so long desolated Africa, degraded Europe, and afflicted humanity." On the 28th August 1833 slavery was abolished in all the English colonies; on the 4th March 1848 it was abolished in the French colonies; in the year 1846 it was abolished in the Swedish colonies; and on 3rd July 1848 it was abolished in the Danish colonies. Portugal has gradually abolished slavery in its African colonies, and Spain has done the same at Porto Rico, decreeing, in the case of Cuba, that all male children who shall be born after 17th September 1868 should be free, while those slaves which at the moment of the promulgation of the law had completed sixty years were immediately emancipated. It is estimated that 63,000 individuals have been liberated during the past ten years,

but that more than 350,000 still remain slaves. The other Christian nation which still maintains slavery is Brazil. The law of 28th September 1871 immediately enfranchised the slaves belonging to the State and the religious congregations, as well as all the children who should be born of slave parents; but it did not withdraw from the authority of private masters either the sons of slaves under twenty-one years nor other adult slaves. If the provisions of this law are not changed, there will be slaves in Brazil for about other fifty years. In the United States of America, after the War of Secession, the fifteenth amendment of the Federal Constitution, promulgated 18th December 1865, raised to the status of active citizens about five million slaves whose chains were broken by the victory of the Federalists.

Equality was destroyed below by slavery, and partitioned above by castes and classes. Castes rest on the principle of heredity, and render all progress difficult. In the classes or orders of society the principle of heredity is tempered by the free choice of the professions. In the East the castes dominated the State, and in the Greco-Roman antiquity and in the Middle Ages the orders supported it. Neither Buddhism nor the Mohammedan conquest could free India from castes, and the caste principles still prevail as a voluntary legislation under the British rule. In Egypt the castes were less rigorous, but they were sufficient to sterilise a people so well equipped with the arts and sciences. Egypt under the Romans was maintained apart from the common law of the nations of the Empire, and it was declared unworthy to furnish not only senators, but simple citizens. While the political emancipation and the administrative reforms passed from one province to the other, the Egyptian, perpetually subjected, beheld his country reduced under the arbitrary power of a Roman knight. Under Caracalla hardly a subject of the kingdom of the Pharaohs and the Ptolemies reached the benches of the senate, or was promoted thence to the consulship;

history, indeed, has only preserved the name of one who was of Greek origin, namely, Ceranus. In Persia the Magi had rather a pre-eminence than an absolute dominion, just as the Levites of Israel were the councillors and not the despots of the people.

The Greek Eupatridæ and the Roman patricians, like the German nobles (*Adelinge*), were descended from noble fathers. Under them lived the clients, or the people attached to them, and beside them the freemen (*demos, plebs, Gemeinfreie*). The nobility stood above them, not in the manner of the Indian castes, as being essentially different, but as a superior order, which had its roots in the national law itself.

From the first dawn of history we find nobles, citizens proper, and lower classes. It was not long till both in ancient times and in the Middle Ages the official nobility took the place of the nobility by birth. The former was conferred in Rome by the people, being the result of the public offices; in England it was given by the king. The peerage is not properly a nobility, but an office; and it is not communicated to all the members of the family, but only to the eldest son. The English peer is not a noble, but a legislator, a councillor, a judge. According even to Jepherson, it is impossible to get rid of a natural aristocracy that is founded on genius and talent; and hence the fundamental attribute of equality will not be violated if certain privileges are conceded to certain persons in the public interest, provided that it is legitimate for every one to aspire to them. Equality ought to be a thing of right, and not of fact; and if in the present day we have no orders, we have divisions of citizens to whom the name of directing classes is given, and who by their intellectual, moral, and material conditions naturally possess a political capacity which in other divisions of the citizens could be found only as an individual exception. Inequality of conditions is the secret of creation, without which neither devotion nor disinterestedness would be possible; and it

springs from the more or less judicious and moral use which we make of our faculties, unequal as they are by nature. The fundamental statute of the Italian Constitution, as a common guarantee, declares in Art. 24 that the civil and military offices are accessible to all; it consecrates the equality of all the subjects of the kingdom before the law, and it grants political rights to all, save in particular exceptions determined by the law. By Art. 25 it is established that all ought equally to bear the burdens of the State in proportion to their possessions or means; so that not only is civil equality assured, but political equality has also taken a great step. Art. 71 consecrates the principle that no one can be withdrawn from his natural judges and that extraordinary tribunals are not to be created. This article secures equal justice for all. The right of petition is regulated by Art. 57, which prescribes no other condition as necessary but the majority of the petitioner. As a simple precaution, Art. 58 adds that no petition may be presented personally to the Chamber, in order to avoid disturbances and not to put the public into direct communication with the Parliament. This article confines to the constituted authorities the right of presenting petitions of a collective character.

### § 2. Liberty.

Passing now to the second attribute of human personality, Liberty, we find that it is the most important, and consequently greater guarantees ought to secure it in a well-ordered society. These guarantees are the right to be arrested and judged only according to the conditions of the law (which is commonly called individual liberty), the inviolability of domicile and property, secrecy of letters, the liberty to manifest one's thoughts through the press, teaching, and worship.

Individual liberty will be considered violated: (1.) If the order of arrest has been given or executed otherwise

than according to the cases and modes prescribed by the penal laws; (2.) If the arrested person be detained without being remitted to the judiciary authority; (3.) If in the judgment the forms established by the law be violated, and if penalties be applied which do not exist in the laws. Formulating summarily these three cases, we may say that individual liberty would be violated by an illegal arrestment, by an arbitrary detention, or by an unjust condemnation.

Individual liberty is rather enunciated than guaranteed by Art. 26 of the Italian Constitution, which prescribes that no one is to be arrested or delivered to judgment except in accordance with the cases and in the forms of law. This article accordingly relates entirely to the penal laws. But it makes the liberty of the individual depend on the judiciary power, and not on the executive power; and this is the highest of guarantees.

In order that individual liberty may be efficaciously guaranteed, we ought to find in the penal procedure the following three things: (1.) A sworn charge or accusation, in order that the arrest may take place only when there exist grave reasons for it; (2.) A peremptory or definite fixed term during which the trial ought absolutely to commence; (3.) Provisory liberty, extended to a very great number of cases according to rules perfectly established. These three guarantees exist in the English laws. Art. 29 of the Magna Charta says: "Nullus liber homo capiatur, vel imprisonetur, vel disseissiatur libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlegetur aut exulet, aut aliquo modo destruratur nec super eum ibimus nec super eum mittamus nisi per legale judicium proprium parium suorum vel legem terrae. Nulli vendemus, nulli negabimus aut differemus rectum vel justitiam."

By this article individual liberty was amply guaranteed in property and person. It promises prompt and gratuitous justice, as well as the maintenance of the jury.

But one of the most beautiful English institutions is the provisory liberty of the *habeas corpus*, founded upon a statute of Charles II.

Provisory liberty under caution is the general rule in England in regard to delicts, and is extended even to a certain number of crimes. The person in custody has a right to take action to bring to an end his illegal detention or to obtain provisory liberty. The petition in this action must be considered within the space of twenty days by one of the courts which sit in London, or by the High Chancellor, or by one of the chief judges during vacation, under a penalty of a fine of £500 sterling. In dealing with crimes, provisory liberty is granted by express decision of the Court of King's Bench. When three months have passed before a jury has been held, the judges who go on circuit to hold the assizes assemble a commission called the *gaol delivery*, and discharge the person in custody. The jailer does this of himself when, for any reason whatever, the commission has not met.

In Italy the Section of Accusation takes the place of this jury of accusation. The procurator-general notifies his requisition by extract, and deposits the Acts in the office of the Section of Accusation. There is a delay of a period of ten days, in order that a defender provided with a special mandate from the accused may consult the Acts, with a view to use them in presenting a written memorial, if he thinks it proper.

By the law of 30th June 1876, the order of compearance is substituted in the greater number of cases for the order of detention, and provisory liberty is extended to crimes which bear temporary penalties, except in cases imposed by the social danger which are enumerated in Art. 206. There is an essential difference between the provisory liberty conceded in the case of delicts and that which is granted in the case of crimes. The first lasts until the sentence is passed on the accused; whereas the second ends with the sentence of remand to the court

of assize, which may be issued by the Section of Accusation.

It is a question whether an illegal arrestment should be resisted by force or obeyed for the time being, and whether the authors and executors of this unjust measure are to be called to account for it before the court. The Italian laws punish every resistance to the public force, so that nothing remains but to have recourse to the tribunals civilly and criminally. In England personal resistance to an illegal arrest is permitted.

At Rome individual liberty was energetically guaranteed, and the *leges Valeriae* surpassed the *habeas corpus*. The *custodia libera* excluded all previous imprisonment. The tribunals were always ready to protect the citizen; the *judices jurati*, which corresponded to our jury, pronounced the sentence, and voluntary exile was equivalent to the abolition of the penalty of death.[1]

The right of free locomotion, of going about armed, and of hunting may be regarded as consequences of individual liberty. Passports are an administrative measure which our age has almost wholly abolished. The right to carry arms is subject to an administrative authorisation directed to prove that the person has not undergone any correctional or criminal sentence, and therefore has not offended against society. The chase is limited by the administrative authority to certain months of the year, in order not to injure agriculture and the reproduction of the animals. A license for hunting is required merely from a fiscal interest and as a consequence of the license to bear arms.

The inviolability of the domicile is a consequence of individual liberty, and is consecrated by Art. 27 of the Italian statute. The laws which regulate it are those of the penal and civil procedure. Arts. 142–151 of the penal procedure determine the cases and forms for proceeding in domiciliary visits and in searches. Arts. 42, 553 *et seq.*, 752 *et seq.*, of the civil procedure determine

[1] Laboulaye, *L'Etat et ses limites*, p. 108. Paris, 1863.

the mode of proceeding in the execution of judicial acts.

In England the inviolability of the domicile is an ancient tradition, and hence the maxim, *My house is my castle.* Thus, for example, civil executions cannot be carried out if the doors are closed. Domiciliary visits can only be performed when done under a *search warrant,* and they are only permitted during the night in cases of urgency. This matter is regulated by a statute of George IV.

Arts. 194–206 of the Italian Penal Code protect individual liberty and the inviolability of the domicile. Art. 29 of the Italian Constitution proclaims the inviolability of property, making exception only in favour of expropriation for the public utility, on the condition of a just indemnity. It is a standing principle of jurisprudence that the servitudes established by law enter into the normal regime of property, and furnish no right to indemnity. But there are very burdensome public servitudes, such as the losses which may be occasioned by the laying out of a street, &c., which deserve an indemnity.

In the Roman Law, although the principle of expropriation for the public utility is not clearly formulated, it is frequently seen put in practice both for movables and for immovables, while with us it is applied to immovables only. The State and the municipalities held this right. The senate ordered and the censor executed the expropriation, the tribunals deciding as to the differences regarding the price to be paid. In the municipalities the court gave the order and the *curatores operum* executed it. In England a *Bill* is necessary for expropriation, but the parliamentary procedure which precedes the Bill is so costly that the parties generally come to an amicable agreement.

In France, according to the law of 1841, expropriation above a certain sum has to be ordained by law, and the

indemnity has to be determined by a special jury. According to a decision of 1852, a law is required when the work that is to be performed necessarily requires a vote of credit from the legislative power, but otherwise a decree is sufficient. A special jury is retained to determine the price.

These principles have been followed by the Italian law of 25th June 1865, regulating forced expropriation. A law is required only for those cases in which the work of public utility has to be specially approved by the legislative power, otherwise a simple decree suffices. The indemnity is fixed, in case of dispute, by experts appointed by the court.

The secrecy of letters constitutes a sort of mixed right, intermediate between individual liberty and property. It was proclaimed in England by an Act of Queen Anne, and by several more recent statutes. It is not contained in the letter, but in the spirit of the Italian Constitution. The Arts. 237–296 of the Penal Code of Italy protect the secrecy of correspondence. In thus referring to the various statutes which secure liberty as the second attribute of human personality, we have spoken thus far of those which more particularly protect the physical person. There are certain others which relate to liberty of thought.

So long as thought is not manifested in expression, it has no need of any guarantee, as no one can penetrate into the inner consciousness of man. Thought is manifested principally by printing and by other representative signs, and through teaching and worship. Hence every well-ordered Government ought to guarantee these modes of manifesting thought. Many writers have believed that the liberty of the press is not a natural right, and consequently that it ought not to be reckoned among fundamental rights, but to be considered as merely a political guarantee. They say that speech only is natural to man, but not the press, which is a contingent discovery, and therefore not essential

to human development. It is answered that the auxiliaries added by human industry to the natural order of thought are likewise themselves natural, and are subservient to the same end. It is not necessary to confine natural right to a certain primitive state of man and to separate it from civilisation, as the latter is a fruit of our nature which is capable of a progressive development. Hence we need not deny that, strictly speaking, speech may suffice; but adding to speech the writing which preserves and the printing which propagates it, does not take these means of perfecting it out of the natural order. Hence the liberty of the press, without ceasing to be a political guarantee, as we shall show in its proper place, likewise belongs to the category of fundamental rights.

When the sublime invention of printing became public, it produced an impression of enthusiasm and of terror. Every one perceived that while Columbus doubled the physical world, Guttenberg did the same for the moral world. The Governments of that time suddenly found in it occasion for police regulation, and the censorship was not confined to permitting the printing of a book, but also claimed to approve of its contents. Many edicts punished with death printers, booksellers, and even ordinary citizens, who printed, sold, or distributed an unauthorised book.

In England, under the Tudors, the press was subjected to a very rigorous regime. Printing-presses were only allowed at Oxford, Cambridge, and London. The sale of books was put under the surveillance of the police, who could even enter private houses in order to examine the libraries. A previous censorship had to approve of every writing which went to press, and this was intrusted to the Bishop of London and to the Archbishop of Canterbury. Nevertheless the license of the censor did not protect the order from being tried in court; for every publication, even when approved by the censor, might lead to the punishment of the author. Under the protectorate of Cromwell, Milton vainly defended the liberty of the press in his

celebrated treatise on the subject directed against the censorship. The Restoration brought again into force all the ancient ordinances, and this state of things lasted down to 1679, when the censorship was abolished, and its place was taken by frequent confiscation of books. In 1685 the censorship was re-established for a period of seven years, part of which preceded and part of which followed the celebrated Revolution of 1688, so that the liberty of the press in England may be said to date from 1695. From that date the repression of the press has entirely depended on the courts of justice. The penalties are very severe, threatening death or deportation for the publication of any writing which has a tendency to dethrone the monarch, to excite civil war, or to provoke an invasion. Defamatory libels are punished with one or two years' imprisonment. Obscene writings, and those which are *contra bonos mores*, may be confiscated without trial by the order of a police magistrate or of two justices of the peace, according to a law of 1857. Newspapers were bound to give caution in 1819.

In France, the Constituent Assembly reckoned the liberty of the press among natural rights, and a law of the 18th July 1791 authorised the police officials to arrest those who by writing or words incited to rebellion. The Constitutions of 1793 and of the year III. proclaimed the absolute liberty of the press, without promulgating any repressive law. The Government, thus deprived of all legal arms, defended itself by violent measures. The Constitution of the year VIII. made no mention of the liberty of the press, which began to reappear in the Charter of 1814. The second Restoration, by the ordinance of the 8th August 1815, subjected the periodical journals and other similar publications to a censorship, in spite of Art. 8 of the Charter, and this measure lasted down to the end of the session of 1818. The following year there were published three laws, which may be called the press code, regulating the founding of journals, the

repression of the delicts and contraventions of the press, competency and procedure.

This state of things did not last long; for the laws of 31st March 1820 and 26th July 1821 established the provisory censorship, which was abolished by the law of 18th July 1828, under the Liberal Ministry of Martignac. Then followed the famous ordinances which caused the fall of the Restoration, and the liberty of the press was proclaimed anew by Art. 7 of the Charter of 1830, which expressly stated that the censorship was never to be re-established. The law of 8th October of the same year re-established the competency of a jury for all offences which had a political character, whether committed by the press or in any other form. The law of the 14th December of the same year regulated the conditions for the founding of journals. But the Government having been attacked by a formidable insurrection, and an attempt having been made to assassinate the king, the law of 9th September 1835 laid down severer conditions for the press. The February revolution abrogated these laws, and brought into force the previous legislation. The Constitution of 1848 proclaimed the liberty of the press, which was regulated by the organic law of 16th July 1850. After the *coup d'état* the press was ruled by the organic decree of 17th February 1852, which gave to the executive power authority to admonish and suppress journals, and they could not be founded without the permission of the Government. As regards books, the printers had always their share of responsibility. But the liberty of the press was much enlarged in France by the law of 10th May 1868.

After the revolution of 4th September 1870, the Government of the National Defence suppressed the rule of stamps and caution by the decree of 15th September and 10th October 1870. During the sitting no steps were taken to modify the laws regarding the delicts of the press, nor did any necessity for this make itself felt, because, in

fact, the journals enjoyed an absolute liberty during that calamitous period. The National Assembly, sitting at Versailles, re-established the competency of juries in the matter of printing, save in certain exceptional cases reserved for the correctional tribunal (Law of 15th April 1871). But the National Assembly was not long till it repented the trust which it had shown in the press, and it re-established caution on the 16th July 1871. Some years later it further recognised that repression by juries was insufficient, and by the law of 29th December 1875 it considerably enlarged the powers of the tribunals of the correctional police (Art. 5 of the law). The laws of 1870, 1871, and 1875 have been superseded by the very liberal law of 29th July 1881; and journals are no longer subject to any preliminary conditions of a preventive kind, such as the preceding laws of authorisation, stamps, and caution, under the Empire. The printing-press and the book-shop are absolutely free, and this emancipates the writer from the indirect censorship arising from the responsibility of the printers or publishers. Colporteurs and bill-posters are not subjected to any prior authorisation. Finally, the press delicts have been notably reduced, and the powers competent to the correctional tribunal have been confined within the narrowest limits.[1]

In Italy, the liberty of the press is proclaimed by Art. 28 of the Constitution, except for Bibles, catechisms, liturgical books and prayers, which cannot be printed without the previous permission of the Bishop. The repressive law passed by Charles Albert on 26th March 1848 was slightly modified by the laws of 26th February 1852 and of 20th June 1858. In the Neapolitan provinces this law was published by the Lieutenancy on 1st December 1860 with certain modifications drawn from the code and the penal procedure of 1859, which had not yet been published in these provinces. Art. 1 specifies as sub-

[1] Batbie, *Traité théorique et pratique de droit public et administratif* t. iv. p. 127. Paris, 1885.

ject to repression the manifestation of thought, both by the press and by other figurative signs, such as engravings, lithographs, &c. Other articles impose the obligation of indicating the place, time, and name of the printer, and depositing a copy with the procurator-general before the publication. A classification is given of offences against the dominant religion and the other cults, and against the person of the king, the chambers, the sovereigns and heads of foreign governments, and the members of the diplomatic body; and various penalties are pronounced. In the case of foreign sovereigns procedure is taken at the instance of their ambassadors. The provocations to commit offences are considered, and there is an accurate distinction made between defamation, injury, and libel.

In cases of offences against the holders and agents of the public authority in facts relative to the exercise of their functions, the author of the incriminated writing is allowed to submit the proof of his affirmation. Proofs of facts asserted against private persons, are admitted only when the injured party desires it. There are special dispositions regarding periodical publications, such as the obligation of a responsible editor. Editors are bound to insert not later than the second publication succeeding the day in which they have received them the replies or declarations of the persons who have been spoken of in the journal. The insertion of the reply must be entire and gratuitous to double the length of the article which is replied to, the rest having to be paid for according to the charge for advertisements. The editor is held bound to insert at the head of his journal every communication or correction from the Government, receiving payment for it according to the rule of private cases. When the articles are signed, the writer divides the responsibility with the editor. No caution is necessary for journals.

The competent authority in matters of printing belongs to the courts of assize, except in simple contraventions, which are judged by the local courts. This law, when

applied with firmness and discrimination, leaves very little to be desired.

The necessary permission to printers and publishers to exercise their industry, is regarded as the complement of the law of repression in reference to printing.

Next to the press, the most important manifestation of thought is given by means of teaching. The liberty of teaching concerns not only those who teach, but more than ever those who learn. It embraces instruction and education. It is difficult to distinguish education from instruction; for all that we have in our mind is reflected in the heart, and the idea is reproduced in feeling. Cormenin, a modern writer, founding on this distinction, believed that he could thus resolve the question of the liberty of teaching. He says that education comprehends hygiene, morality, religion, and philosophy, or the inward life of the consciousness and the private life, and that it should be left to the father of the family. Instruction comprehends classical instruction, the sciences, and literature, or what comes into closer contact with public life, and it should belong to the State, from which all ought to obtain it as a matter of obligation, and gratuitously. Thus, he concludes, will the great problem of modern society be resolved, the problem of harmonising the greatest individual liberty with the greatest public authority, the greatest diversity in education being thus combined with the greatest unity in teaching.

The solution of Cormenin, although insufficient, yet marks a step beyond what is practised in some States, and it is advocated by certain authors. In ancient times education and instruction could be called public, and were given in common, as at Sparta; at least they were inspired solely by the State, to whose service the citizen was dedicated in body and soul. In the Middle Ages religion was so predominant that instruction and education were in the hands of the clergy, and the clergy and the men of letters were synonymous. The legists com-

menced to emancipate the State from the Church. The Universities were constituted as free associations, and they then became privileged establishments, and furnished the State with most energetic aid against the Church. The attention of the Government has been turned successively from the superior instruction to secondary instruction, then to primary instruction, and, finally, now to technical instruction.

The principle of liberty of teaching was not formulated by the Constituent Assembly. But the French Revolution having been effected under the influence of the political ideas of Rousseau, it was thought that teaching ought to be assigned to the State in order to have the citizens educated in uniform ideas, as in the small republics of antiquity. Liberty of teaching was proclaimed in the Constitution of 1793, and in the law of 19th December of that year; but there was required for those engaging in it a certificate of citizenship, and it was subjected to the surveillance of the municipality. In those calamitous times two conditions sufficed to annul in practice the liberty which was proclaimed in right. Art. 300 of the Constitution of the year III. was thus conceived: "The citizens have the right to found special establishments for instruction, and free societies for promoting the progress of the sciences, letters, and arts." Art. 69 of the Charter of 1830 promised that special laws would provide for "public instruction and liberty of teaching." The Constitution of 1848 proclaimed that teaching would be free, but made due reservations as to the conditions of capacity, morality, and surveillance on the part of the State, which should be fixed by organic laws. In fact, the organic law of 19th March 1850 introduced liberty of teaching, and its principle was retained by the Empire, and applied to the higher teaching by the Third Republic in the law of 12th July 1875.

Article 71 of the Belgian Constitution proclaims:— "Teaching shall be free; every preventive measure is

interdicted, repression being regulated by the law." The instruction given by the State is also regulated by the law. The instruction of the State is therefore authorised; and later laws have regulated the manner in which examinations are also to be held in the free universities, which are entitled to bestow diplomas in the same way as the Government universities.

In England, the Church, as a matter of fact, found itself in possession of the teaching of the people, but no citizen has ever been forbidden to teach. Subscriptions and voluntary gifts are the bases of the system of teaching in England. In 1839, however, the Government appointed a Committee of the Privy Council, and assigned a subsidy to be distributed to those schools which were willing to submit to inspection and to the rules of this Committee. Then followed the law of 1858, completed by the law of 1861 as to the local regulation of the service; and this gave new power and new funds for the increase of schools.

In Scotland, the church and school were closely united from the Reformation, and for centuries there was a school in every parish maintained out of the rates levied in the parish. By the Education Act of 1872 the parish schools were transformed into general public schools, put under the management of School Boards elected by the ratepayers, and supported by rates and by Government grants, determined by the result of Government inspection. Religious teaching is optional, and is not paid for nor examined by the Government. Primary education has now (1890) been made almost wholly free.

At the close of last century the Irish Parliament adopted the principle that the State should subsidise the schools, from which religious teaching was to be excluded in order to make them available for children of every creed. In 1837, Lord Stanley, Secretary of State for Ireland, formulated the conditions requisite for obtaining State grants, making it obligatory to receive children of every creed,

and giving them the time necessary for receiving religious instruction in conformity with their beliefs.

In North America the schools are maintained by the community or by private individuals, and the teaching is independent of every religious profession.

In Italy the public instruction is regulated by the Casati Law of 13th November 1859, which, like the French law of 19th December 1793, divides instruction into primary, secondary, and higher. To this is added the technical or professional instruction, to which the needs of industry and commerce have given origin. The Casati Law was introduced into Naples by a decree of the Lieutenancy of 16th February 1861, but without the obligation of university enrolment and with other opportune modifications. By the law of 30th May 1875 the obligation to be enrolled in the courses of lectures was extended to the University of Naples, and the system of payments and of examinations was largely changed by subsequent regulations.[1]

By the Articles 326 and 327 of the Casati Law referred to, primary instruction was declared obligatory, and fathers, or those exercising the paternal authority, who failed to send their children to the common school without providing effectively in another way for their instruction, are threatened with punishment according to the penal laws, which, however, do not lay down any particular penalty. The law of 15th July 1877 (Art. 4) punishes by fine parents, or those who take their place, when they do not send their children to school, and do not provide in other ways for their instruction. Primary instruction is given gratuitously in all the communities, and the common schools are subsidised by the State if the smallness of the local revenues does not enable them to bear all the expenses necessary for elementary instruction. The license obtained in the lyceums and technical institutions is

[1] The subject of higher education has been specially treated by the author in his treatise *I Regolamenti universitari Bonghi Coppino.* Napoli, 1877.

accepted as evidence of capacity in any one wishing to take up a private elementary school; but there must also be obtained a certificate proving moral character. As regards secondary instruction, the greatest liberty is left to the fathers of families according to the tenor of Articles 251 and 252. By it persons who desire to devote themselves to teaching are required to furnish evidence of their morality and capacity. As a general rule, the gymnasia are made a burden upon the communities where they are supported by the community, and the lyceums are made a charge upon the State (Arts. 196 and 201).

Technical instruction is given in its rudiments at technical schools at the expense of the municipalities, and in higher subjects at technical institutions maintained by the provinces with the concurrent aid of the State in case of need (Arts. 280 and 284).

The higher instruction is given at the expense of the State, and all students are obliged to follow the courses of instruction in the universities. Liberty of teaching is represented in them by the private teachers (*privati docenti*) authorised to teach in universities, and by the professors being irremovable, and their not being dependent on the Minister as regards disciplinary penalties, but on a council of public instruction.

The liberty of higher teaching does not exist in the Italian legislation, nor is it guaranteed by the statute of the Constitution. According to sound doctrine, the State may come to the aid of private citizens with analogous educational institutions, but it should not compel its courses to be taken. Satisfied with exacting examinations on very broad programmes, so as to grant the diplomas necessary for the exercise of any professions which imply a sort of trust, as in the case of medical men, pharmaceutical chemists, &c., it ought not to ask from any one where he has studied, but only watch over those who teach, in order to be assured that no law is violated.

The highest manifestation of thought is worship. When

the human mind rises spontaneously to God and recognises Him as the Creator of the universe, we have religion. The mind does not stop at this vague contemplation, but seeks to put itself into direct relation with God in a clear, special, and permanent manner by means of worship. Accordingly the subject-matter of religion and philosophy is the same, namely, truth, but their method is different; for in religion the human mind raises itself spontaneously to truths, whence faith and religious sentiment take their origin, whereas in philosophy it makes use of reflection and of reason. In religion the pure intention of the mind becomes united with symbols or traditions, from which arises the principle of authority, whereas in philosophy reason always operates alone.

Religious intolerance is natural to the human mind; for every one would like to see the God he adores alone honoured. In the East castes jealously guarded their dogmas, and Buddhism has had to undergo many persecutions for diffusing them. In Greece the penalty of death was inflicted on any one who divulged the Eleusinian mysteries. At Rome religion was wholly political, and the Christians were not persecuted because they worshipped their own God, but because they would not sacrifice to the gods of the Empire, among whom the emperor was included; and on this account they were regarded as rebels. We admit religious intolerance, but not civil intolerance; that is to say, we believe it just that whoever does not adopt all the doctrines of a given Church should be excluded from it; but this should not have any civil consequence.

Christianity was no sooner established than it persecuted heretics, and in the Middle Ages it made war against the Albigenses and instituted the Inquisition, which we may consider as a lasting form of the ancient intolerance. Religious persecutions continued to the end of the seventeenth century; that is, to the *dragonnades* occasioned by the revocation of the Edict of Nantes in the last years of

Louis XIV. The Protestant and Russian Churches have shown themselves not less intolerant than the Catholics. In England, Catholic emancipation was not granted till 1829, and it is not yet quite complete. In Switzerland, the law of 1687, still in force, interdicts the converting of persons to a different religion under severe penalties. The persecutions suffered by the Catholics in Poland at the beginning of the present century make us shudder. The Jews are still suffering various political and civil incapacities on account of their religion.

Even the French Revolution showed itself hesitating in this regard, for the declaration of rights did not suffice to wipe away all the vestiges of religious persecution. A long time after it was declared that all men are born and remain equal before the law, the Constituent Assembly still deliberated as to whether Protestants and Jews might be admitted into the municipal colleges or corporations. It opened the door of them to Protestants, but did not consent to regard the Jews as citizens till the month of September 1791. In short, liberty of worship was not proclaimed under its true name in an open way, like all other liberty. Referring to the demands of the Third Estate of the city of Paris in 1789, just at the outbreak of the Revolution, which sum up a century of discussion, we find in the chapter on religion, Art. 3, the phrase "The Christian religion ordains civil toleration," but nothing was pronounced as to religious toleration. The Convention then went so far as to abolish all the creeds, and to persecute the Catholic religion and every kind of religion. The Constitution of the year III. in Art. 354, not only proclaims the free exercise of the various creeds, but also their perfect equality, in these terms: "No one shall be prevented, while conforming himself to the laws, from exercising the religion which he has chosen, and no one shall be compelled to contribute to the expenses of any creed. The Republic does not subsidise any of them." The Concordat declares the Catholic religion the religion

of the majority. The Charter of 1815 at the same time proclaimed liberty of worship and the religion of the State. The Charter of 1830 makes this contradiction disappear, but retains for the Catholic religion the title of the religion of the majority given to it by the Concordat. The other later French Constitutions recognise the equality of the existing creeds, but maintain the necessity of a preliminary authorisation for the practice of a new cult.

Art. 1 of the Italian Constitution declares the Catholic religion to be the religion of the State, and promises simple toleration to the other cults. We repeat what we said in vol. i. (at p. 197), that every one ought to be free to believe in his own way, but only to manifest his religious opinions within the limits which do not infringe the right of others; and hence follows the toleration or liberty of the various cults according to circumstances, but never atheism nor indifference.

## § 3. Sociability.

Sociability completes the development of the individual.

It is a controverted question whether man is sociable by nature or by convention; but the majority of writers, especially in this century, have acknowledged that man is sociable by nature. The rights of union and association guarantee this attribute of the human personality. Union and association are distinguished in this, that the first is accidental, while the second has a permanent character. To unite, says a French author, is to will, to be instructed, and to think, together; to associate is to prepare for action.

In ancient times the people governing directly did not feel the need of formulating specifically the right of association and of union.

At Athens there were legal and extraordinary assemblies, the former being convoked regularly, and the latter on occasion by public criers, who announced the day and the subject of the meeting. At Rome, besides the normal

assemblies devoted to the voting of the laws and to the election of the magistrates (*comitia*), there were also special assemblies (*concilia*), which were entirely free, provided they did not involve danger from their object and the number of those attending them; otherwise they were subject to restriction, to special previous authorisation, and to very severe penalties, like that of treason, if they encumbered the public way, and if they were composed of armed men and were hostile to the Republic.[1]

In the Middle Ages the corporations took the place of associations, as in them the various classes discussed their own interests and made them respected.

The right of union is very ancient in England. It was only under Charles II. that political meetings in the coffee-houses were forbidden. But with the Revolution of 1688 the political discussions and the life of the coffee-houses were revived. The first meeting which history mentions was in 1679.

The first special Acts against rioting go back to the reigns of Mary and Elizabeth, but they were temporary measures. The *Riot Act* did not take the character of a permanent law till 1715; it prohibited all meetings of twelve persons or more illegally assembled who did not separate after the formal injunction of a justice of peace. This injunction has to be preceded by the reading of the *Riot Act* under pain of penalty. The military cannot take action against disturbers of the peace except on the requisition of the civil authority. Both the soldiers and the civil functionaries would incur severe penalties if they made use of arms before having carried out the formalities legally prescribed.

By an Act of the reign of George III. every political association whose members contract obligation under oath, and subscribe any declaration or obligation whatever with-

[1] Dig. Leg. 2 *De collegiis et corporibus*; Leg. 3 *Ad legem Juliam de vi publica*. The dissertation of Dr. M. Cohn, *Zum römischen Vereinrecht* (Berlin, 1873), may be consulted with profit.

out being authorised or being required to do so by the law, is illegal.

The same holds with reference to societies which conceal the names of their members or keep from the society itself the names of their heads, or which are divided into various sections under different heads. The only exception to this rule is in favour of religious societies, benevolent societies, and the Masonic Order.

The opening of a club or place of meeting for discussion and the reading of journals or books, was made subject to the authorisation of two justices of the peace. An Act of the same sovereign prohibited relations between the societies with each other, and the meeting of delegates of various societies in a general conference, excepting in the case of benevolent, scientific, and literary societies.

In France a law of 19th November 1790 declared that the citizens have the right to meet peacefully and to form free societies, subject however to the common laws. The Constitution of 1791 recognised the right of assembling peacefully and without arms while observing the police laws, which excluded the right of association and recognised only a right of meeting. Notwithstanding this, political associations were formed, and after the triumph of the Jacobins over the Girondists the popular societies became a means of government, and were protected by the decree of 25th July 1793. There followed certain restrictions of this right, and the Constitution of the year III. not only imposed the obligation on the associations not to compromise the public order, but also brought the right of meeting into uncertainty by an ambiguous mode of expression.

The consular and imperial Constitutions were silent as to the right of association, but it was regulated by the Penal Code, which interdicted it to more than twenty persons. This regulation was evaded by breaking up the societies into various sections of twenty persons each, and this was prohibited by a law of the 10th April 1834.

But neither did the penal code nor the laws referred to restrict the right of meeting. The Constitution of 1848 recognised both rights; but a law of the 25th of July of the same year, without exacting a preliminary authorisation, subjected clubs to various conditions, among which was the publicity of their sederunt. A legislative decree of 25th March 1852 extended the regulation of the penal code to all meetings and associations, whatever might be their object, including electoral meetings. The law of 6th June 1868, passing in silence over private meetings which might be supposed free, distinguished public meetings into political and religious, which it subjected to preliminary authorisation, and into meetings that were neither political, nor religious, nor electoral, which it permitted after a previous declaration had been made of their purpose. The Third Republic, in spite of the decree of 27th October 1870 of the delegation of Tours, limited associations and meetings of assemblies by the law of 15th April 1871.

In Belgium, Art. 20 of the Constitution guarantees the right of association, and implicitly the right of assembling in meetings, without the liability to be prohibited by any preventive measure. Such is the respect with which this regulation is observed, that it has been made a subject of dispute as to whether anonymous commercial societies or companies have need of authorisation.

In the United States of America associations enjoy the most entire liberty. They may organise themselves into a central assembly, called a *Convention*, to which delegates are sent. The societies also meet to draw up programmes and sign petitions with the object of calling the attention of the Government to ameliorations or improvements which they consider ought to be made. Art. 32 of the Italian Constitution recognises the right to meet peacefully and without arms, while conforming to the laws which regulate its exercise in the interests of public affairs. The right of assembly is controlled by the police laws, and after three intimations made by the agent or delegate of public

security, every one is obliged to go away. The right of association is not enunciated in the said article, nor is it as yet regulated by any special law, but meanwhile the Government continues by a royal decree to dissolve associations which it considers contrary to the security of the State, in spite of opposite declarations made by political parties within or outside of Parliament.

The first time the question was brought up in the Italian Parliament was in consequence of the question raised by the deputy Signor Boggio with reference to provident societies. Ricasoli, the Minister, in reply to him said: "I shall divide my reply into three parts. The first will refer to the legal conditions, not merely of provident societies, but of every political association; the second part will refer to what the Ministry has done on this subject; and thirdly, reference will be made to what the Ministry proposes to do hereafter. By the constitutional statute citizens have a right to hold a peaceful meeting . . . but not to form a permanent association with a political purpose. I have found that at the time when the Constitution was promulgated there were certain dispositions in the penal code which regulated association (Arts. 484, 485, and 486 of the Sardinian Penal Code); but these dispositions were abrogated by the law of September 1848, and they were abrogated in order that the rights of the citizens should be put into accord with the spirit of the Constitution. In this way it was declared that the citizens not only had the right of assembling in public meetings, but also that of forming themselves into associations. Hence I conclude that association is a right of the citizen, and accordingly that the Government cannot strike at associations because the law does not prohibit them; and what the law does not prohibit the citizens are within their rights in practising. Nor is this all; for I consulted the royal procurators, and more particularly the Minister, the keeper of the royal seal, and all were agreed in declaring that

the right of association is a right acquired by the Italian citizen. . . . I have also been able to verify the fact that from 1848 to 1852 this right of association was exercised in the old provinces, and that it had not come into the mind of the Government to restrict it. In 1852 there was brought before the Council of State a law which proposed to regulate the right of association. The Council of State considered it, and returned the project to the Government with its observations, but accompanying it with a report in which it was declared that, according to the mind of the Council, it did not seem opportune to restrict this right, which had been exercised by the Italian citizens of the old provinces without any detriment to the public good. . . . As to the Government, the way was clear. It was to allow the formation of associations, but, without examining what were the objects of the associations, to see if their acts were in contravention of the law; and if they were not so, to see whether they were acquiring such proportion as would put the public interest in danger. Down to this day it has not appeared to the Government that this danger has arisen; the manifest purpose of these provident societies has been conformable with the policy and programme of the nation. They have been endeavouring to attain what all the nation has been wishing to attain. . . . Thus, then, nothing remains for the Government to do but to watch over them, and this appears to be just the duty of the Government which rules a free country; for the preventive system is not adapted for a free country; it is specially characteristic of despotic Governments. A free Government ought only to have the force necessary to repress on those occasions when abuses of liberty show themselves. For if it wished to use force, not to restrain the abuses but to embarrass the use of liberty, it would strike at the whole nation, and liberty in Italy would be slain for ever. As to the future I am calm, being certain that my fellow-citizens will not transgress the bounds of law. The love of their country, of which they have always

given evidence, is a guarantee to me that I shall not trust them in vain ; but I assure those who are timid on this point, that the day when this may not be the case will find the Government capable of checking every abuse which may be made of liberty. With this position we do not leave the limit of legality, nor by it is this new fruit of liberty sterilised at the moment when it has been transplanted into Italy. . . . If, then, abuses should commence, and should proceed with dangerous frequency; if it could be doubted that the liberty proclaimed by the plebiscite along with the monarchy of our glorious king, and the constitution which was already enforced in the old provinces, and that system of law which provides for its development, was indeed incompatible with the temperament of the Italians, I would be ready immediately, in the interest of our country—but only from my love for my country—to propose to Parliament those preventive laws which would have been demonstrated to be necessary by the circumstances."

The Chamber unanimously sanctioned these theories, in which liberty was not disconnected from order, and accepted the proposal of Signor Lanza to adopt the order of the day in these terms: "The Chamber, taking note of the declarations of the Minister, passed to the order of the day."

The Minister, Rattazzi, began by following the system of his predecessor, but he soon recognised the necessity of a law to establish the right of association, and he presented the scheme of it in the sitting of 3rd June 1862. Sufficiently precise and liberal in its principles, the project was vague and equivocal in its determinations, although it had been modified for the better by the committee presided over by Signor Boncompagni. Penalties were drawn up against associations which are abstract beings, and it was not well explained how they were to be inflicted on their members, whether *in solido* or individually. Authority was given to the Government to dissolve associations on the condition of giving notice within five days

thereof to the judiciary authority, which would have to pronounce on the merits. The competency of deciding was assigned to the court of assizes, and, in failure of condemnation, the suspension was annulled of full right. In an abnormal state of the public opinion we do not know how far the intervention of juries might prove opportune, and in case of an unjust acquittal the Government would have found itself disarmed before a private association. The difficulties thus surrounding the question were perhaps the cause of the project not being carried forward to discussion.

In the sederunt of 11th February 1867, Ricasoli being again Prime Minister, a question was raised as to why he had interdicted public meetings at Venice for the discussion of the rearrangement of the ecclesiastical funds and of the liberty of the Church; and he replied as follows: "Art. 32 of the Constitution, which grants to the citizens the right to meet peacefully and without arms, nevertheless subjects it to the disposition of the law. And as there is no law which determines the modes of exercising this right, these modes and these limits fall under the dispositions which relate to the subject of the public security in general; that is to say, seeing that there does not exist a special law, the limits of this special right are drawn by the commonwealth. In fact, if on one side the statute grants the citizens the right of meeting, but always under the observance of the law, many other laws prescribe to the Government, and especially to the Minister of the Interior, the duty of preventing whatever might disturb the public order or the security of the State in its relations both at home and abroad. Since I had the honour to express for the first time my opinion to the Chamber on this subject, there has been formed, I may say, a jurisprudence which has already laid down precisely the basis of the manner in which conduct should be guided in the matter of meetings and associations. Both the Government and the Chamber, not less than the courts, have main-

tained, pronounced, and declared that, so long as there is not a special law determining the ways in which this right shall be exercised, it pertains to the Government, which ought to be responsible to Parliament and to the country for the preservation of the public order, to judge if at any particular moment it would be compromised by the assembling of these popular meetings."

The Hon. Signor Mancini opposed the new theories of Ricasoli, so different from those formerly held, saying, among other things: "Whenever the laws do not regulate and do not limit the exercise of a right, liberty remains entire and juridically inviolable. The only difference which exists between a free constitutional Government and the absolute and arbitrary Government of mere good pleasure, if I am not mistaken, is contained in this, that in a Constitutional Government it does not belong to the will of the Ministers, but only to the legislative power, in promulgating the law, to determine the limit of the exercise of the liberty of the citizen; and this limit then marks precisely the extreme line beyond which begins the danger recognised as affecting the social order; while, on the other hand, in an absolute Government or a Government of arbitrary will—it may even be sometimes that of an honourable prince and of a paternal administration—it depends only on their judgment or estimation to perceive in any fact or in the most inoffensive exercise of a right the threatening of a danger for society, and to determine by a discretional estimate where the legitimate use made of it by the citizens has to stop. . . . The Hon. President of the Council, who on another occasion made a luminous and memorable exposition of the Constitution, has to-day referred to it in order to discover in it somehow the root of that theory which he has enunciated. But if I am not mistaken, Art. 32 is precisely what condemns him, since in it there is recognised in a positive and formal manner the right of the citizens to meet peaceably and without arms, and, it adds, by conforming themselves to the laws which may

regulate the exercise of it in the interests of the public good. The statute of the Constitution accordingly recognises textually a law regulative of the right of meeting as only possible, but not yet as absolutely necessary. Certainly, if special laws were made on this subject, if Parliament considered it suitable to regulate the exercise of the rights of meeting and association by a special law, the dispositions of that law would constitute obligatory regulations to which the citizen would have to conform. But from the fact that such a law does not exist, is one entitled to infer that the liberty of meeting and of forming associations disappear, or remains only subject to the mercy and to the variable and subjective estimates and judgments of a few persons who compose a particular Ministry, however conscientious and honest they may be?"

The order of the day, approved by the Chamber by 136 against 104 votes, was that proposed by Mancini in the following terms: "The Chamber, trusting that the Government will put an end to the impediments which are opposed to the exercise of the constitutional right of free meeting on the part of the citizens, so long as it does not degenerate into offences against the laws or into culpable disorders, passes to the order of the day."

The Opposition having come into power, there were not wanting contradictory declarations on the subject. That of Nicotera, in the sederunt of 13th December 1876, declared that, in default of a special law, it considered the Government arbiter of the exercise of the right of meeting and association under control of the Parliament; while that of Zanardelli declared, in the sederunt of 6th May 1878, that an incipient danger was considered a necessary condition in order that the Government may restrain the exercise of a natural right sanctioned in principle by the Constitution, but always under the co-operation of the judiciary authorities.

This difference of opinion is an indubitable sign that the question is a complicated one, involving as it does the

reconciling of the strict obligation of the Government to maintain public order with a sufficient latitude on the part of the citizens for the expression of their ideas by means of meetings or associations. As there is here the danger of a conflict between individual and social rights, it is necessary to keep well in mind that individual right ends where social or collective right begins, and that the latter begins wherever society feels itself threatened. If the individual arrogate to himself or usurp a right of the State, will he let it alone in the view of afterwards claiming this right? When the political action arrests an act in its first stage, it appears to prevent it, but it really only represses it in time by an anticipative coercion. So long as a meeting or association remains in the field of pure discussion, it may be watched and not dissolved; but if it proceeds to act, if in its precedents, in the persons of its promoters, in its manifestoes, in the discovery of certain secret threads, there is certain indication of a criminal purpose, why wait till the public order is disturbed, and why not check it by preventive measures? Should the Government in such a case be obliged to refer the matter to the judiciary authorities, or ought it only to be held morally responsible for it to Parliament? Art. 88 of the fundamental law of Denmark of 28th of July 1866 prescribes as follows: "No association shall be dissolved by an administrative measure, although associations may be provisorily interdicted; but in such cases a judiciary process shall be immediately initiated against them in order to bring about their being dissolved legally." In Italy there is nothing like this, and hence the executive power has a freer hand. In the absence of a special law the following articles of the Italian Penal Code are applicable:—

"Art. 468. Whoever, either by speeches delivered in meetings or public places, or by means of the press or writings fixed up or scattered or distributed to the public, may have provoked the committing of any of the crimes contemplated in Arts. 153 and 154 of this Code, shall be

punished with two years' imprisonment and a fine of 4000 francs.

"Art. 469. Whoever, by any of the means indicated in the previous article, may have provoked the committing of any other offence, shall be punished, if it be a crime, with imprisonment, which may extend to three months, or with a fine, which may amount to 500 francs; and if it be a contravention of law, by arrestment, with the admission of a warning according to the circumstances, and of a fine not exceeding 100 francs.

"Art. 470. But if the offence has been committed, the person guilty of inciting to it will be subjected to the punishment of accomplices, according to the rule established in Art. 104, without prejudice to the other special dispositions of the law with regard to instigators.

"Art. 471. Any other public discourse or speech, as well as any other writing or fact not included in the preceding articles, which may be of a nature to excite contempt and discontent against the sacred person of the king or persons of the royal family, or against the constitutional institutions, shall be punished with imprisonment, or with banishment for not more than two years, and with a fine of not more than 3000 francs, regard being given to the circumstances of time and place and the gravity of the offence."

A special law for regulating associations, although difficult, is not impossible, if it proceeds upon the position taken by the article of the Danish law above quoted, if it defines with sufficient exactness the responsibility of its head and members, and if it assigns a definite period for the Government submitting the case to the judiciary authority. In default of a special law, it seems impossible to deny the Government the right to dissolve the associations under the too elastic guarantee of the Ministerial responsibility.

We conclude this subject by quoting the thoughtful words of Peyrusse, quoted by Professor Arsoleo in his valuable monograph on political meetings and associa-

tions. "Experience has shown," says Peyrusse, "that it is sufficient of itself that this one kind of liberty be badly regulated to bring into danger all other liberty, to oppress legitimate Governments, to excite and organise civil war, and to compromise our liberty which ought to be dear to all, which has its place in the principles of 1789, and which sums up all the other kinds of liberty, as well as private and public security."[1]

With this we have now terminated the discussion of the direct guarantees for securing the fundamental attributes of the human personality; but they would be stipulated in vain without a complex of institutions for putting them under the surveillance of the majority of those who are interested, and this is not obtainable without a good organisation of the State.

## SECOND SECTION.

### FUNCTIONS AND ORGANS OF THE STATE.

Besides the absolute rights which are a consequence of their quality as men (of which we have thus far been treating), individuals may enjoy other rights called relative rights, which do not spring from their personality, but rather from their status or capacity.

These rights relate to participation in the sovereignty, and give the full and entire qualification of citizen or political member of the State. The political organisation should correspond to the social organisation. The State is no sooner constituted than it has a life of its own, although it is only the result of the individual life. The State has the mission to protect the development of men united in society, and in this sense it is the organ of right and the mediator of the social life. But what are the means which the State should adopt in order to fulfil its mission? This question obliges us to investigate the origin of power, and then to consider its organisation.

[1] *Riunioni ed associazioni politiche.* Napoli, 1878.

The origin of power is mixed up with the origin of the right which is called to rule. Passing in review the various writers on the subject, we find that they derive right from convention or will, from utility, from the historical development of the nation, from God directly, from reason, or from the idea of the good and from justice. Grotius was the first in modern times to hold by the obligation springing from contract (*obligatio ex consensu*) as the source of civil right; and he forms society or the State upon a contract real or tacit. Hobbes applied the social contract to legitimatise the despotic form of government which he believed indispensable for putting a check on the fierce passions of men. Locke maintains that the State had its origin in a contract, but that its mission is to proclaim the rights resulting from the intelligent and rational nature of man.

Rousseau proclaimed more explicitly that contract was the source of the State, and that the law is the expression of the general will, which he regards as impartial and enlightened in its essence.

Bentham revived the doctrine of utility, which is common to all the materialistic systems, and made happy applications of it, without reflecting that utility may be the effect, but not the cause, of right. The Historical School bases right on the instinct of nations, and raises into a principle what has taken place in primitive ages. The Theological School derives right entirely from revelation, and would lead us back again to a theocracy. Leibniz laid down the first principle of a doctrine in which right is harmonised with the good, or is all that is divine, just, and useful. These ideas were formulated by Wolf, who raises the perfection of man and of society to a principle of right, detaching both the one and the other from their common root, the idea of the good, so that the perfection advocated by him lacks an ethical basis.

According to Kant, the State is a social institution necessary to realise right, and only historically has it been

able to be formed by contract or convention. Reason, demanding that the law shall reign, that man shall determine himself in his actions in such a way that his conduct may serve as a maxim of universal legislation, gives origin to right which has liberty as its condition. Accordingly the State ought to be organised in such a way that man and humanity shall never be used as a means for any one, but may be an end to themselves.

After the doctrine of Kant, that of Hegel is the most celebrated, and it may be summed up as follows. Right is liberty realised by fatality; for what liberty can man have who is a moment of the eternal becoming of the Absolute Being? According to Hegel, right is realised by means of the State, which absorbs and regulates everything: morality, the sciences, the arts, and religion. From the system of Hegel we have seen emerging a god of progress, a god-humanity, which has been adored by the modern Socialists and Communists.

According to Krause, right is the condition of the organic development of human nature; and the State, which is its special institution, does not absorb man and society, but only maintains the development of human activity in the ways of justice. He demands distinct organisations for morality, religion, the arts, industry, and commerce, desiring that the State secure to the individual every means of making himself perfect. Krause's definition springs from the pantheistic system, for by admitting the unity of substance between God and man, there arises the absolute obligation in the State to furnish the individual with all the means requisite for attaining this perfection. As we regard it, free development being left to the individual, the function of the State is only to further it indirectly, by providing him with the means thereto so far as is possible.

In our view, power is derived from God, but it is exercised by means of the human reason and will in accordance with right, and it belongs only to the most worthy to

exercise it. Power is legitimate while it is just. The external signs of legitimacy are tacit or expressed consent and duration.

Power is synonymous with sovereignty, and therefore it is necessary to determine well in what sovereignty consists.

Aristotle says that the sovereign power of the State is composed of three things—deliberative authority in the common affairs, various magistracies, and the judiciary authority. The first is of a superior order, and includes the authority which deliberates on war and peace, contracts alliances, promulgates laws, condemns to death, banishment, and confiscation, and pronounces sentence on the conduct of the magistrate. Evidently this definition does not distinguish sufficiently the various kinds of power.

In modern times the publicists have not been all successful in defining the sovereign power. Bodin assigns five chief functions to the sovereign power, or majesty as he calls it, namely, giving the laws, making war and peace, creating the supreme magistrates, deciding finally every judicial case, and granting pardon to the guilty. Grotius distinguishes the functions of government into general and particular. He says that the governing power regulates the general affairs by enacting or abrogating the laws, including the religious laws, in so far as it has the right to intermeddle with them; and it regulates the particular affairs in which the State has an interest (and which he calls public particulars) when it makes peace, war, and alliances, or levies taxes, or exercises eminent dominion, and such like. It also regulates matters entirely private which it causes to be decided by authority, and from this the judiciary art takes origin. The ideas of Grotius regarding the sovereignty are thus more confused even than those of Bodin and Aristotle. Pufendorf, Huber, Böhemer, Wolf, Lampredi, and other writers on natural and public right, have not been more explicit in describing the long

series of the rights called those of majesty. Locke and Vico, although they start from different principles, both agree in holding that the sovereign power consists in the legislative power, and that the criterion for determining the form of government lies in examining into who possesses the legislative power. The English philosopher expressly says that when in a society the greatest number make the laws, the form of the government is a democracy; when a few persons make them, it is an aristocracy; and when one person only makes them, it is a monarchy, which may be elected or hereditary. The Legislative Power, he adds, is the sovereign power, for those who are able to give laws to others must necessarily be superior to them, and all the other powers of the different members of the State are subordinate to it. The Italian philosopher says "that the quality which distinguishes every mixed State is the dominion of right or *jurisdictio;* and when this is in the hands of one, the State is a monarchy; when it belongs to an order, it is an aristocracy; and when it is held by the people, it is a democracy;" so that, as he elsewhere observes, the power of making laws is with peculiar appropriateness called *jurisdictio.*[1]

Having found the origin of power, it remains for us to examine its organisation.

The power or the sovereignty may be intrusted to one individual only, to many individuals, or to all the members of a political society, with greater or less restrictions. Governments are accordingly distinguished according to the number of those who participate in the sovereignty, and according to the power embodied in them. Under the first aspect they are distinguished generally into the governments of one only, of a few, or of all the members of a political society; or into monarchy, aristocracy, and democracy, which may degenerate into tyranny, oligarchy,

[1] See Doudes Reggio, *Introduzione ai principii delle umane societa.* Genova, 1857, p. 207.

and demagogy.[1] Under the second aspect they are distinguished into pure governments when they have unlimited powers, and mixed governments when they have their powers limited by an aggregate of political institutions. There is always an intimate relation between the number of the governing persons and the powers conceded to the Government. Mixed governments were already eulogised by Hippodamus the Pythagorean, who said that a State would be solid if its constitution was mixed or compounded of what is peculiar to monarchy, aristocracy, and democracy. This advantage was recognised by the greatest writers of Greece and Rome, such as Aristotle, Cicero, and Tacitus, who perceived in it the means of preventing each of the forms mentioned degenerating. We may quote passages in this connection from the last two writers. Cicero writes thus: "Quartum quoddam genus reipublicæ maxime probandum esse censeo quod est ex his, quæ prima dixi, moderatum et permixtum tribus."[2] "Placet enim esse quiddam in republica præstans et regale; esse aliud auctoritati principum partitum ac tributum; esse quasdam res servatas judicio, voluntatique multitudinis."[3] Tacitus observes: "Cunctas nationes et urbes populus aut primores aut singuli rogunt: delecta ex his et consociata reipublicæ forma laudari facilius quam evenire; vel si evenit haud diuturna esse posset."[4]

Representation adds another speciality to the various forms of government. States being extensive, and all the citizens not being able to exercise directly the part in the sovereignty which the fundamental law confers upon them, they give a full mandate to certain persons elected from among them as their representatives.

[1] Bluntschli adds to this classification a fourth division, Theocracy, which would have as its correspondent among corrupt governments, Idolocracy. But it has been rightly observed that a theocracy might be monarchical, aristocratic, or even democratic, and therefore would not constitute a special form of government. A theocracy is only a variety of the other forms.

[2] De. Rep., i. 29.

[3] Ib., i. 45.

[4] Annales, iv. 33.

In order that a Government may be properly designated as having a mixed form, it is necessary that the sovereign or legislative power be exercised collectively by a monarch, an order of magnates, and the people; or at least by two of these, so that no law shall be promulgated without the consent of the two or all the three parties who possess the legislative power. For greater guarantee, the device has been adopted of separating the execution of the laws from their formation, seeing that willing is one thing, and putting into practice is another. Besides the Legislative Power, we thus have the Executive Power, which is distinct from it by the nature of things, even when they are found actually united in a single person or in a moral body. The executive power is further subdivided, as the laws are of two kinds; some relating to the public interest in general, and others to the suits which arise between individuals or the crimes which are committed in the State. The power of carrying out the first is more especially called the Executive Power; the power of putting the second into execution, which consists in judging, is called the Judiciary Power.

We thus see reproduced in the government the three essential elements which constitute man, and which Vico reduces to *nosse, velle, posse;* that is to say, to the intelligence which, through the medium of the will, makes itself obeyed by the senses. The legislative power corresponds to the intelligence; the executive power to the will; and the practical side of affairs to the *posse.* Laferrière, without rising to the simplicity of the principles of Vico, gives this account of the organism of the government. Government, he says, ought to be founded on the nature of man and of society, on the morally necessary relations which spring from them, and on the obligation to protect them in their actual condition and in their tendency to advance. The legislative power corresponds to the intelligence; the executive power corresponds to the will; the judiciary power to the will which curbs the passions; and the

spiritual power to the faith implanted in man. Perfectibility is represented by the principle of election and by the intervention of society in the State, by the principle of public and private teaching, and by the liberty of the press.

Montesquieu (L. xi. ch. iv.) has thus formulated the principle of the division of power. "In order that power may not be abused, it is necessary to arrange things in such a way that power shall check power." A little thereafter he goes on to distinguish the legislative, executive, and judiciary powers in the way in which they have been above explained.

Although this theory was very slow in reaching such a perfect formula, it was instinctively practised by all peoples, so that we may most justly maintain that liberty is ancient and despotism modern. If we examine the Bible, the Zend-Avesta, and the Suh-King, primitive monuments of the peoples, we shall see human society beginning with the patriarchal or family government. Several families united formed the tribe, and various confederated tribes became a small people (*peuplade*). The head of the tribe or people could not do less than consult the heads of families, and sometimes all the adults and warriors in the more important affairs. The Asiatic empires are exceptions; but we must remember that the emperor, or *king of kings*, reigned directly only over his minor kings, and had at his side the magnates and priests.[1] Another organisation was attempted in the name of religion in the form of a theocracy, but it was soon overthrown by the warriors.

In Greece the ancient kings (*βασιλεῖς*) governed with a tempered rule, as we see, for example, in the two kings of Sparta, a remainder of the oldest constitutions. But in Greece the republican government soon came to prevail, and tyrants or absolute kings arose from the excesses of liberty. In Italy the same thing happened; and from the fall of the Roman Republic, which absorbed all the

[1] Balbo, *Della monarchia rappresentativa*, cap. i. Firenze, 1856.

republics, we see an unexampled tyranny rise, namely, that of the Empire.

The constitution of the German clans or tribes described by Tacitus resembles that of all the Aryan peoples. Almost all the Germans had a king, assemblies of chiefs or heads of tribes for dealing with ordinary affairs, and assemblies of all the tribe in grave and extraordinary cases. Montesquieu, contemplating this picture, exclaims that representative government was born in the forests; but this was a mixed government, like so many others of antiquity, and not a representative government. When the Germans invaded the Roman Empire, they carried their institutions into it, and, in spite of the bold attempt at imperial restoration by Charlemagne, down to the eleventh century, nothing was seen but a continuous struggle between the ancient liberty of the forest, the monarchical regime, and the aristocratic power.

From the eleventh to the thirteenth century a feudal aristocracy had subjected persons and lands, and by an instinctive federation it had reduced the central power to impotence. From the thirteenth to the sixteenth century this feudal aristocracy was attacked from above by the monarchical power, which had strengthened itself, and from below by the enfranchisement of the citizens and cultivators of the soil. In England alone the aristocracy and the citizens made common cause in imposing limits on the royal power. On the Continent the communes gathered around the king in order to destroy the aristocracy when they did not succeed in making themselves independent. Hence in England representative monarchy was established, and on the Continent absolute monarchy. But under this absolute government, civil justice made progress, order became strengthened, wealth and instruction were diffused, and the Continental nations began consciously to desire what the force of events alone had produced in England. The reform promised by the princes seemed slow, and the human spirit emancipated itself by

the French Revolution of 1789, whose results are adopted, or are now desired by all nations.

If most of the States of Europe shaped themselves into monarchies, the republican form also triumphed in some places. In Italy the Roman institutions were very strong, and the barbarians were not so firmly seated there. The municipal regime was organised, and attracted to the cities the nobles of the country districts; but it could not unite security with liberty, and it perished under the usurpations of the lords. In Venice alone the lasting form of a strictly aristocratic State was attained. In Switzerland the nobles of the country formed an alliance in 1291, and they conquered and made the burghers of the cities sharers in their privileges. In Flanders, along the shores of the Baltic, and on the Rhine, the needs of commerce gave origin to independent communities, who were able to resist the attacks of the neighbouring lords.

At a more recent date arose the English Republic, which resulted from the triumph of a party, and which lasted but a few years, without producing any social change. The Dutch Republic was a mere confederation of cities and provinces, and the deputies to the States General were bound to seek instruction for every special case. In 1787 the English colonists of America emancipated themselves and declared for a republic, but they retained a large part of the institutions of the mother country and granted to all the people the political rights which in England belonged only to certain classes of citizens. In France the Republic was proclaimed in 1792, and, passing from terror to anarchy, it fell into the hands of a victorious general.

But in both the monarchies and republics the extension of the modern States requires that the citizens participate in the sovereignty, not directly, but by representation. Those who derive power from contract consider that the will of the electors should be represented, and that they ought in consequence to claim an imperative mandate.

The followers of the doctrine of utility maintain that the social interests ought to be represented. Those who make power spring from right, from justice, from the idea of the absolute good which reason directly perceives, consider that justice is represented, and that the mandate is large and general. There is, they hold, a faculty of reason whose function is to contemplate the absolute good which, appearing to us as justice, imposes itself on our wills as rule, discipline, duty.

The depositories of power are responsible for all the rest; and in order that every one may be able to form a clear idea of their conduct, everything ought to be done with the greatest publicity. The conditions of a free government, therefore, are the division of power, election, responsibility, and publicity.

The power is divided into the legislative, the executive, and the judiciary. We must now examine the relations which exist between these three kinds of power. Both in monarchies and in republics the executive power is intrusted to a hereditary or elective head (in some republics to a commission), and the judiciary power is distinct from the executive, although it takes origin from it. The head of the State, to whom the executive power is intrusted, stands in a different relation to the legislative power in the case of the two forms of government referred to. In a republic, speaking generally, the head of the State has a right to delay the promulgation of the laws and to present his observations to the legislative power, whereas in a monarchy he shares in the legislative power and dissolves the deliberative bodies. Montesquieu notes as one of the advantages of representative constitutional government that it makes those who are to execute a law share in the formation of it, in order that they may be able to introduce into it all necessary modifications. He might have added another to the effect that, as the executive power is exercised in the monarchies by an irresponsible sovereign through the medium of responsible Ministers (as we shall

have occasion to explain), a radical change in the policy of such a government is possible merely by a change of the Ministry without any disturbance being brought about in the State. Both in a republic and in a monarchy the legislative power should be intrusted to two assemblies, if there is a desire for maturity in the councils and permanence in the order of the State. The executive power is responsible to the two assemblies for the execution of the laws. These three organs of power may remain in repose or in action, but by the nature of things being bound to move, it is incumbent on them to put themselves into accord with each other. This is the system of representative Constitutional Government, or of Parliamentary Government, as it may be more appropriately called.

To fix the limits between the executive power and the judiciary power, it is not enough to say that in those matters in which the general interest predominates the executive power (otherwise called the administrative power) will decide, and in matters in which individual interests have the first place the judiciary power will decide. The point to be determined is whether the judiciary power ought to claim for itself all the questions which arise between private individuals and the Government, and whether the public functionaries ought to be made personally responsible for every infraction of law before the ordinary judges. In that case the administrative hierarchy is abolished, and the law, represented by the magistrates, will pronounce directly.

The principal difference which exists between a monarchy and a republic lies in the separation of the executive power from the legislative power, the simple execution of the laws being assigned to the head of the State. In a republic, the interpretation of the laws as to their application (which in Italy forms a subject of regulation) also belongs to the legislative power. A great spirit of legality is needed to prevent the legislative power becoming a kind

of French Convention. Only an elected head, who holds office for a short time, could accept so subordinate a function under the legislative power. The second difference consists in assigning to the judiciary power the decision in all matters which involve a question of right. In England the powers are not entirely divided, because the English constitution sprang gradually from the common law. In America they have been better determined, in the sense which we have just indicated.

The advantages of a monarchy, therefore, are, that it has a very strong executive power and that it avoids the convulsions incident to an election of the head of the State. Only special conditions of political moderation and social prosperity can maintain a republic successfully. But it may also be upheld by the interests of a caste when the republic is aristocratic, whereby this form of government is rendered more lasting.

But whatever be the form of the government, monarchical or republican, the result ought to be the same, namely, respect paid to the fundamental rights of man, and a share in the sovereignty assigned to the most capable. We thus distinguish the natural or civil liberty which belongs to all men, from political liberty. The ancients confused these rights, making all liberty consist in the exercise of the sovereignty; and this resulted in making few free, and excluded the greater part from all right whatever. Political liberty, as we regard it, consists in the participation of the most capable in the sovereignty, and in the checks to which power is subjected, so that it shall not violate either natural or political rights. The definition which Robespierre gave of liberty in his sketch of the Declaration of the Rights of Man, includes both natural liberty and political liberty. He said: "The end of all political association is respect for the natural and imprescribable rights of man, as well as the development of all his faculties. Liberty is the power which belongs to every individual to use his faculties as to him seems good. This liberty has justice as its only

rule, the rights of others as its limit, nature as its principle, and law as its guarantee."[1]

Before passing to a special examination of the organs of power, we may glance at a distinction which has been much discussed, namely, the distinction between constituted power and constituting power. We have divided power into legislative, executive, and judiciary, and in this connection we have to consider whether there is generally included in the legislative power the authority or right to change the fundamental orders of the State. On most occasions the peoples have adopted a solemn form of proceeding when it has had to have recourse to such changes, and thus has arisen the distinction of constituted power and constituting power. For example, the Lacedaemonians conceded to Lycurgus constituting power, as the Athenians to Solon, and the Romans to the Decemvirs. In England the Parliament (this name including the two Chambers and the King) has always exercised the legislative and constituting power. In the ancient French monarchy, although the king possessed all and whole of the executive and legislative power, yet it was a maxim that he was not able to touch the fundamental right of the kingdom; and the Parliaments, which were judiciary bodies, only registered under compulsion the ordinances in which they considered this right infringed. The Constituent Assembly, however, distinguished the two powers, and fixed a mode of revising the Constitution. The Italian Constitution in its preamble declares that the dispositions contained in it are "fundamental, perpetual, and irrevocable laws," and it has also distinguished the constitutive power from the constituent power. Does this, then, exclude all possible revision except by means of a revolution or a *coup d'état?* If we maintain that the agreement of the three organs of the legislative power is not sufficient to change the State, it would be sufficient to fix a mode

[1] L. Blanc, *Histoire de la révolution française*, vol. viii. p. 260. Paris, 1868.

of revision by having recourse to the electoral body for the convocation of an assembly *ad hoc.*

We come now to examine Representative Government more closely, and we shall speak of the King, of the Ministers, of the two Chambers, of the Elections, and of the other conditions necessary for such a form of government. And we shall conclude our examination with a historical survey of the principal Constitutions.

### § 1. The King or Sovereign.

The King is the head of a State; he is the first in rank and power, which he possesses at least for life; and he is irresponsible for his actions. In the present day the monarchy is a dignity, the real power being intrusted to a sort of *maire du palais,* who is the Prime Minister, and who is removable always at the will of the Parliament. In England the king is called *the sovereign* to indicate his pre-eminence, and the sum of the royal right is called *the prerogative,* while the name of *privileges* is given to the power invested in the two Chambers.

The royal prerogative is direct and incidental. The first kind of prerogative consists of three species, according as they relate to the public character of the king, or to his power, when they take the name of *majora regalia;* or as they relate to the revenues or income of the king, which are called *minora regalia.* These revenues, however, have passed in great part to the State; even in England a civil list being assigned to the king. The first species of direct prerogative, which, as we have said, relates to the public character of the king, includes the sovereignty and pre-eminence, the absolute perfection, or the impossibility of doing wrong and the perpetuity, of the royal character, which is expressed by saying that *the king never dies.* The second species of direct prerogative, which relates specially to the power of the king, is divided into internal and external. The internal prerogative comprehends:—1st, the

constituent power of the king in nominating the members of the first Chamber and convoking the second Chamber; 2nd, his being generalissimo or supreme commander of the army and navy; 3rd, his being head of the department of justice and the source of offices and honours. In England the monarch is also head of the Church and arbiter of commerce, because he makes laws for the merchants. The external prerogative consists in the right to declare war and to conclude alliances. The incidental prerogative constitutes exceptions to the common law in favour of the king, such as that of being represented in judicial proceedings by a procurator in all tribunals and courts of appeal.

From what we have said it follows that the constitutional king is rather an institution than an individual. On ascending the throne, the individual is transfigured, as it is not allowed to inquire into what he has previously done. He becomes inviolable and infallible, that is to say, he renounces his personal character and is obliged to act by means of third persons, who are ministers. Where there is no action there cannot be a fault, and this is the way in which the infallibility of the prince is explained. Not being able to do any wrong, it is just that he be regarded as infallible, seeing that in renouncing his will he renounces responsibility. It is a moot-point whether in fact the king *reigns and does not govern*, that is to say, whether he renounces all influence on the affairs of the State. It is evident that if, in order to escape legal responsibility, the king has to find Ministers who answer for him, he does not renounce all will, and therefore he cannot remove moral responsibility from himself. The perpetuity of the king means that there is an identity in all the persons who succeed to the throne, and that no one can repudiate the acts of his predecessor.

Art. 4 of the Italian Constitution consecrates the inviolability of the king, and Art. 67 lays down the responsibility of the Ministers and the necessity of their signature

to every act of the Government. As to perpetuity, Art. 3 declares the throne hereditary according to the Salic law. Art. 11 settles the age of royal majority at eighteen years; and Arts. 12, 13, 14, and 15 regulate the regency. Finally, Art. 16 fixes what is to be done in case the king should be in a state in which it would be impossible for him to reign.

Passing on to the power which the king possesses, we find that he gives origin to the Parliament, that he nominates the members of the Upper Chamber who are not hereditary, and that he summons, prorogues, and dissolves the Chamber of Deputies. Some writers give this power the designation of parliamentary power; but it would be better called the constituting power, at least the first time that it is exercised. As regards the legislative power, by the 3rd Article of the Italian Constitution the king possesses a share in it, since no law can be made without being approved by the two Chambers and sanctioned by the king. The king accordingly lays proposed laws before the Chambers, and they are maintained by his Ministers; and the Ministers also take part in the discussion of projects initiated by the Parliament which lead to the introduction into them of the modifications desired in name of the crown. Art. 5 attributes to the king the executive power, but Art. 67 declares the Ministers responsible, and lays it down that the laws and acts of the Government shall not have force unless provided with the signature of a Minister. Moreover, Parliament has the right of controlling the finances; and both in the minute arrangement of the budget and in accepting measures, it touches the executive power. As head of the executive power, the Constitution referred to further explains that the king commands the forces by land and sea, declares war, makes treaties of peace, of alliance, and commerce, giving notice of them to the Chambers as soon as the interest and security of the State permit, and accompanying the notification with the relative communications. Trea-

ties which involve a burden on finances or changes in the territory of the State have effect only after the consent of the Chambers has been obtained. According to Art. 6, the king nominates and appoints to all the responsible offices of the State, and makes the decrees and regulations necessary for the execution of the laws, but without being able to suspend their observance or to dispense with them. According to Art. 68, the judiciary power also originates in the king, and from him emanates justice, which is administered in his name by the judges whom he appoints. The independence of this power is secured by the irremovableness of the magistrate after three years exercise of their office, except in the case of justices of peace (*giudici di mandamento*), according to the terms of Art. 69. To temper the rigour of the law and to amend acts of human injustice, Art. 8 gives the right to the king to pardon and to commute penalties.

Some writers, such as Laferrière, distinguish as properly constituting royal prerogative the command of the forces by land and sea, the right to convoke the Chambers, to dissolve the Chamber of Deputies, to make treaties, to declare war, to nominate Ministers, and to grant pardon; and they maintain that the signature of the Ministers is necessary in these species of acts only to certify that of the king, and not because they themselves are to be regarded as having any sort of power. In the other acts, however, as in those appointing to public offices, &c., which deal with the executive power properly so called, the signature of the Ministers is essential, as to them belongs all the responsibility. To us it appears that the king is properly autonomous only in the appointing of Ministers, in the dissolving of the Chamber of Deputies, in conferring orders of knighthood and titles of nobility, and in exercising the right of pardoning; but that in all else he should act in accord with the Ministers, on whom the responsibility lies.

The third species of direct prerogative relates to the revenues. At first the royal domain was confounded with the national domain, and the king or queen of England is still considered theoretically as the possessor of the English soil. When the English Revolution dispensed the king with providing the expenses of the State out of the revenues which were assigned to him, it became necessary to assign the sovereign a special fund for the expenses of his house. In 1777 the English Civil List amounted to £900,000 sterling, and the revenues of the towns were thrown into the coffers of the State; but at that time the salaries of judges, ambassadors, and other high functionaries were still a charge upon the king. In the time of William IV. the civil list, relieved of some of the charges referred to, was reduced to £500,000 sterling. Pitt obtained consent to the king's being permitted to establish a private patrimony. The civil list of Queen Victoria is £325,000 sterling for her court, and £60,000 for her private expenses.

In France, it was not expressly forbidden the king to possess a private patrimony, but such a patrimony did not in fact exist. The Constituent Assembly, while it declared the royal domain to be inalienable, admitted that the king might possess a private patrimony. The Restoration retained the principles of the Constituent Assembly; and the two laws of 1814 and 1825 maintained the private patrimony, with the devolution to the domain of the goods which the king possessed before ascending the throne, as was practised under the ancient monarchy. The Chambers in 1832 allowed Louis Philippe the right to preserve his goods, exempting them from the devolution which they upheld in principle.

Art. 20 of the Italian Constitution confirms to the king the right to possess a private patrimony, besides the grant of the civil list, which is to be settled at the beginning of every reign for its whole duration. The said Article also exempts the king from the limiting dispositions as to the

disponable amount contained in the common law. Art. 21 secures a grant to princes of the blood who have reached majority, or are on the point of contracting marriage, a portion to princesses, and a dowry to the queen, which have to be fixed by law.

History shows us other forms of monarchies besides the constitutional monarchy which we have above described, and which is the form of government in all Europe except in Russia and Turkey.[1] In India, the kings were the chiefs of the warriors, but they were entirely subject to the Brahmans. In Egypt, the ascendancy of the priests was great, but the Pharaohs gradually freed themselves from it. In Judea, the kings were mostly indocile creatures of the Levites; and in Persia the monarchy maintained itself with sufficient independence of the Magi.

It is quite different with the monarchy of the heroic times, which, according to Freeman,[2] was common to all the Aryan peoples, and therefore to the Greeks, the Italians, and the Teutons. In the camp of the Achaeans before Troy, as well as in the island of Ithaca, and even among the gods of Olympus, we find a supreme head or king, minor heads forming his council, and an assembly of freemen which approved or disapproved the resolutions already formed. We perceive the same thing in the primitive order of Rome and the other Italian republics, as well as among the German peoples. After the conquest of the Roman Empire, the minor chiefs were scattered over it, and it became difficult, if not impossible, to bring together an assembly of freemen. In the midst of the universal disorder, the king bound the lesser chiefs to himself by means of the feudal bond, which in most cases was very loose. The feudal monarchy represented the king as the *grand fieffeux*, the judge and redresser of wrongs. By degrees he appeared as the depositary of the

[1] The Turkish Constitution of 23rd December 1876 has been, in fact, abolished.

[2] *Comparative Politics.* London, 1873.

public power, separated from local contentions, and capable of restoring order and doing justice. With this power was conjoined the religious sanction, which rendered it more august, and the imperial tradition, which rendered it more absolute. Certain circumstances, which we shall indicate when treating of the two Chambers, prevented the king of England and the king of Hungary from becoming absolute, as in the other States of Europe.

The old French monarchy has found an unexpected defender in Ernest Renan. This ingenious writer, with good reason, considers the social hierarchy as a vast organism, in which whole classes must live for the glory and enjoyment of the others. The peasant of the old regime laboured for the nobles, and therefore loved them; he enjoyed the splendid existence which they led from the fruit of his sweat and toil. The king was the head of the hierarchy, and hence France held him to be sacred, and regarded the monarchy as the eighth sacrament. The king, consecrated at Reims, *performed miracles.* The religion of Reims was the cult of Joan of Arc, who lived and died there. "Incomparable religion, holy faith!" exclaims Renan. This ideal began to be spoiled by Philippe le Bel, who, lending an ear to the jurists, the representatives of the Roman principle, made a fierce war on the local sovereignties and the provincial liberties, and struggled to establish a sort of sovereignty quite different from that of St. Louis. In the sixteenth century the Renaissance called again into honour the political ideas of antiquity and the State, after the Greek and Roman style. The political writers, who were mostly Italian, dreamed of democratic Utopias founded upon an abstract conception of man, or they offered incense to the most powerful sovereigns. France was inclined by its character to uniformity; the theocratic tendency, inoculated by Catholicism, produced the strangest phenomenon of modern times, the monarchy of Louis XIV., which looks as if copied from a Sassanidaean or Mongolian model, and is

an unnatural fact in Christian Europe. The Middle Ages, adds Renan, would have excommunicated this Oriental despot, this anti-christian king, who proclaimed himself the sole proprietor of his kingdom, who disposed of souls and bodies, and who annihilated all rights in consequence of an unbounded pride inspired in him by his identification with the State.

England alone has understood how to limit the royal authority by the parliamentary regime and the division of power, without destroying the higher orders of society and the collective unities. The ideal of Renan would be a king surrounded by an aristocracy of birth and merit, and by the clergy; the social services left to the corporations; and for the individual there would be the right to think, to speak, to develop his own faculties, and to raise himself in the social scale without finding any legal obstacle in the way. As Renan quotes the example of England, his view implies a second Chamber, in which the individual citizens fulfilling certain requisites would also be represented.

Very different is the theory of Benjamin Constant, who writes thus:—"The immediate action of the king diminishes inevitably in the direct ratio of the progress of civilisation. Many things, admirable and attractive in other times, are now inadmissible. When we picture to ourselves the kings of France dispensing justice at the foot of an oak, we feel ourselves seized by emotion and reverence at the august and ingenuous exercise of paternal authority; but who of us would see in a judgment given by the king, and not by the court, anything else than the violation of all principle, the confusion of all power, and the destruction of the judiciary independence?"

This distinguished writer attributes to the king the moderating power which was sanctioned by the Constitution of Brazil. He explains admirably the necessity of making the king participate in the legislative power thus:—"If, in dividing the power, you do not put limits

to the legislative authority, it will come eventually that some will make laws without taking thought of the inconveniences which they will produce, and others will put them into execution without holding themselves responsible for such inconveniences, because they have not taken part in the formation of these laws. When the prince concurs in the formation of the laws, and his consent is necessary, their faults never reach the same degree as when the representative bodies decide without appeal. The prince and the Ministers are instructed by experience; if not guided by the feeling of what was obligatory, they would be guided by the knowledge of what is possible. The legislative power, on the contrary, never comes into contact with experience, and for it no impossibility in regard to execution ever exists. It requires only to will; another authority executes. Now it is always possible to will, but it is not possible always to execute.

The head of a republic, as its president or director, differs from a monarch by the duration of his power, and still more by the intensity of it. The head of a republic does not share in the legislative authority, as he has only a suspensive *veto*, after which the legislative assemblies decide by two-thirds of a majority instead of by a bare majority of one more than the half of the votes. Nor has he even the complete possession of the executive power, for in the appointment of ambassadors and other high functionaries he has to confer with the Senate. He is responsible personally, and the Ministers are considered as his commissioners. By an exception, the President of the present French Republic has been declared irresponsible and irremovable, his Ministers being responsible.

A hybrid form between a monarchy and a republic is presented in the Empire, as it was understood under the first Roman emperors, and as it was restored by the Napoleons. Napoleon I. recognised in the nation the source of all power, and tried with the Senate to revive

the aristocracy, granting to the people a pale shadow of representation in the legislative body. Napoleon III. embodied better the imperial ideal characterised under the name of Caesarism. He bowed respectfully before the majesty and power of the people as "the true source of all power." He made them approve the Constitution by a plebiscite, and assigned to them the election of the legislative body by universal suffrage. The Emperor declared himself responsible before the people, reserving to himself the initiation of the laws, the regulation of politics, diplomacy, the army, and the treaties of commerce. The Constitution recognised only two powers, the will of the people and the Emperor. The Ministers were responsible only to the head of the State. The second Chamber shared in the formation of the laws, but mostly in a negative way; it was able to prevent a bad law, but not to amend it except in agreement with the commissioners of the Council of State, to whom it fell to prepare the drafts of the law, and to get them discussed before the legislative body. The Senate was a conservative body, which voted the laws under reference to their simple constitutionality, and it was able in exceptional cases to bring forward reforms. The nomination of the Senators was assigned to the Emperor, and as they were made recipients of a large payment, no spontaneous independence was to be feared from them. This regime oppressed France for about fifteen years; it could not resist the reforms contained in the decree of the Senate of 20th April 1870, and it finally fell under the revolution of 4th September 1870.

## § 2. The Ministers.

The responsibility and power of the Ministers arise as the necessary complement of the royal person. The king possesses the executive power, but intrusts its exercise to the Ministers.

This implies their responsibility, and that responsibility

covers the person of the king who appoints them, and recalls the appointment at pleasure. We must now examine how far the responsibility of the Ministers goes, and where the special jurisdiction to which they should be made subject for their acts ends. The charter of 1816 determined that the Ministers could only be accused for treachery or concussion. The term "treachery" virtually includes the bad management of a war or of diplomatic treaties, the introduction of a system destructive of liberty, and in general every proceeding which may prove prejudicial to the State. The term "concussion" is to be understood as including the bad use of the public money. In their other acts, when the Ministers do not proceed upon express order of the law, they may become delinquents like every other citizen, and then they have to be punished, according to the common laws.

The statute of the Italian Constitution by Article 6 establishes a special jurisdiction (as we shall see in speaking of the Senate) for all crimes of high treason and for the judgment of Ministers accused by the Chamber of Deputies. Although this statute is expressed in such general terms, we however consider that the doctrine is applicable which has been developed in reference to the French charter, in virtue of the juridical principle that special jurisdictions are to be restricted as much as possible.

Benjamin Constant demonstrates the impossibility of a law concerning the ministerial responsibility, since it would have to deal with so many moral considerations in detail that the English themselves, who are so bound to the law, have been able to indicate it only with the vague designation of *high crimes and misdemeanours*, without defining precisely either the degree or the nature of these offences. Nevertheless, such a law has been several times attempted. After the Restoration the Chamber of Peers approved a scheme which, with slight modifications, was submitted to the Chamber of Deputies. Under the

Republic of 1848 a similar attempt was renewed. The deputy Senio, having mentioned these various projects, formulated one in the Italian Parliament on the 10th March 1862. To cases of treachery and concussion he added prevarication. In the same project, however, he included every other crime or delict which might be committed by the Ministers even outside of the exercise of their functions, which uselessly complicated the matter. As regards the penalties he referred to the Penal Code for foreseen cases, and for those that were unforeseen, he suggested indistinctly interdiction from public offices. He also made useful suggestions regarding the mode of procedure, both in regard to the accusation and the trial. And, as a matter of fact, it is principally the procedure which is regulated in the Austrian law of 25th July 1867, concerning the ministerial responsibility. The right of accusation belongs to both Chambers of the Council of the Empire, but the judgment is reserved only for the judiciary court of the State. This tribunal has to be formed so that each of these two Chambers elects (not from its own members) twelve independent citizens and jurists of the kingdoms and countries represented in the Council of the Empire, and they remain in office six years.[1]

As regards the right of accusation, it must be added that the prorogation or dissolution of the Chamber would not put an end to such a process, and that the king is forbidden to grant pardon to a condemned Minister. These two guarantees were claimed during the impeachment of the Earl of Danby; the first was established by the Revolution, and the second was confirmed during the trial of Hastings. The Italian Constitution does not limit the right of pardon in the sovereign, even when he wishes to use it in the case of Ministers.

[1] On the ministerial responsibility, see the learned work of Prof. Adeodato Bonasi, *Della responsibilità penale e civile dei ministri e degli altri uffiziali pubblici secondo le leggi del regno e la giurisprudenza.* Bologna, 1874.

It is necessary to note that the House of Commons or Chamber of Deputies very rarely makes use of the right of accusation, but mostly limits itself to inflicting a censure on the Ministers, in consequence of which the custom is that they give in their resignation.

The responsibility of the Ministers extends to the subordinate agents of the Government. But an important distinction must here be made; for if the Ministers are responsible for using their power legally and to the advantage of the State, the subordinate agents, not being able to enter into all these considerations, are only responsible for the legality of their acts. For example, the commanding general and the officers are not responsible for the justice or opportuneness of a war, nor is an ambassador responsible for the advantageousness of a treaty. All functionaries, however, are responsible for attempts against security, liberty, or property; and as such attempts are crimes, whoever lends a hand to them cannot be shielded by any higher authority.

In order to find the origin of the actual composition of the Ministry, we should remember that it is of the nature of a necessity that a monarch should surround himself with councillors in whom he has trust. We find in the Roman Empire two councils, one composed of a limited number of members, and called to direct the administration of the empire under the designation of *Consistorium*, and the other devoted to judiciary affairs under the name of *Auditorium*. The Middle Ages show rather a confidential hierarchy for administration around the monarch, which did not represent the general interests of the nation in distinction from local associations, but rather the personal and private interests of the sovereign as opposed to the territorial lords and the municipal associations. There was no actual and legal distinction between the internal economy of the house of the prince and the external ceonomy of the Government. But in proportion as the

royal power became stronger, this arrangement lost its peculiar privy character.

In England, the ministers were gradually distinguished from the other members of the Privy Council; and as the parliamentary franchises became consolidated, Parliament began to have an influence upon their selection. After the second English Revolution the practice began to be in use that the king should change the Ministers when they lost the confidence of the House of Commons, so that under this aspect the ministry might be called a parliamentary committee. Hence the Ministry, also called the Cabinet, is a body of statesmen chosen from members of the Houses of Parliament by the majority, who leave the nomination of them to the Crown. The influence of Parliament, or rather of the House of Commons, was indirect down to 4th June 1841, when, on the motion of Sir Robert Peel, it voted that the Ministry of Lord Melbourne no longer possessed its confidence. A similar motion was presented by the Marquis of Hartington in June 1859, and adopted by the House. Charles I. composed a Cabinet consisting of his most devoted partisans, to whom he confided the direction of all affairs, and which he called his Council. Charles II. followed his example, and the persons whom he selected were called the *Cabal*.[1] The Act of Settlement of 1701 restored the Privy Council to its functions, and prohibited the formation of a Cabinet; but this clause was abrogated by a law of Queen Anne. By a strange anomaly, although the ministerial Council or Cabinet is really at the head of affairs, it is nevertheless ignored by the English Law wherein mention is made only of the Privy Council which is consulted by the Cabinet only as a matter of form. This constitutional Cabinet is collectively responsible for the matter discussed in council, but every

[1] The Cabinet of 1671 was called the Cabal, because the initial letters of the names of its members formed the word, viz., Clifford, Arlington, Buckingham, Ashley, Lauderdale; but the word was in use earlier, and this was a mere coincidence.—*Skeat.*

Minister is also partially responsible for the affairs of his own office.

The central administration in Piedmont was regulated by the Law of 23rd March 1853, which put under the immediate direction of the Ministers the various public offices which were formerly entrusted to particular administrations. Art. 2 of the Law of 13th November 1859, which was extended to all the annexed countries, confirmed this principle, enacting that the bases of the general directions and other internal offices of the Ministry should be determined by regulations decided in the Council of Ministers. The acts of the central power which have to be discussed in the Council of the Ministers are the questions of public order and of supreme administration; the drafts of laws which are to be presented to the Chambers; treaties with external powers; organic decrees; conflicts as to authority between different Ministers and the dependent offices; the demission or pensioning of those functionaries whose nomination is subject to the deliberation of the Council of the Ministers; the granting of titles of nobility and decorations, which are not conceded *motu proprio* by the sovereign; the authorisation to wear foreign decorations, &c.

The executive power being exercised by the Ministers, certain functions of the State are entrusted to them for maintaining society in the way of conservation and progress in the general political direction; and they have to see that the orders which emanate from them are carried into execution over the whole territory, and in all particulars, by the officials who are dependent upon them. The Ministers are therefore the minor organs of the State. The Ministers responsible for this preservation of the State are the Minister of the Interior, whose office includes the civil administration and the police; the Ministers of Grace and Justice; the Ministers of War, of the Marines, and of Foreign Affairs; and the Minister of Finance, whose office is the principal one, which gives life to all the rest. The

Ministers who are responsible for the progress of the State are the Ministers of Public Instruction; the Minister of Agriculture, Industry, and Commerce; and the Minister of Public Works. The relations between the State and the Church in Italy fall to the Minister of Grace and Justice. In England, this rational partition of the ministerial offices is not followed; and although the powers of the central administration are more restricted, some of the functionaries who form part of the responsible Ministry on the Continent occupy an entirely subordinate place.

By means of the administration there is unfolded in the political order that principle which in the physical order presides as an essential law over the mechanism of the natural forces. Just as in the cosmical order a central force attracts, regulates, and directs the force and proper life of all the beings which move in the orbit of its action, subordinating and ruling all the repulsions of their respective movements, in order to maintain the harmonic equilibrium and unity of the system; so, likewise, in the political order, the force and central action of the State extends over all the beings and parties which constitute it, so as to regulate and rule the movement of each, subordinating their several activities to the dominating force which maintains the cohesion and unity of the whole.

### § 3. The Chamber of Peers, House of Lords, or Senate.

When referring to the historical development of the various forms of government, we said that among the Germans the chiefs or kings gathered all the free men in assembly, in order to deliberate on the more important affairs. After the Conquest, only the more considerable proprietors were wont to take part in this assembly. Among the Anglo-Saxons this assembly took the name of *Wittanagemot* (assembly of the wise men), and every one took part in his own name; or, according to a

charter of King Athelstane, he might send a procurator, as is still practised in the House of Peers. From the *Wittanagemot*, and the rights of sovereignty which the Norman feudalism granted the king over the barons who immediately depended on him, has arisen the House of Peers, as at present constituted. The expressions, *Curia de more, curia regis, magnum concilium, commune concilium*, which we find in the contemporary writers, indicate the same assembly as composed of the magnates of the kingdom, called to take part in the government. It is probable that the feudal principle was followed in the formation of this assembly, according to which it was incumbent on all the vassal-knights of the king to render service both at the court and in war. In the course of time the term *Baron*, which was common to all the immediate vassals, was specially applied to the richer and more important ones among them. The bishops and the abbots attended as heads of the clergy or immediate vassals of the king and of the barons. But all of them had to be convoked individually, and thence is derived the present right of the Crown to appoint peers for life. Notwithstanding this, the right which all the knights as direct vassals of the king held, not to undergo any burden without their consent, and to attend the court of the king as they attended the court of the county, did not prescribe. Art. 14 of the *Magna Charta* makes mention of this right, only with this distinction, that the barons were to be convoked individually, and the others *en masse* by the sheriff.

With these immediate vassal-knights of the king there were gradually associated the other *freeholders*. In 1213 an order was given to send to Oxford to the general assembly four knights from every county, to deal with the affairs of the kingdom (*quatuor discretos homines de comitatu tuo illuc venire facias*); and this was the first beginning of political representation.

The name "Parliament" was applied by Matthew Paris to the assembly of the barons held at London in 1240, and it was given officially to the assembly held at Oxford on the 11th June 1258, under Henry II. Two citizens, or burgesses, of every city or borough were summoned by Simon de Montfort to the Parliament held at London in 1265. The *Writ of Summons* contains these words:— "*Item in forma praedicta scribitur civibus Ebor, civibus Lincoln et coeteris burgis Angliae; quod mittant in forma praedicta duos de discretioribus, legalioribus et probioribus, tam civibus quam burgensibus suis.*"

Under Edward I. there appeared two kinds of Parliaments, some composed of great barons who seem to have formed the Great Council of the king, and others in which the deputies of the counties and boroughs sat. The great barons were summoned four times a year, while the other kind of Parliament met when it was desired to give greater solemnity to the resolutions on the affairs in hand, and when it was necessary to obtain subsidies from the counties, cities, and boroughs. The regular institution of Parliaments goes back to the year 1295, when Edward I. gathered a great assembly at Westminster. To it were summoned forty-nine counts or barons, two deputies from every county, and two from every city or borough (there being about 120 boroughs), besides a certain number of deputies of chapters and of the clergy. Edward I. completed the work of his adversary, Simon de Montfort, and from that time till now Parliaments have succeeded each other more or less regularly.

"Thus—says Mr. Freeman—in the time of Edward the First, the English Constitution definitely put on the same essential form which it has kept ever since. The germs of King, Lords, and Commons we had brought with us from our older home eight hundred years before. But, from King Edward's days onwards, we have Kings, Lords, and Commons themselves, in nearly the same outward

shape, with nearly the same strictly legal powers, which they still keep. All the great principles of English freedom were already firmly established. There is, indeed, a wide difference between the political condition of England under Edward the First and the political condition of England in our day. But the difference lies far more in the practical working of the Constitution than in its outward form. The changes have been many; but a large portion of these changes have not been formal enactments, but those silent changes whose gradual working has wrought out for us a conventional Constitution existing alongside of our written Law. Other changes have been simple improvements in detail; others have been enactments made to declare more clearly, or to secure more fully in practice, those rights whose existence was not denied. . . . Up to the reign of Edward the First, English history is strictly the domain of antiquaries. From the reign of Edward the First it becomes the domain of lawyers."[1]

Opinions differ as to the time when Parliament was divided into two Chambers, some accounting for this fact by a division of their place of meeting, and others from the dividing of their votes. The knights of the county were united with the great barons, even when they made common cause with the freeholders, while the deputies of the boroughs considered themselves as always forming an assembly apart. Thereafter, as the social conditions became always more equal between the freeholders and the deputies of the boroughs, their representatives were united and formed the House of Commons. Generally the division into two Chambers may be traced back to 1377, when the House of Commons appointed a Speaker for the whole session.

Having thus seen the division of Parliament into two

[1] Edward A. Freeman, *The Growth of the English Constitution from the Earliest Times*, p. 86, 1872.

Chambers, we have now to examine what specially distinguishes them, beginning with the Chamber of Peers, the House of Lords, or the Senate. The heredity of social position which sprang from the feudal system, has produced heredity of political position. In fact, the only hereditary peers were those who were members of the Chamber on account of their feudal tenure. The judiciary functions of this Chamber have the same origin, since the barons alone compose it. The national assembly took possession of the judiciary matters, and continued to keep this function. An explicit declaration as to the mutual relations of the two Chambers was made in 1399, on the invitation of the House of Commons through the mouth of the Archbishop of Canterbury, who said that the Commons were simple petitioners in Parliament, and that all judgment belonged to the King and the Lords, except in matters of statute, subsidies, and such like. Down to the electoral reform of 1832 the House of Peers preserved its preponderance by filling the House of Commons with the cadets of their families, and their creatures, especially by means of the *rotten boroughs*, which were then abolished.

The Upper House is composed of hereditary peers who are the descendants of those who were summoned individually by a Writ of Summons, of peers for life, like the Irish peers, and of peers elected by the other nobles, like the Scotch peers. In 1856 the Queen wished to appoint Baron Parke a peer for life, but such was the opposition to it that the Crown had to desist from exercising this, its unquestionable right. Every law which concerns the privileges of the House of Lords has to be initiated by itself, and it may be rejected but not amended by the House of Commons. The opposite holds for laws of taxation; but in 1860 the House of Peers amended a law of duty on paper, and the House of Commons, reserving its prerogatives, acquiesced. The

presence of three peers only is sufficient for the validity of a resolution, supposing that absent members have given a mandate to those who are present.

In England the House of Lords is the centre and head of all the administration of justice; and this shows clearly how closely united were the political and judiciary institutions, both being derived from those primitive assemblies which Tacitus describes as invested with judiciary power. By degrees the functions of judge, juror, witness, and legislator were separated. The House of Lords constitutes a special political tribunal to try the Ministers and other public functionaries. The House of Commons has the right to accuse them before it of all kinds of delicts which cannot be dealt with by the common law. This right is regarded as the safeguard of public liberty, and as worthy of a free country and of the noble institution of a free Parliament. In England peers are generally tried by their colleagues, even for common delicts. Both the Chambers in England exercise another sort of jurisdiction over those who have violated their privileges and dignity, whether they be strangers or members of the Chamber itself. They have judiciary officials for carrying their sentences into execution; in the House of Lords this is the *Usher of the Black Rod*, and in the Commons it is the *Sergeant-at-Arms*.

We may pause for a moment to glance at the mode of procedure in a trial of Ministers. 1. One or several members propose to the House the accusation, and support it with the requisite documents. It is discussed and a vote is taken. 2. If the accusation is accepted by the members, the proposer or proposers of it go to submit it to the Upper House, which needs nothing else to be put in possession of the cause. 3. It is not permitted to add anything to the articles of accusation, which are communicated to the accused, and the documents con-

taining his answers are passed to the House of Commons to receive their replies. Meanwhile the accused is arrested, or is left free under bail or security, according to the law. 4. The day of trial being fixed, the House accusing appoints its commissioners, and the accused his advocates; and witnesses are cited for or against by direct order of the House of Lords. 5. The day of hearing having arrived, the accusation and defence are read, witnesses are heard, but contrary to the usual practice, the last word remains for the accusers. 6. If the Chamber of deputies is prorogued, or even dissolved, the trial is afterwards prosecuted from the point to which it had been carried. 7. The question of guilt being put, every peer rises, and with his hand on his heart answers *guilty* or *not guilty*. 8. The House of Lords advises the House of Commons that it is ready to give judgment, and if the latter House does not insist on it the judgment is not pronounced, a sort of right of grace being thus exercised by the deputies. The accused can also set forth reasons for repelling the judgment. 9. Since the trial of Lord Danby the king is forbidden to give pardon to the Ministers.

The English Chamber of Peers or House of Lords exhibits the type of all similar institutions on the Continent. A second Chamber is indispensable to temper the ardour of a single assembly, and to give another point of support for the Crown. The Senate in the United States of America is elected by the nation in a different manner from the deputies, and this has been imitated in Belgium. The Restoration created in France a Chamber of hereditary Peers, but the Revolution of 1830 gave the king authority to nominate peers for life, to be taken out of certain classes. The Italian Constitution follows the French system of 1830, and by Art. 33 it fixes twenty-one categories or classes for the choice of the senators. These categories mostly include the eminent

offices in the State, which must be occupied before any one can be called to take part in the Senate. The twentieth category is an exception to the rule, as it authorises the nomination as senators of those who may not have adorned the country by eminent services or merits; and so likewise is the twenty-first category, which allows the selection of those who have been paying for three years 3000 francs of direct taxes, drawn from a rating of their goods or their industry. The said Art. 33 fixes the age of those to be elected at 40 years complete. The princes of the royal family in their own right form a part of the Senate, which they enter on the completion of the twenty-first year, but they do not vote till twenty-five. The president and the vice-president are appointed by the king. The Italian Senate participates in the legislative power; but it only approves the laws of taxation after the Chamber of Deputies, without its being forbidden to it to make modifications upon them. It enjoys the same inviolability as the Chamber of Deputies as regards the opinions or votes which it emits (Art. 51). The functions of the senator, like that of the deputy, are in Italy entirely gratuitous (Art. 50).

The Senate constitutes itself into a High Court of Justice in order to judge of the crime of high treason, or any act directed against the security of the State, and this is in accordance with Art. 36, which in this manner creates an exceptional tribunal contrary to the spirit and letter of the Constitution. The said Article assigns to the Senate the trial of Ministers accused by the Chamber of Deputies. In such cases the Senate ceases to be a political body, and cannot under pain of nullity occupy itself with anything but the judiciary affairs for which it was convoked by express royal decree. The Senate alone is competent to judge of the common offences imputed to its members (Art. 37).

An accessory function assigned to the Senate is to certify

the civil status of the births, marriages, and deaths of the members of the royal family, the papers connected therewith being deposited by order in its archives (Art. 38).

## § 4. The House of Commons or Chamber of Deputies.

At first the function of the House of Commons was limited to voting supplies and addressing petitions to the King and the Lords. The House of Lords continued to be considered as the Great Council of the king, as a sort of intermediary between the Privy Council and the representatives of the counties and boroughs. In the fourteenth century the powers of the Parliament were already much extended. It demanded of the king the dismissal of his Ministers; it often regulated his domestic expenses, or put his authority under guardianship, coming even at last to depriving him of the throne. The constitutional machine was, however, imperfect, as it was not able, without a direct struggle with the king, to obtain what is now reached by a simple vote of no confidence, or even by the rejection of a measure proposed by the Ministers. In the fifteenth century the power of the Parliament declined during the Wars of the Roses, but thereafter it recovered its vigour. An indubitable sign of the increased power of the Parliament in the fifteenth century was the custom of discussing *bills* instead of formulating petitions. These *bills* or proposed laws were discussed in the two Chambers. The right to vote subsidies or supplies with which the House of Commons was already invested was extended to a specific examination of the Budget and of the whole administration of the State, including the conduct of the advisers of the Crown. During this period the liberty of speech and the inviolability of the members of Parliament were clearly recognised. The mode of election was regulated by statutes of Henry

IV. and Henry VI. The ancient spirit of the institution implied that the elected representatives should be inhabitants of the county or city which elected them, and this was confirmed by a statute of Henry V. and another of Henry VI. The trial of matters relating to the elections belonged during this period to the House of Lords and to the Council of the king; and their judgment was often called for by petitions from the House of Commons.

On the accession of the Tudors the aristocracy was found weakened by the Wars of the Roses, and the cities were ruined by the long anarchy. Henry VII. had a submissive Parliament, and Henry VIII. made it subject to his every caprice. Under Elizabeth the Parliament ventured to murmur; it took courage under James I.; and it rebelled under Charles I. The middle class had increased and was animated by the spirit of Protestantism. Macaulay thinks that political causes alone, without the impulse of religious ideas, were insufficient to provoke such a resistance to the sovereign. It is not an erroneous view to reckon Cromwell among the founders of the English Constitution. It seemed, says Bagehot, that Cromwell did not survive his work; his dynasty was rejected after the fall of the republic; but his spirit was not extinguished; it remained latent, like the fire of a volcano. The Revolution of 1688, occasioned by the incredible obstinacy of James II., converted the most recalcitrant to the theory of constitutional government. The selection of the Ministers remained for a long time an absolute prerogative of the sovereign. When George III. lost the use of his reason in 1810 every one believed that George IV., then nominated regent, would take away the administration from Perceval in order to entrust Lord Grey and Lord Grenville, the heads of the Whigs, with the duty of forming a new Ministry. The Tory Ministry prosecuted with success the struggle against Napoleon, on the issue of which depended the fate of the English people. Not-

withstanding this it was believed to be in the power of the Regent to change the Ministry, merely because he was a Whig and the Ministry was Tory. This fact, says Bagehot, shows how modern is the theory of the omnipotence of Parliament.

The eyes of France and of Europe turned towards the English Constitution. Everything accidental to it was eliminated, and the Chamber of Peers and the House of Commons were reduced to the form which they hold in the Italian Constitution. The Chamber of Deputies in Italy possesses a part of the legislative power, and has a simple precedence in the matter of taxes (Art. 10). It has a controlling supervision of the executive power, since, besides its specification of the Budget, it can ask explanations from the Minister on any act of the administration, and can inflict a vote of censure, which, according to established usage, would oblige the king to change the Ministers. It remits to the respective Ministers the petitions of the citizens, calling the attention of the executive power to them (Art. 57). It puts the Ministers under accusation, when it considers that they have violated the Constitution, or any law whatever (Art. 47).

In England, the ancient statutes which obliged the electing of deputies belonging to the county or city which they were called to represent, have fallen into disuse. The mandate given to them was in the early times limited and imperative, but by degrees it became general and free. The Italian Constitution has expressly declared that the deputies represent the whole nation, and that they cannot receive an imperative mandate (Art. 41). The deputies enjoy inviolability for the opinions expressed, and for the votes given in the House (Art. 31). Except in a case of flagrant crime, they cannot be arrested nor handed over for trial, without the previous consent of the Chamber (Art. 45). They cannot be arrested for

debts during the session, or for three weeks before or after its sitting (Art. 46). The age required to be a deputy is thirty years complete (Art. 40). In order to guard the full independence of the Chamber, the appointment of the president and vice-presidents is conceded to it (Art. 43). The sessions of the Senate and of the Chamber of Deputies commence and end at the same time; and no meeting of one Chamber out of the time of the session of the other is legal, and the acts of any such meeting are declared null (Art. 48). The deputies and senators take an oath (Art. 49). Each of the Chambers is competent to judge of the validity of the titles of its members to admission (Art. 69). The statute of the Italian Constitution enters into certain particulars as to the internal regulation of the Chambers. By Art. 52 it prescribes the publicity of their sederunts, except when ten members demand in writing that the deliberation be held in secret. Art. 53 requires the presence of an absolute majority of their members; and Art. 54 requires a majority of the votes. Art. 55 lays it down that every proposal of a law shall be first examined by a commission, and that the discussion go through it Article by Article. The votes are to be taken by standing and remaining seated, by a division, and by secret voting, (Art. 63). Art. 61 assigns to the two Chambers the right of arranging by an internal regulation the mode of exercising its own functions. The Piedmontese Parliament, of which the Italian Parliament is the heir, adopted the mode of regulating its business which was practised in France. It differs from the English practice in the following points, according to Cesare Balbo in his valuable work on *Representative Monarchy in Italy*.[1] In England the only elections of deputies which are tried are those that are opposed by petitions, and they are examined in a judicial form by a parliamentary com-

[1] *Della monarchia rappresentativa*, p. 347, 1856.

mittee with full powers; whereas in Italy many sederunts are occupied in examining the elections, and the whole Chamber takes part in the discussion. In England no bill or project of law is ever proposed in name of the Crown, the Ministers bringing it forward in the same way as any other member of the Chambers. The forms are always the same in the following respects:—1. The proposer or mover rises to ask leave to present the bill on a certain day fixed by himself, reading at the same time its title and scope. The day fixed having come, at the time determined by custom the title of the bill is read anew, and the question is put whether the bill may be now read for the first time. There rarely happens a first discussion at this stage. The first reading, which amounts to its being "taken into consideration," is mostly allowed by the opponents of the bill. A day for the second reading is then fixed, which is rarely within less than eight days. If the opponents of the bill demand that the date be fixed for several months thereafter, so as to be beyond the usual duration of the session, it is understood that if this is carried the bill falls. 3. If, on the contrary, an early day has been fixed for the second reading, when it has come it is proposed that the bill be now read a second time. Therewith the discussion on the second reading is opened, and it is the only important reading, and the one which it is usual to oppose. This discussion is a general discussion of the whole contents of the proposed law; it is carried on without reporter or written report, and the leaders of the discussion speak each only once. 4. The next step is what we call "the discussion of the articles." This is done in two ways: in a general committee of the whole House, if the bill is a very important one; and in a special or select committee, if the bill is one of less importance, or one of the private bills which mostly concern local interests. When dealt with in the first

instance, in the general committee, the bill is not delayed to a later day, nor is it removed from the House; and it is the House itself which is turned into committee. The whole difference between the House at an ordinary sitting and the general committee consists in this, that the members may speak in the latter more than one time indefinitely, and that long or general speeches are not delivered in it. Hence this is the stage of the amendments and sub-amendments, on which a vote is taken if they are meant to make part of the bill. Then the sitting of the House is resumed; that is to say, the Speaker, who had left his seat temporarily for another chairman, specially elected by the committee, takes it again, lays the mace which had been put under the table again upon it, and the Chamber proceeds to vote on the second reading of the bill. In the case of a private bill all that has been said of the general committee is done by the special committee, which often reports it to the House in the same sitting. The third reading is only a matter of form, its object being to verify the text of the law.

In Italy the Chamber is divided every two months by lot into so many sections or offices appointed to deliberate on the "taking into consideration" of a proposal, which gives rise to very useless conversations on its details, and for the appointment of commissioners to examine the matter proposed. Nine operations are necessary in the Italian Chamber in order that a law may be passed:— 1. The deputy proposing it deposits his project in the hands of the president, who informs the Chamber of his having received it without even reading its title. 2. The project is sent to the "offices," who discuss whether it is worthy of being read in a meeting of the Chamber. 3. If it is declared worthy by two at least of the offices out of the nine, the project is read by the president or by a secretary, and the day is fixed for the proposer to bring it forward. 4. On the day appointed the proposer

makes his speech, and asks that his project be taken into consideration; then there rise speakers for and against it; thereafter a vote is taken, and if the proposal is carried the matter is taken into consideration. 5. It then goes back to the offices and is discussed without decision, a commissioner being nominated from each office. 6. When the commissioners have met they discuss the project and appoint a reporter. 7. The reporter then comes to the Chamber, reads his written report, and presents the project as revised and amended by the commission; and thereupon the president announces that the report and the project will be printed and distributed, and a day for the discussion is fixed. 8. On the day appointed the general discussion is opened; then they pass to the discussion of the articles, bringing forward amendments and sub-amendments, which, whether adopted or not by the commission, are put to the vote. 9. The vote is then taken, first, for the general adoption of the proposed law, and then article by article. Every one sees how complicated and prolonged this mode of making laws is.

The procedure in the case of projects of law presented in name of the king, or sent down from the Senate, is somewhat shorter, as they are no sooner announced to the Chamber than they are printed, distributed to the deputies, and transmitted to the offices, who examine them summarily and appoint commissioners. The English system was adopted in part in the regulation of 28th November 1868; but unhappily, in 1871, the Chamber returned to the old regulation. As the express rule of the Constitution does not allow the passing over the appointment of a commission for every law, it might be appointed directly by the Chambers passing over the offices, and then what the commission proposes might be discussed in the general committee. In order to give more time for reflection, Art. 56 of the Constitution prescribes that if a project of law has been rejected by

one of the three branches of the legislative power, it cannot be reintroduced in the same session.

That the Chamber may perform its functions it seems necessary that it be divided into parties, one of the benefits of representative constitutional government consisting in transporting the political parties from the public squares into Parliament and in disciplining them. Two parties are essential in every Government—the Conservative and the Progressive party—one of which enters into power with the Ministry, and the other forms the Opposition. The king, who may be called the thermometer of public opinion, makes the one or the other triumph by changing the Ministry or dissolving the Chamber.

The Germans have not failed to speculate on "the doctrine of Parties." Frederick Rohmer wrote that as the State is founded on human nature, so the parties which give vitality to the State have their root in human nature. He distinguishes four of them, corresponding to the four ages of man: the Radical party corresponding to infancy, the Liberal party to youth, the Conservative party to mature age, and the Absolutist party to old age. It is easy to prove that Radicalism and Absolutism are only exaggerations of Liberalism and Conservatism. History shows us that the infancy of the peoples was guided by entirely different principles. Vico calls it *the divine age*, and he finds the first sages in the theological poets, who were undoubtedly before the heroic poets, as Jupiter was the father of Hercules. Bagehot assigns the age of discussion to the time of the Greek republics.

Bluntschli adopts Rohmer's division, and supports it with ingenious reflections. He shows that a party (from *pars*) is a fraction of the whole, and hence, on coming to power, it ought not to annihilate the other parties, but to maintain that forbearance which strength inspires. Still less should any party outside of the Government

degenerate into faction. A party, according to Bluntschli, has two motors, particular interest and general interest, whereas a faction is moved only by selfishness and passion. Parties, the illustrious author adds, are born and flourish in a healthy nation; factions afflict a State in decline.[1]

## § 5. The Election of Deputies.

At first all the freemen attended the assembly, and took part in it in their own name. After the Germans became the conquerors, only the great proprietors were able to make long journeys in order to attend the National Council; and as we have seen in England, the immediate vassals of the king attended the great National Council at first in person, and then they came as representatives of all the freeholders who had the right to attend the County Court. The cities had no sooner acquired enough of importance to be able to give help to the Government, or to put obstacles in its way, than they were invited to send deputies to the National Council. The electoral right was therefore granted to those who attended the County Court and to those who exercised municipal rights in the cities. The statute of Henry IV. of 1405 apprises us that all the freeholders who were found present in the court of the county took part in the election. A statute of Henry VI. of 1429, and another of 1432, restricted this right to freeholders who had an annual rent of forty shillings. In the old Parliaments every county was reckoned as a unity, and its representatives were bound by instructions. As to the cities or boroughs, it was not the population in them but the corporation which was represented. After the Stuarts the elections in most of the cities were made almost

[1] See Fr. Rohmer, *Lehre von den politischen Parteien*. Zurich, 1844; Bagehot, *Physics and Politics*. London, 1873; Bluntschli, *Charakter und Geist der politischen Parteien*. Nordlingen, 1869.

exclusively by the members of the corporation (*freemen*). In some of these, however, the inhabitants also voted who paid the parochial tax called *scott and lott*. There were also the rotten boroughs, decayed localities which owed their privileges to the evil arts of the Tudors, who wished at any cost to secure for themselves votes in Parliament.

Hence the law was merely an agreement between the delegates of the different corporations, and it is presumed that every deputy in England had the individual right of the *liberum veto*. In the Cortes of Arragon the validity of a resolution was subject to the assent of all the members. In the United Provinces, in order that a resolution of the States-General should become a law obligatory on all, it needed not only the concurrence of all the States, but also that of the corporation of every State in particular. The time at which the House of Commons emancipated itself from the tutelage of its constituents, and took no longer account of their instructions, was when, raising itself to an independent and irresponsible body, it began to decide its deliberations by the majority of votes.

Before the Reform Bill of 1832 the number of independent deputies whose selection did not depend either on the Government or the aristocracy or rural gentry, was about 171 out of 658 members of the House of Commons.[1] Cromwell had withdrawn the right of election from the rotten boroughs in order to invest the more important localities with it, but the Restoration restored things to their former state. The Reform Bill of 7th June 1832 took away the right of election from all the boroughs under 2000 inhabitants, and thus fifty-six rotten boroughs, which sent each three deputies to the House, lost them. Thirty boroughs under 4000 inhabitants

[1] In 1880 the number was restricted to 652, six localities having lost the electoral franchise by the Reform Act of 1867.

had then to elect a single deputy each, instead of two. Of the others, twenty-two new boroughs of 25,000 inhabitants had the right to elect two deputies, and other twenty boroughs under 12,000 inhabitants appointed one. Yorkshire, which till then had four representatives, obtained six; the county of Lincoln got four instead of two; and the representation of the twenty-two counties was doubled by the introduction of sub-divisions. Seven counties sent three members instead of two, and three counties sent two in place of one. Other five members were granted to Ireland, and other eight to Scotland. The total number of the members of the House of Commons was not changed.

The right of voting in the cities was granted to all those who possessed a property which returned £10 sterling a year, or paid a rent of the same amount; while the old burgesses or freemen preserved intact their franchises. In Scotland the electoral right was transferred from the corporations to all the inhabitants who paid a rent of £10 sterling. In the counties the freeholders who paid a tax of forty shillings retained the vote during their life. For the future there was required in case of the freeholders a rent of £10 sterling, and the same applied to the copyholders, or leaseholders holding for sixty years; while those who had a lease for twenty years, or were tenants-at-will, did not become electors unless they showed that they paid an annual rent of £50 sterling.

By the Reform Act of 1867 every inhabitant of a borough was declared an elector if he possessed a house and inhabited it for a year and paid the poor-rates, or if, under the same conditions, he paid an annual rent of £10 sterling. In the counties the condition of the franchise was more rigorous, as it was necessary to possess an estate worth at least £5 sterling a year, or one which was let on lease for £12 sterling, and to pay the poor-

rates corresponding to this sum. Mr. (now Sir) G. O. Trevelyan proposed the assimilation of the counties with the boroughs; but the proposal was opposed by Mr. Lowe from fear of the lower classes of society. In vain was the attempt made to show that as the gentry had not swallowed up the barons, and as the yeomanry and the industrial and commercial class had not swallowed up the gentry, so the artisans would not be able to destroy the leading classes. This Reform Act was extended in the following year, 1868, to Scotland and Ireland, with slight modifications.

The proposal of Trevelyan was taken up by Mr. Gladstone and adopted by the Reform Act of 6th December 1884, which assimilated the electoral conditions of the counties to those of the boroughs. The Act of 25th June 1885 arranging a new distribution of seats took away several seats from boroughs of the least importance, and gave them to the counties, by which there were created six new seats in England and twelve in Scotland, so that the House of Commons now contains 670 members.

As to the eligibility of members, an Act of the fourteenth year of George III. permitted the cities and counties to choose their representatives from the whole kingdom; in 1838 the tax was lessened, and in 1858 all legislative regulation as to the £600 rent from land which every candidate had to possess was abrogated. In 1872 an Act was passed which introduced by way of experiment, till the 31st December 1880, voting by secret ballot, and it remains in force.

The Constituent Assembly in France distinguished the active citizens from the non-active. Active citizens were those who had completed their twenty-fifth year, who were domiciled in a city or canton for a time determined by the law, who paid a contribution to the taxes at least equal to three days' work, who were not domestic servants, who were enrolled in the registers of the National

Guard, and had taken the civic oath. To them was granted the right to take part in the primary assemblies which had to meet every two years in the cities and cantons in order to form the national legislative assembly. The non-active citizens were those who happened to be under accusation, bankruptcy, or insolvency. On 10th August 1793 this distinction was abolished, and all the citizens took part in the primary assemblies in accepting or rejecting the laws. Domestic servants acquired political rights; but the exercise of these rights was suspended in the case of every citizen who happened to be under accusation, or who was condemned for contumacy. The constitution of the year III. returned to the ideas of the Constituent Assembly in requiring qualities of independence and good conduct, as well as the payment of a personal or property contribution to the taxes. The later constitutions held firmly to these principles, except those of 1848, 1852, and 1875, which proclaimed universal suffrage as it exists in the United States of America.

A new electoral law for Italy was published on the 22nd January 1882, in substitution for that of the 17th December 1860. In order to be an elector it is necessary to have the enjoyment by birth or by descent of civil and political rights, to be of the age of twenty-one years complete, to be able to read and write, to pay an annual tax of not less than 19 francs 80 cents, made up of any direct contribution whatever, the provincial tribute being also added to it; or the payment of the rent of a house or place of business of 150 francs in the small cities, and of 400 francs in the larger cities. Those also are electors whose capacity is manifest, such as teaching professors, the members of academies, those possessing the dignity of the knightly orders of the State, public functionaries, procurators, notaries, accountants, surveyors, apothecaries, officers of the mercantile marine, bankers

and brokers legally practising, those who have obtained the patent of communal secretary, those who have obtained the certificate of a lyceum and gymnasium, or one of a technical, professional, or university kind; also those who have passed the examination of the first course of an institution or a public school of a secondary grade, be it classical or technical, normal, magistral, military, nautical, agricultural, industrial, or commercial, or that of arts and trades, or of the fine arts, and music; and in general the certificate of any institution or public school of a higher grade than the elementary, whether under Government, or affiliated and recognised or approved by the State.

In order to be a deputy the Italian law requires no other condition than those laid down by Art. 40 of the Constitution: the age of thirty years, and the enjoyment of civil and political rights. Art. 83 of the electoral law above referred to makes ineligible ecclesiastics having cures of souls or jurisdiction with the obligation of residence, those who take their place; and the members of chapters. The law as to parliamentary incompatabilities of 30th May 1877 declares not eligible the employees or functionaries receiving a salary from the budget of the State, or from the budgets of the fund for worship, from the general savings of vacant benefices, from the Civil List, from the Grand Master of the Maurician Order, and from the schools of all kinds subsidised by the State; with the exception (1) of the Ministers and general secretaries of the Ministers, the Minister of the royal house, and the first secretary of the Grand Master of the Maurice Order; (2) of the president, presidents of Session, and councillors of State; (3) of the first president, presidents, and councillors of the Court of Cassation, the first president, presidents and councillors of the Courts of Appeal who cannot be elected in the territory of their actual jurisdiction or in that in which they have held office six months before the election; (4) of the general

officers and superior officers by land and sea who cannot be elected in electoral districts in which they actually serve, or have served six months before the election; (5) of the members of the higher council of health, public works, and mines; (6) of the ordinary professors of the universities or other institution where the higher academic degrees are conferred. These functionaries, however, in all may not exceed the number of forty, in which number, however, are not reckoned the Ministers and general secretaries, nor those who have retired from office or are nominated again to their former functions. The following are not eligible: directors, administrators, mandatories, and in general all those who are paid out of the budgets of the industrial and commercial societies subsidised by the State with a continuous subsidy or guarantee of interest, when these subsidies are not conceded by virtue of a general law of the State. Similarly, the legal agents and procurators who habitually give their work to the aforesaid societies or undertakers are ineligible. Ineligible, too, are those who are personally bound with the State by concessions, or contracts of works, or contracts of supply. It would have been much shorter and more conclusive to substitute for Arts. 97, 99, and 100 of the abolished electoral laws a single article in these terms: There cannot be elected as deputies any who directly or indirectly receive anything from the budget of the State, with the exception of the Ministers. The professors, magistrates, and other functionaries ought to bring to the Senate the equipment of their knowledge and the fruit of their experience, the other Chamber remaining the real interpreter of the wants of the country. The kingdom of Italy has been divided into 135 electoral districts (*collegi*), to which have been assigned two, three, or five deputies, according to their numerical importance. But in a district with five deputies the elector writes four names on his schedule, and the fifth will be elected in the person of the

one who, in the summing up, shall have obtained the greatest number of votes.

This deputy or representative of the minority has been suggested by the celebrated work of Thomas Hare on *The Election of Representatives, Parliamentary and Municipal*, in which the author proposes to divide the country into great electoral divisions, such as England, Scotland, and Ireland, for the British Islands. The electors would be divided in the proportion of the deputies to be appointed, and there would be as a quotient the number of votes necessary to be obtained to be a deputy. Every elector would vote for several candidates, and when the first on the list in the whole department had obtained the determinate number of votes, the other votes would go to the benefit of the candidate second on the list, and so on. In this way the minority of the whole district would effectively co-operate in the appointment of the deputies, notwithstanding the votes being local, and no vote would be lost.

John Stuart Mill, again, as is seen in his celebrated work *On Representative Government*, is keenly interested in the lot of the electors, and would like to bring to the poll all who are not in a dependent condition, such as domestic servants and the poor supported by the parishes, and those who are in a state of bankruptcy or insolvency. To avoid the absurdity of having the taxes voted by those who do not pay them, they ought first to be subjected to a light direct tax; moreover, there ought to be required a proof of capacity by their being submitted to an examination in reading, writing, and arithmetic. But they should not have an equal suffrage, since such is not the mental condition of all. The criterion which ought to be taken should be education, or instead of it the occupation of the individual, and not his riches. To persons considered more capable from their occupation, or who would show this by a voluntary examination, there should be given

a plural vote. The sum of these votes, however, ought not to degenerate into a caste privilege, and hence they should be in a just proportion with single votes. In order that this prerogative may not become odious, the persons invested with the plural vote would have to vote several times under different categories instead of making them deposit a plurality of votes in the box in presence of electors who gave in only one vote.

Professor Lorimer, in his work on *The Constitutionalism of the Future*, showed himself to be also an advocate of relative suffrage. He wished to substitute for mechanical election dynamical election, which would consist in assigning to each citizen as many votes as corresponded to his age, his taxation, his profession, and his education. Thus an English citizen of fifty-one years of age, who has been a member of Parliament, who has an income of £10,000, a university degree and a profession, would come altogether to have twenty-five votes. In this way all would be electors, but with unequal votes, according to the social inequality.

In order to make all participate in the election of deputies, it has also been held that recourse should be had to indirect election by having an electoral body chosen by all, which body would appoint the deputy. This system was adopted in the French constitutions of 1791, of the year II., and of the year III., and is in use in Prussia and in other States; but it does not receive the sympathy of writers on the subject, who consider it a useless complication.

All these systems, however, start always from the individual. In Chapter IV. of this volume we have examined those which propose to give to the representation a general and collective basis. We believe this to be applicable rather to an elected Senate; thus keeping the individual vote for the Chamber of Deputies and returning to the separate electoral districts, but without severing

it in an absolute manner from the status of the elector in reference to the taxation, since a good electoral system ought to be based upon the capacity and independence of the elector.

## § 6. Accessory Guarantees.

In order that the division of the powers and the election of deputies might be also applied to the provincial and communal order, Art. 74 of the Italian Constitution lays it down that the communal and provincial institutions, and the electoral districts of the communes and provinces, are regulated by one law. Art. 52 makes public the meeting of the Chambers, and Art. 72 the sederunts of the courts. The liberty of the press is only the exercise of a natural right, but it completes the guarantee of publicity. The irremovableness of the judges after three years in office (except in the case of praetors) is established by Art. 69, and it strengthens the regulation of Art. 71, according to which no one can be withdrawn from his natural judges.

Art. 75 ordains that the conscription or levying of soldiers, which may be called the tax of blood, shall be regulated by a law; and Art. 76 institutes a communal militia on bases also fixed by a law.

In all times arms have been entrusted in Italy to those who exercised political rights. The citizen was a soldier, and the soldier could not forget that he was a citizen. The Roman patrician went to war followed by his *gens* and his clients. The reform of Servius Tullius was both political and military. The five classes established by him formed bodies of infantry, and they were distinguished principally by their arms. Above them were the cavalry, and below the light infantry, slightly armed. The age of entering the bodies was seventeen years, and that of leaving them sixty; the time of remaining in

them being just that which was fixed for the military service. The younger men composed the active army, and the older men formed the reserve. This reform constituted a revolution, analogous to what took place towards the end of the feudal regime, when the soldiery, instead of gathering under the banner of their lord, obeyed the captain nominated by the king. The Roman army was made up according to the patrimony of the citizens. The less wealthy formed a restricted number of companies; the aristocracy and the rich plebeians (somewhat like the English *gentry*) kept up at their own charge half of the company of foot soldiers and all the cavalry, and the poor were entirely excluded. After the Samnite war, owing to the necessities of the service, the infantry was divided into four categories, the *Astates*, the *Principes*, the *Triares* (a select body), and at one of the wings the *Velites*, while the other wing was occupied by the cavalry, of which the nobles formed the first six companies. Under the first consulship of Marius, the army ceased to resemble the city, the proletariate being incorporated in it. Payment of taxes was not required from the legionaries, nor from the cavalry. Under the imperial despotism the business of arms became a separate profession; even the barbarians were incorporated in the legions, and they gradually obtained predominance over the citizens, and disposed of the empire.[1]

The virtue of the Roman valour having spent itself, the empire broke into fragments, and the barbarians who were not taken as auxiliaries fought against it as enemies. Every captain gathered his band of dependents, and led it in the enterprise which had been decided by

[1] See Fustel de Coulanges, *Les armées romaines sous le rapport politique*, in the *Revue des deux mondes*, 15th Nov. 1870. During the siege of Veii an indemnity was paid to the legions, and this was practised in long campaigns. But the payment of the soldiers properly so-called began after the consulship of Marius. Cæsar doubled the pay.

the chiefs in their assembly. After the conquest of the empire they preserved nearly the same organisation. Under the Lombards and other Germans every duke or count had to bring his dependants to the army. Under the rule of the Carlovingians every subject, with the exception of slaves and Jews, had to serve in war, provided he was not under infamy. The Count led them to the field, exercising also the power of supreme judge; and the poor remained to guard the country. The obligation to serve in the field terminated after forty nights; whoever left sooner incurred the penalty of death and confiscation. When they were not carrying on war on the frontier, they were fighting in the interior. But the institution of the Communes sprang up near the castle from which the baron descended with his knights to pillage the country and to attack his rival. Out of them arose the union of freemen, who opposed the strength of many to the force of one; and in order to arrange themselves for defence, they constituted themselves into a communal militia. The king obliged the Communes to furnish men on foot and on horse, without diminishing the obligation of the feudatories to come with their dependents at the royal call. Thus the army was composed of feudal and citizen soldiers, besides the mercenaries, who were mostly Brabantine, Italian, and Scotch; and this continued down to the time of Charles VII. When Philip Augustus wished to punish the contumacious Count of Flanders, he gave pay for the first time to the troops; and Henry II. had already introduced this practice among the English. With the progress of strategy, permanent armies were established almost everywhere; and nothing remained for the communal militia to do but the humble office of maintaining order.

At the beginning of the French Revolution the citizen militia took the name of the National Guard. The

Constituent Assembly recognised the necessity of conscription; and on 22nd April 1791 it called out more than 300,000 men of the National Guard, in order to form them into companies and battalions, so as to be ready for every emergency. The Convention made itself strong at home and terrible abroad; and in July 1793 it decreed a levy of 1,200,000 men. All the young men ran to the frontiers, where they brought no confusion, because they were immediately enrolled in the eighteen armies of the Republic. By degrees it began to be understood that with the tactics of the times a mere multitude of soldiers was of no advantage; and Napoleon won his most celebrated battles with a limited number of combatants.

The armed force was therefore divided into three classes —the Army, the National Guard, and the *Gendarmerie*. The army was designed to guarantee the external security of the State; the National Guard had to guarantee the internal public security; and the *Gendarmerie* the security of the private citizen. The first French Constitution of 3rd September 1791 clearly distinguished the three kinds of armed force; and the later Constitutions expressly stipulated the maintenance of the National Guard, to which was entrusted not only the preservation of order, but also the defence of the constitutional liberties. Hence the edict of 4th March 1848, which ordained the establishment of the communal militia in Italy, expressly sanctioned the position that this militia is instituted to defend the monarchy and the rights consecrated by the Constitution, to uphold obedience to the law, to preserve or restore the public order and tranquillity, to aid the army when necessary in the defence of the frontier and coast, and to maintain the integrity and independence of the State.

After the American War of Secession and the battle of Sadowa, the military system was changed everywhere.

The rapid means of communication have permitted the transporting and feeding of a great number of soldiers. In Italy all the citizens are personally obliged to military service from the twenty-first to the thirty-ninth year of their age. Those who are not found suited for the standing army or the movable militia (the first and second categories), are enrolled in the territorial militia in terms of the law of 17th August 1882. This is the Prussian system of a standing army, consisting of the *Landwehr* and the *Landsturm*, which of itself supersedes the institution of the National Guard, as has been the case in Italy, notwithstanding Art. 76 of the Constitution.

This military organisation corresponds to the political rights where universal suffrage is in force. In other countries it is extended to all the citizens in virtue of the modern principle which distinguishes liberty from sovereignty. But if hereafter strategy should show itself less successful than in 1870–71, in moving such a great multitude of armed men, the number of the combatants will be restricted; and it will then have to be considered whether arms may be entrusted to every class of the citizens, notwithstanding the ferment of the social question, trusting only in doing so to the bond of discipline.

## § 7. The Principal Constitutions.

Written constitutional laws are an entirely modern invention, as the peoples followed custom and precedent before getting to written stipulations.

Europe is inhabited by three principal races—the Latin, the German, and the Slavonian. The ancient civilisation was principally propagated by the Latin race, which made the citizen subordinate to the State, confounding liberty with sovereignty. The Germanic race tends by

its nature to individuality, and hence the modern free institutions have been created by it. The Slavonic race has shown itself in part free and in part servile, having a genius of less repulsion than the Germanic race. We shall commence our examination with the Germanic race.

The most ancient migrations proceeded from the Scandinavian peninsula, from which went forth the Goths and the Suevi, who settled on the banks of the Euxine, at the mouths of the Don and the Dniester, whence they were driven away by the Huns. Their organisation, like that of the primitive peoples, was into tribes, with deliberation in common on the most important affairs. The Goths never returned to their original country, but scattered themselves over the south of Europe. In Sweden we find in vigour as early as the ninth and tenth centuries assemblies called *Worf* or *Thing*, which elected the sovereign (generally in the same family), settled the taxes, decided the most important affairs, and judged as a supreme tribunal all private disputes. These assemblies were convoked by the king, or by the magnates who assisted the king.

The speciality of the organisation of SWEDEN was the admission of representatives of the peasants in these assemblies. Down to 1448 the cities and the country districts were promiscuously represented; but the cities had then special representatives. In Sweden there were no slaves, and the feudal regime was introduced in a very mild form. The vassals could not be taxed without their consent.[1]

Acts of the years 920 and 1282 exist which relate to the election of the king and the revenues of the Crown. In 1442 King Christian revised the laws of Sweden, among which were found many political regulations; so that Sweden may be reckoned among the first of the

[1] On the organisation of the ancient nations of the North, see Ortolan, *Histoire du droit politique*, 1844.

States which had a written Constitution. This Constitution was frequently modified. It was modified in 1680 in the royal favour, in 1719 in favour of the classes, and in 1772 again in favour of the king. Although the Revolution of 1809 was effected by the aristocracy, it had the unanimous consent of the other classes. The form of the Government was established by the Constitution of the 6th June 1809, and modified as regards the national representation by the law of 22nd June 1866, which has abolished the ancient distinction between the four orders of nobility, clergy, citizens, and peasants. The legislative power in Sweden is now in the hands of the king and two Chambers. The First Chamber contains 133 deputies, elected for nine years by the Provincial Councils (*Landsthing*), and by the Municipal Councils (*Stadsfullmägtige*) of the cities which contain at least 25,000 inhabitants. The Second Chamber is composed of 198 deputies, elected directly by all the Swedish citizens of the age of twenty-five years, met in a primary assembly, provided that the majority in the commune composing the electoral district does not resolve to elect deputies directly. It is necessary that the elector pay taxes. The control of the Executive Power is rigorous; and when the Chambers are not sitting it is exercised by a commission and by a procurator-general.

NORWAY, which depends on the same Crown, but with a separate administration, has a single assembly which was formerly triennial, but is now annual. It is called the *Storthing*, and contains 114 members. It divides itself into two Chambers, assigning to the first the fourth of the elected deputies, and retaining the others in the second. The First Chamber (called the *Landsthing*) can accept or reject the projects of law approved by the Second (called the *Odelsthing*), but cannot amend them. In the latter case, after the Second Chamber has twice approved the proposed law, it may demand a plenary

sitting with the other Chamber; and then what may be voted by two-thirds of a majority will have the force of law. The fundamental Law of the Norwegian Constitution bears the date of 4th November 1814, but it was modified on the 4th April 1869 and on 7th July 1878. Resolutions voted in three consecutive legislatures obtain the force of law, in spite of the refusal of the royal sanction.

The Danes, although they were pirates, and fiercer in their habits, had the same organisation as their neighbours. They were not in contact with the rest of Europe till the ninth and tenth centuries, when they appear under the name of Normans. DENMARK, being nearer the continent than Sweden and Norway, was more largely penetrated by the feudal usages and the spirit of privilege. The nobility were haughtier, but there did not exist slaves properly so-called, the soil being possessed by free cultivators or farmers on a scale of conditions agreed upon with the proprietors.

Denmark possesses three codes of different dates, but none of them contains the political institutions, which must be sought in preceding Acts or in other separate Acts. A Diet takes part in the election or confirmation of the king and in the more important Acts. In 1660, under Frederick III., the ancient constitution was changed, and the royal power became absolute by an agreement between the monarch and the citizen, directed against the nobility. These changes were confirmed by the *lex regia* of 1665. In 1831 Frederick VI. granted provincial liberties. His successor, Frederick VII., on ascending the throne on 20th January 1848, promised a new constitution, which was promulgated on the 5th June 1849, after having been discussed in the Chambers. This constitution was modified in 1855 and 1863, and was finally sanctioned by the law of the 28th July 1866. It establishes a bipartite diet in two Chambers, namely, the

*Landsthing*, composed of twelve members nominated by the king, and fifty-four members elected by a double-graded suffrage; and the *Folksthing*, elected by direct universal suffrage.

In GERMANY proper the political institutions had a less rapid development. As soon as the successors of Charlemagne divided the empire by the Treaty of Verdun in 943, the monarchical and centralising principle became dominant in France, and the separatist principle in Germany. The three great dynasties—the Saxon, the Frank, and the Swabian—strove in vain to create a firm and stable monarchical power. After the fall of the house of Swabia, and the long interregnum, Germany became what Frederick the Great called "a republic of princes with an elected head."

The constitution of the old German Empire contained a college of electors (three of them spiritual and four temporal); a college of princes, in which voted the princes who were not electors, the bishops with the rank of princes, the counts, and the prelates generally; and a college of free cities. In order that a decision might be valid it was necessary that it should have received the majority of the votes of the three colleges and obtain the sanction of the Emperor. After the Thirty Years' War the Parliament became permanent in 1665; but as the princes ceased to take a personal part in it, it was reduced to a conference of ambassadors. It thus became a model of slowness and circumlocution, and in these respects it was perfectly imitated by the diet which succeeded it in virtue of the Federal Act of 8th June 1815. In vain was the attempt made in 1848 to give a new constitution to Germany; since neither the constitution of the Parliament of Frankfort of the 28th March 1849, nor that of Erfurt of the same year, came into force. On the 20th May 1850, the ancient Diet was re-established, with the whole system constituted by the Federal Act of 1815.

After the Austro-Prussian War of 1866, and the Franco-German war of 1870, Germany became a republic of princes with a hereditary head, who first assumed the title of President and then that of Emperor. According to the constitution of 16th April 1871, the Imperial Power exercises exclusively the right of legislation as regards military matters by land and sea, the finances of the Empire, the customs, and German commerce, the post-offices, the telegraphs and the railways necessary for defence, and the development of the constitutional compact. The Executive Power is entrusted to the King of Prussia, who at the same time is Emperor of Germany; and he governs by means of a single responsible Minister, who takes the name of Chancellor. The Legislative Power belongs to two assemblies—the *Bundesrath* composed of representatives of the various States that are members of the confederation, and the *Reichstag*, a chamber of deputies elected by direct universal suffrage, there being one member for every 100,000 inhabitants. The accordance of the majority of the two assemblies is sufficient to make a law pass. The Emperor has not the right of *veto*, seeing that he is already represented in the *Bundesrath* as King of Prussia.

In the several German States we see a sort of reflex of the constitution of the Empire. As the great vassals and the cities of the Empire stand relatively to the Emperor, so do the nobles and the corporations of the cities stand relatively to their sovereign. Biedermann, the author, whom we follow in this account, gives as instances of the ancient diets in the feudal States of Germany the constitution of the two Grand Duchies of Mecklenburg, a constitution which was confirmed in 1755, more than a hundred years ago. He says that a seat and a vote in the diet of Mecklenburg belong in the first place to all the proprietors of estates (formerly these being only the nobles, but now citizens are also admitted), and

this they have personally in virtue of their own rights; and in the second place, the cities which enjoy this privilege are represented by their magistrates. There is therefore no question of election. The population of the country districts thus remains deprived of representation, except the landholders. The nobility and gentry divide with the Grand Duke the legislative power in such a way that he exercises this power alone and without limit, over the domains or goods of the State. The legislative acts, applicable to the whole country, are divided into "indifferent acts," or those that do not affect the privileges of the State, but bear upon the good of the whole country, and the other "acts which bear in whole or in part on the rights acquired by the nobles and landowners." As regards the former it sufficed to hear the "considerations" of those orders. As regards the latter their express consent was necessary. The same holds with regard to the requisition and imposition of the taxes. A part of them is determined by the States according to their pleasure, and it is distributed over the populations which depend upon them, namely, the inhabitants of the cities and the vassals of the baronial estates; and they make what use they please of them without having to give any account thereof to the Government. Another part of them is fixed by the Government with the approbation of the States, and to it have to contribute not only the baronial estates and the cities but also the demesne of the sovereign. Finally, there is another class of expenses, those which the particular States, the lords, and the cities require for their local wants, and which they have to furnish exclusively out of their own means.

After the Thirty Years' War such institutions were almost entirely abolished. Two countries were exceptions, namely, electoral Hesse and Würtemberg. Fox said that the Würtemberg constitution was the only one on the Continent which had some analogy with the

English constitution. With the French invasion all this disappeared; and the sovereigns, though liberal in promises during the time of the national struggle, forgot everything after the victory, hardly sanctioning by Art. 13 of the Act of Confederation the rule that all the governments should have a constitution with a provincial diet. Bavaria and the Grand Duchy of Baden in 1818, Würtemberg in 1819, Hesse-Darmstadt in 1820, and Saxony in 1831, had but shadows of constitutions. In 1848 these constitutions were renewed, and even Austria and Prussia paid tribute to the ideal of the age. Austria suddenly withdrew from the constitution of 4th March 1849, which it had only conceded in form without applying it; but after the war of 1859 it returned to the representative regime by the diploma of 28th October 1860, and by the patent of 26th February 1861. Prussia, on the accession of Frederick William IV., obtained provincial councils. In 1847 the representatives of the various provinces were summoned to Berlin and divided into two Chambers—the Court of Lords and the Court of the Estates. The resistance of the king prevented the desired reform from being realised, and the revolution of February made Prussia pass through various vicissitudes until the constitution of 31st January 1850 was passed. It is still in force, although shorn of some of its liberal elements in consequence of the revision brought about by the minister Manteuffel.

SWITZERLAND belongs ethnographically to Germany. Its principal cities on the side of Swabia, such as Zurich, were imperial cities, and even the cities of the Forest Cantons, Schwyz, Uri, and Unterwalden, had become cities of the Empire. The form of its government is very ancient, and it seems to have proceeded from the hand of nature. As among the other Germanic peoples all affairs were resolved upon in the general assembly of the freemen presided over by their *Landmann;* but the

Emperors kept their *Vogt* or representative. After the battle of Morgarten the confederated Swiss asserted their liberty, and the Treaty of Westphalia recognised their absolute independence. Although Switzerland was born of a struggle against the imperial aristocracy, the cantons were organised aristocratically, and they remained such down to 1798. By the Act of Mediation, Napoleon, then first consul, gave them equality in default of liberty. In 1815 things returned to their former state by the preponderance being restored to the aristocracy and to the small cantons. In 1830 the cantonal constitution began to be reformed in a democratic sense, and on the 12th September 1848 the Federal Compact was revived by establishing a Directory of seven members under the name of a Federal Council nominated by the legislative power. This Council is divided into a National Council, elected for three years by universal suffrage, and into a Council of the Estates whose components are chosen by the popular assembly and by the great council of each canton. In the Swiss Constitution the executive power, taking its origin from the legislative power, lacks independence. A federal tribunal judges disputes relating to the confederation. The Federal Compact was again renewed by the Swiss people on the 29th May 1874. It regulates the uniform military organisation in the cantons, the legislation relating to the civil capacity, the acts of a civil kind, the affairs of commerce, literary and artistic property, and the diplomas of the liberal professions. The federal power supervises the primary instruction and the issue of bank-notes; it regulates the railways, and has the administration of fishing, hunting, forests, and public amusements; and it has charge of the dykes and other public works, and of the working of children in factories. It is limited, however, by the right which every citizen has under certain conditions to demand the *referendum* of the laws and decrees voted by

the federal assembly, which are then submitted for the approval of the people, who must necessarily be consulted on every modification made on the fundamental compact.[1]

The Saxons, on passing into ENGLAND, carried thither the spirit of liberty and equality which reigned in the forests of Germany. Their social institutions, which had taken the shape of a confederation of tribes, assumed a more rigid form in order to maintain the new conquest. They founded a large number of principalities or kingdoms, which met at need under a supreme head. But for the assembly of all the freemen fit for arms, there was substituted an assembly of the great proprietors and public officials called the *Wittanagemot*. We have already seen how the *Wittanagemot* gave origin to the House of Lords and then to the House of Commons.

The English on crossing the Atlantic left behind them the Monarchy, the Aristocracy, and the official Church. The AMERICAN Colonies organised themselves after the likeness of the mother-country; in all of them we find a Governor with the more or less extensive right of *veto*, and two Chambers elected in different ways. The federal constitution of 17th September 1787 was drawn up on the model of the constitution of the different colonies, but with happy innovations. The president was made independent of the Chambers, and his responsibility delivered the Ministers from the daily struggle with the Chambers. But the appointment of the highest functionaries, including the Ministers, has to be approved by the first Chamber or the Senate. The Senate of the United States is composed of two senators from each State, elected for six years by the respective legislatures, a third of them being elected every three years. The Chamber

[1] On the 18th May 1879, Art. 65, which abolished capital punishment, was abrogated, there being substituted for it the Article of the Federal Act of 1848, which suppressed it only for political offences.

of Representatives is formed of members who are elected every two years (one for every 130,000 inhabitants) by the electors in the various States. From 1830 to 1850 almost all the States adopted direct universal suffrage. The initiative in bringing forward laws which affect federal interests, belongs to the two Chambers; but every tax must take origin in the House of Representatives, the Senate being entitled to propose amendments upon it as on every other law. The President communicates with the two Chambers by a message on the opening of the session, and by writing whenever he considers it expedient. Every law approved by the two Chambers has to be presented to him; if he approves it he signs it, but otherwise he sends it to the Chamber where it took origin. This Chamber causes the objections of the President to be transcribed in its minutes, and proceeds to a new examination of the law, when it must be voted by two-thirds of a majority. If it obtains the same majority in the other House, the law will enter into force notwithstanding the opposition of the President. The President is chosen by special electors nominated by each State, of a number equal to the senators and representatives which it sends to the Congress. The presidential electors meet the same day in their respective States and vote for a President and Vice-President. The judiciary power is sufficiently strong and independent to keep the assemblies and the President in their proper limits: the Supreme Court of the United States being entitled to annul when unconstitutional any law of the several States and even of the Union. There is thus left open a legal remedy for every one as the condition of disarming sedition, or, at least, taking away every pretext from it.[1]

[1] The revision of the Constitution of the United States may take place on being demanded by the Congress or the Legislatures of the States, but only when carried by a majority of two-thirds of these assemblies. In the first case the Congress will propose the Amendments; in the second case the Congress will summon a convention to propose the Amend-

Before passing to the Latin race we shall give a glance at Hungary and the Slavonic peoples. HUNGARY has a written Constitution, called the *Golden Bull*, granted by Andrew II. in 1222, seven years after the English barons obtained the *Magna Charta*. The Hun population had no sooner established themselves definitively in the two Pannonias than their great king, Stephen I.—whom the Church reckons among its saints—laid the basis of their political and social organisation. At that time their society was divided into three orders: the clergy, the magnates, and the simple nobles. The remainder of the population forming the common people, was attached to the soil and in part enslaved: *misera et contribuens plebs*. The citizen class cannot be said to have been constituted before the fifteenth century, when many free cities acquired importance and formed the fourth order. The lands, cultivated originally by the peasant soldiers who depended directly on the supreme court, had been declared part of the royal domain and were possessed only by a precarious title. The Anjevin rulers established the feudal regime, and the lands were held under the title of feus. The Golden Bull stipulates the maintenance of the principal liberties of the nobility and clergy, and expressly reserves the right of insurrection against the king if he should ever come to violate them. The country was not divided into departments like the France of our day, nor into fiefs like the States of former times. It was divided into *comitati*, that is to say, into so many castles around which were grouped the cities and boroughs, and in which the provincial magistrates resided. At the head of the comitatus was the

ments which will not become definitive unless approved by three-fourths of the voters. There have been fifteen Amendments. Ten Amendments were approved on 15th Dec. 1791; the eleventh on 8th Jan. 1798; the twelfth on 28th Sept. 1804; the thirteenth on 18th Dec. 1868; the fourteenth on 28th July 1869; and the fifteenth on 30th March 1870.

chief count nominated for life by the king, and he was assisted by the vice-count, who was also nominated by the king, but on the proposal of the chief count. The soul of the comitatus or county was the provincial congregation, a small diet which met every three months for ordinary affairs, and which constituted the administration of the county every three years. It further examined the royal decrees and the sentences of the higher tribunals before putting them into execution. It was composed of all the nobles, without distinction, and of the clergy.

The general Hungarian diets met under the presidency of the king, who heard complaints and gave remedy in just appeals. Their existence is very old, and they are sanctioned by the Golden Bull. They were appointed to be held annually in autumn, during the reign of Matthew the Just. At first the diets were composed of all the men of arms; and from the prologue of a decree of Saint Laudislaus of 1092, it appears that all the nobles took part in it. The Golden Bull consecrates this right; but under Bela VI. the principle of representation prevailed. Before the time of King Sigismund, the prelates, barons, magnates, and "the servants of the king" formed a part of the diet; but under this monarch the cities were represented. The diet was then composed of four orders, comprised under the sacramental formula: *Universitas praelatorum, baronum, nobilium et urbium.* The laws were enacted most frequently after proposal by the king; but sometimes also on parliamentary initiative. They were then sanctioned at the end of the session, in a single decree. Under the pretext that the deputies were too numerous the diet was divided into two Chambers. In the first of these, called the Diet of the States, sat the prelates, the barons, and the magnates. In the second, called the Diet of the Orders, sat the representatives of the counties and cities. The Palatine was an institution peculiar to Hungary.

He was the tutor of the king when a minor, the commander-in-chief after the king of the national army, the supreme justiciar, and the keeper of the archives of the kingdom. He was appointed by the Orders out of four candidates proposed by the king. He was the mediator between the governor and the governed; he received the complaints of the citizens who considered themselves injured by the king; and in the early times he cited his Majesty to compear at least by a procurator. He has been rightly regarded by writers on the subject as the personification of the law.

The Hungarian Constitution lasted a long time under a strictly aristocratic form; but after 1825 the ideas of social liberty penetrated into Hungary, and various privileges were abolished. In 1848 the peasants were enfranchised by an indemnity paid by the nation to the lords. The diet was abolished as a diet of the four orders, and rose again as a national representation. On 9th March of the same year, Hungary obtained a separate Minister; but after a heroic struggle for the attainment of its complete independence, it was overcome by the united forces of Austria and Russia. After 1859 Austria tried a policy of reconciliation with Hungary through the diploma of 20th October 1860, and the patent of 26th February 1861 above mentioned, which organised provincial diets for all the nationalities of the empire, and a common representation under the name of the *Reichsrath* (Council of the Empire). Hungary would not renounce its past, and an agreement (the *Ausgleich*) was come to on the 28th June 1867, of which we may state the fundamental positions. Hungary preserves the Constitution of 1848 with the following modifications:— The finances remain common with the rest of the empire, in so far as regards the army and foreign affairs; the Hungarian diet votes the annual contingent of the kingdom; and the Hungarian diet and the Reichsrath of

Vienna appoint two delegations, equal in number, for managing the common affairs, with the right of initiative. A single responsible minister, called the Chancellor, represents the Emperor of Austria and the King of Hungary in the delegation. This system is known under the designation of dualism.

Alongside of Hungary there arose two Slavonic kingdoms which took a great part in European history, namely, POLAND and BOHEMIA. The name of Poland is sacred to all, and therefore it will not be out of place to give some particulars regarding its political organisation.

The Polish Constitution was based upon an elected king, a Senate, a general diet, and local diets. The Senate was composed of the bishops and the irremovable dignitaries, whom the king appointed to rule the administrative districts or palatinates, besides the twelve dignitaries of the king, who formed a sort of ministry. The functions of the Senate consisted principally in giving counsel to the king; and Sigismond Augustus, in the diet of Petikan of 1548, promised to decide nothing without conferring with the senators.

The local diets met in every palatinate on the convocation of the king, and under the presidency of the Palatine. They were composed of all the nobles of the palatinate, who met to deliberate on affairs peculiar to the palatinate, or in preparatory meetings regarding the general affairs, or to select deputies to the great diets.

The general diet was convoked by the king, and was composed of the representatives of the nobility of the various palatinates, who took the name of *nuncios*. They received a special or general mandate according to circumstances, and an allowance from the public treasury. They met in two preparatory assemblies at Kercin and Kol; and every noble had the right to take part in these preliminary conferences. The proposals at the general diet were made in name of the king by the Chancellor.

The Senate gave its opinion, and the nuncios retired to deliberate, being entitled also to make counter-proposals. The Senate discussed their observations, and the king pronounced upon them, and his decision was the law. The king was thus judge between the Senate and the nuncios; but as his power would have become absolute if it had remained uncontested, every senator and every nuncio had the right to oppose the royal decision if he considered it contrary to the laws and the liberties of the kingdom. This right was called *liberum veto*. In that case, all remained suspended until the various opinions were brought to agreement, or another resolution was adopted.

The throne was elective. The nobility knew no subdivision nor gradation, since there was no feudal bond among the nobles, all being equal. The lower class was placed outside of all political and natural law. The citizens, artizans, or inhabitants of the cities, were corporeally free, but the remainder of the population was reduced to the hardest servitude. When the nobles wished to reform their Constitution in order to escape the imminent ruin which hung over their country, they learned that Russia and Prussia, by the treaty of 1776, had put the *liberum veto* under their common guarantee.

The patriotic confederation of Bar could not avert the fate of unhappy Poland; for Austria united with Russia and Prussia, and the first partition took place in 1774. All parties gathered around the king, Stanislaus Poniatowski; and on the 3rd May 1791 they reformed the Constitution, declaring the throne hereditary, abolishing the *liberum veto*, and proclaiming toleration for all sects, the emancipation of the citizens, and the progressive enfranchisement of the serfs. But it was too late!

The French Revolution proved fatal to Poland; for France, engaged in defending her own frontiers, could not lend her the slightest aid. Napoleon founded the Grand

Duchy of Warsaw, to which he gave a statutory constitution; and it served as a basis for that of 27th November 1815, granted by Russia, with the consent of the other powers. This Constitution assigned the executive power to the king, and the legislative power to the king and the diet, which was composed of two Chambers, one consisting of thirty members, nominated for life by the king, and the other of sixty-nine deputies, elected by the smaller diets. The diet was to be convoked every two years to deliberate on the laws which might be proposed to it. The session was not to last more than fifteen days. This statute was recalled after the Revolution of 1830, and there was substituted for it the organic law of the Constitution of 1832, which left a shadow of representative government in the *Woiwoden* councils and in the provincial assemblies which were never convoked. This Constitution made mention also, as if in irony, of individual liberty! After the fatal insurrection of 1864, Poland lost every vestige of autonomy.

The old Constitution of Bohemia embraced general diets and local diets, a Senate, an elected king, and a *Burggraf*, who had much resembance to the Palatine of Hungary. The general diet was convoked by the king, and in an interregnum by the Senate. It was composed of the clergy, the barons, the nobles, and the deputies of the free cities, who formed the four orders, as in Hungary. The king opened the diet, surrounded by the Senate and by his principal officials, expounded his projects, and then retired to leave the orders to deliberate. The diet was then presided over by the Burggraf; each order deliberated separately; then they collected the votes and approved of the royal proposals, or made observations upon them. The king also sent his observations, and the united orders deliberated upon them, and determined the decree, which was proclaimed by the diet after they had begged the king to assist in this proclamation.

This system is new, because it gave the king the simple right of initiation and amendment, leaving to the diet the decision and the promulgation of the law.

The Constitution of SERVIA of 1833 is a better representation of the political traditions of the Slavs. It assigned the legislative power to the Prince and to a Senate which sat permanently, and whose president had to subscribe, along with the Prince, the Law already voted by the Senate. The *Skupcina*, which was composed of the deputies of the villages, did not take part in the discussion of the laws, but met every year in order to approve, modify, or reject the budgets. The Ministers had to furnish every year a minute account of all their acts, and they could be indicted by the *Skupcina* before the Senate for every violation of law, the Senate being declared the supreme tribunal between the Prince and the people. In 1838 the power of the Prince was restricted in the name of the senators, who were nominated by the seventeen circles or tribes of Servia. At present, in virtue of the Constitution of 11th July 1869, the legislative power is exercised simultaneously by the Prince and the *Skupcina*, which has 134 members—33 of them being nominated directly by the Prince, and 101 elected by the people. The Senate was transformed into a Council of State charged with the preparation of the laws. If the throne is vacant, if a regency has to be appointed, or if the Constitution has to be changed, or an important part of the territory to be ceded, an Assembly is nominated directly by the people with four times the number of the members in the ordinary Assembly. By the Treaty of Berlin of 13th July 1878 Servia has obtained its complete independence, and in 1882 it assumed the title of a kingdom. On 22nd December 1888 King Milan, by the desire of the people, granted a new Constitution, according to which the *Skupcina* is wholly nominated by the people; that is to say, by electors of twenty-one years

of age, who pay fifteen francs of direct taxes, or less if they are members of the domestic associations called the *Zadrugas*. A Council of State of sixteen members, half of them nominated by the king and half by the *Skupcina*, prepares and brings the laws before the *Skupcina*.

Having thus examined the institutions of the Germanic and Slavonic peoples, it now remains to cast a glance over those of the Latin race. In FRANCE just the contrary had happened to what had taken place in England. In England the monarch put a curb on the aristocracy, and then abusing his power, he provoked an alliance between the nobility and the small proprietors. In France, on the contrary, the aristocracy was preponderant, and the monarchy came to the aid of the poor people. The ancient traditions of the Roman Law, resuscitated by the legists, helped to strengthen the royal power. Under the first two dynasties we find mention of March Assemblies, and then May Assemblies, which were attended mostly by the barons and the great dignitaries. It is only in the time of Philippe le Bel, in the year 1303, that we find a General Assembly (*Etats Généraux*), where the citizens were represented alongside of the nobility and the high clergy. These Assemblies were not a regular means of governing, but an expedient to obtain subsidies on very grave occasions; and thus Charles VII., in the fervour of the national reaction against the English, asked once for all the subsidies necessary to maintain a permanent army, and obtained them. Francis I. abolished the States General, putting in their place an assembly of nobles, men called by the king at his pleasure and dismissed by him; and thus the French monarchy became completely absolute, except in receiving the remonstrances which the Parliaments (judiciary bodies) were wont to make on registering the ordinances when they were supported by the public opinion. When the exhaustion of France, brought about by the wars of Louis XIV. and the

extravagancies of the regency, made radical remedies indispensable, Louis XVI. convoked first an assembly of notables, and then the States General, which changed themselves into the Constituent Assembly.

The Constitution of 1791 assigned the executive power to the king, and the legislative power to the king and a single Assembly. To the Assembly alone it pertained to propose and decree laws (the king could only call its attention to the making of them), to fix the public expenses, and to apportion the imposts. The king could refuse his sanction twice to the decrees of the Assembly, but the third time they acquired the force of law. The king had not the power to dissolve the Assembly, which met as a matter of right on the first May of every year, although he could convoke it on extraordinary occasions. The judges and the administrators of departments and districts had to be elected by the people.

The Republican Constitution of the year 1793 established a single Assembly for making the decrees regarding the public administration, and voting the laws, which were submitted to the direct vote of the sovereign people in the Primary Assemblies. The executive power was to be entrusted to a Council of twenty-four members nominated by the Assembly from the list presented by the Electoral Assemblies of the departments. This Constitution was never put into application, as the Committee of Public Well-being was made the arbiter of everything.

The Constitution of the year III. (1795) introduced a double representation, namely, the Council of the Five Hundred, and the Council of the Elders, both elected by the people and in the same assemblies, with different conditions of eligibility. The executive power was entrusted to a Directory of five members, nominated by the Council of the Elders out of a list presented by the Council of the Five Hundred.

After the *coup d'état* of the 18th Brumaire of the

year VIII. (9th November 1798), a new Constitution was created in accordance with the scheme of Sieyès. Thiers has given his judgment of it in the following words: "This universal suffrage, this legislative body, this tribunate, this senate, this grand elector, thus constituted, enervated and neutralised by each other, gave evidence of a prodigious effort of the human mind to unite in the same constitution all the known forms of government, but only to annul them in the end by excess of precaution."[1] Buonaparte and the Commission rejected the Grand Elector, and there remained a Conservative Senate, a Council of State for proposing laws to the Tribunate, which, approving or disapproving them in principle, selected three orators to support them or combat them in concurrence with the orators of the Council of State before the Legislative Body, which listened in silence to the discussion, and then approved or rejected them by its vote. The executive power was entrusted to the First Consul, assisted by other two consuls with a consultive vote. After Napoleon had assumed the title of Emperor he got the Constitution several times modified by the Senate, assigning to himself the nomination of the president and the members of the Senate, who were formerly chosen by the senators themselves. In 1807, with the suppression of the Tribunate, there disappeared the last vestige of representation.

On the fall of the Empire, Louis XVIII. granted the Charter of 14th June 1814, in the preamble of which it was said that the legislative power belonged to him, and consequently that the nobles and people had only to deliberate on what pleased the monarch. But if the initiation of the law belonged to the Crown, the two Chambers, after having put themselves into accord, might supplicate the king with regard to any proposal. The rest was regulated in the English manner by establishing

[1] *Histoire du consulat et de l'empire*, liv. i. Paris, 1845.

an Elective Chamber, and another Chamber which was in part hereditary and in part appointed for life by the royal nomination.

The Act additional to the Constitutions of the Empire, promulgated by Napoleon during the Hundred Days, retained the essential points of the Charter of Louis XVIII., conceding the initiation of the laws to the two Chambers, with other accessory modifications.

On the second return of Louis XVIII. the Charter was completed by the two Ordinances of 1816, which made the dignity of the peers wholly hereditary, and established election in two stages for the Elective Chamber. Certain ordinances for restricting the liberty of the press brought about the fall of the elder branch of the Bourbons, and gave origin to the Constitution of 14th August 1830, which was a correction of the one already existing. The preamble, which represented the Charter as a gratuitous concession of the king, was suppressed. It was expressly declared that the censorship could never be re-established. Hereditary peerage was abolished, and the right of initiating laws was accorded to the two Chambers.

The Revolution of 18th February 1848 put an end to the Constitution of 1830 and brought forth the Constitution of the 4th May 1848, which was fashioned on that of 1791 with a single Assembly. It lasted but a short time; and there was substituted, after the *coup d'état* of 2nd December 1851, the Constitution of 14th January 1852, which reproduces the essential part of the Constitution of the year VIII. by establishing a Council of State to elaborate and defend the projects of law before the Legislative Body (which discusses and proposes amendments that are remitted to the Council of State), and a Conservative Senate, which approves the laws from the point of view of their mere constitutionality, and which can only modify the Constitution in agreement with the head of the State. By a decree of the Senate of the 2nd November 1852,

and a plebiscite of the same month, the imperial dignity was re-established. With another decree of 25th December of the same year, the Constitution was revised in a restrictive way. But such a rigorous system could not last, and on 24th November 1860 several concessions were made: namely, the discussion of an address in reply to the speech of the throne; the intervention of ministerial speakers without portfolio to defend the acts of the government; and, finally, on 14th November 1861, the voting of the budget no longer by the Ministers but by the sections, and the suppression of the supplementary credits by mere imperial decree. With all this, parliamentary government did not exist in France, as the head of the State continued to declare himself responsible directly to the French people, and the Ministers depended entirely on the executive power. The "crowning of the edifice" (*couronnement de l'édifice*) several times promised, was expected with anxiety, and it was obtained by the decree of the Senate of 20th April 1870, which restored parliamentary government in France.

The defeat of Sedan marked the end of the Second Empire, and prepared the way for the Third Republic, with the institution of the Septennate. The law relating to the organisation of the public power, of 25th February 1875, entrusted the legislative power to two assemblies: the Chamber of Deputies, elected by universal suffrage, and the Senate, composed in accordance with the special law of the day before. The executive power belongs to the President under the responsibility of the Minister. The President is held responsible only in case of high treason. In agreement with the Senate he can dissolve the Chamber of Deputies; and in that case the electoral colleges are convocated by right at the expiry of three months. The President has the initiative of the law concurrently with the two Chambers. He cannot dismiss the Councillors of State except after a resolution approved

by the Senate. The President is appointed for seven years by an absolute majority of votes of the Senate and the Chamber of Deputies met in congress; and he is re-eligible. The Constitution may be revised when the two Chambers express the desire for it spontaneously, or in consequence of a request by the President, the proposals being determined by a majority of votes. Then the two Chambers meet in congress and amend the Constitution by a majority of votes.

The Senate is composed of 300 members. At first 75 were elected by the National Assembly, and 225 by the Departments and the Colonies. The senators elected by the Assembly were irremovable; and when a death or a demission occurred, the Senate nominated the successor. The Congress of Versailles, in the sitting of 14th August 1884, abrogated Arts. 1–7 of the Organic Law of 24th February 1875, abolished the irremovable senators as their places fell vacant, and provided for the supply of their places by allotment among those Departments which had a smaller number of senators, according to their population. No one can be elected a senator unless he is forty years of age and enjoys all the civil and political rights. The election is held at the chief town of the Department, or of the Colony, in a special college composed of deputies, of general or district councillors, and of delegates chosen by the municipal council among the electors of the commune; no longer, however, in the same number for each commune, as was practised under the Organic Law of 1875, but in the proportion of two to twenty-four of the municipal councillors. The senators elected remain in office for nine years, but the Senate is renewed to a third of its numbers every three years.

The Senate may be convocated in the High Court of Justice in order to try the President, the Ministers, or those who are accused of offences against the security of the State. Although the French President is appointed

by the Chambers, he is absolutely independent of them, enjoying all the perogatives of a constitutional monarch except in being personally responsible in case of high treason.

The said Congress of Versailles abrogated § III. of Art. 1 of the Constitutional Law, which prescribed public prayers on the Sunday following the opening of the Chambers; and it modified § III. of Art. 8 of the Law of 25th February 1875, which ran thus: "The deliberation for the revision of the Constitutional Laws in whole or in part shall be decided by an absolute majority of votes of the members composing the congress." For this it substituted the following paragraph: "The republican form of government cannot form the subject of a proposal of revision. The members of the families who have reigned in France are not eligible for the Presidentship of the Republic." Finally, it prescribed in case of a dissolution of the Chamber that the electoral colleges are to meet for the new election within the term of two months, and that the Chamber shall be convocated ten days after the closing of the electoral operation, thus modifying § II. of Art. 5 of the Law of 25th February 1875, which simply required the convocation of the electoral colleges within the term of three months.

After the fall of the Roman Empire, SPAIN passed into the hands of the Visi-Goths, who brought with them the institutions of the north: namely, assemblies, election of a king, dukes, and counts, revocable at first but afterwards hereditary. But very soon the clergy acquired a great ascendancy; and National Councils were substituted for the assemblies, in which the laity also took part. After the arrival of the Arabs, a handful of heroes took refuge in the mountains of the Asturias, where they elected as sovereign Pelagius, of the family of the last Visi-Gothic king, and they transported thither the ancient institutions. About 1035 we see in Spain four monarchies: the Kingdom of the Asturias, also called that

of Oviedo and Leon; the Kingdom of Castille (which formerly formed a part of the Kingdom of the Asturias); the Kingdom of Navarre, which had made itself independent of the French; and the Kingdom of Arragon, which had separated itself from the Kingdom of Navarre. With the Kingdom of Arragon was united, in 1037, Catalonia, which had also withdrawn itself from the dominion of France. These four kingdoms extended themselves every day by encroaching on the possessions of the Moors; and in the course of the fifteenth century they were happily united under a single sceptre by the marriage of Ferdinand and Isabella.

The primitive institutions of the Goths spread in Spain as the old inhabitants descended from the mountains to which they had betaken themselves. Feudalism was established only in the part nearest France, the other provinces being subject to the Arabs at the time when that regime was introduced in Europe. The absence of feudalism did not deprive Spain of an aristocracy, for there was established the aristocracy of the grandees (*grandes*) and of the rich men (*ricos hombres*). Every city had a council (*consejo*), and a charter (*fuero*).

From the organisation of Spanish society we can understand the composition of the assemblies, which, under the name of *Cortes*, participated in the sovereignty. In the Cortes of Leon and Castille, and of Catalonia and Navarre, there were three orders or *arms* (*brazi*): the ecclesiastical arm (*brazo eclesiastico*), composed of the prelates and clergy; the arm of the rich men, barons and knights (*brazo de los ricos hombres, barones, y caballeros*), belonging to the nobility; and the arm of the universities, cities, regions, and districts (*brazo de las universidades, ciudades, vallos, y villeros*), often called "the royal arm." In Arragon the Cortes had four arms: that of the nobility, divided into two; the arm of the rich men; and the arm of the knights. The cities took part in the

Cortes of Castille in 1188, and in those of Arragon in 1205, a considerable time before they acquired a similar right in England. These institutions, not being founded after the formation of a single monarchy, remained special to its various parts. In Arragon we find the *Gran Justicia*, who has much resemblance with the Palatine of Hungary. He was appointed by the king for life from among the *caballeros;* he annulled every illegality which might be committed by the Crown, and he could even prohibit the exacting of imposts. He was inviolable like the tribunes.

All these liberties gradually disappeared before the power of Ferdinand and Isabella, and of Charles V. and his descendants, to give place to the Inquisition and to Monachism, which have destroyed the powers of this generous nation. After having withdrawn themselves from the French dominion, the Spaniards could not go back again to their historical beginnings. They published in Cadiz in 1812 a Constitution imitated from the French Constitution of 1791, with a single Assembly and a suspensive *veto* conceded to the king. This Constitution was drowned in blood on the return of Ferdinand VII. in 1814, whom it had set on the throne. It was renewed in the revolutionary movement of 1820, and it disappeared again under the French intervention of 1823. In 1834 was published the Royal Statute (*Estatuto Real*), the work of Martinez della Rosa, on the lines of the French Charter of 1814; but the Constitution of 1812 again obtained the ascendency in the statute published on the 18th June 1837. The Moderate Party reformed this Constitution on 23rd May 1845. In 1852 a project of reform of the Constitution was brought forward, which restricted the Chamber of Deputies, raised the electoral qualification, claimed the voting of the Budget, and implicitly diminished the political and municipal liberties. The army rose, and after the victory of Vicalvaro a

Constituent Assembly was convocated, which concluded nothing, and which returned to the Constitution of 1845, slightly modified by the additional Act of 15th September 1856. Another insurrection of the army and of the navy was victorious in 1868 at Alcolea. It overthrew the reigning dynasty and convoked the constituent Cortes, which promulgated a democratic and ultra-liberal Constitution on 4th June 1869. The return of the dynasty did not revive the ancient state of things; for on the 30th June 1876 there was proclaimed a new statute, compiled in agreement between the Cortes and the king. The Spanish Senate is composed of senators in their own right (princes of the blood, grandees of Spain, and the first functionaries of the State), senators for life nominated by the king, senators elected in legal form by the corporation and by the larger contributors to the taxes. The number of senators by right and for life cannot exceed the number of the elected senators, which is 180. There is nothing special about the other Chamber.

The Kingdom of PORTUGAL took its origin from the Spanish monarchy, and its Constitution reproduced that of Castille. The decadence of liberty was slower in Portugal, where, however, the monks and the Inquisition also succeeded in annihilating it. The movement of 1820 and 1821 penetrated into Portugal and brought forth, on 15th September 1822, a Constitution on the basis of that of Cadiz, but with a better electoral system. On the 12th April 1826 King Dom Pedro granted a Constitution according to the ideas of Benjamin Constant. It was abolished by Dom Miguel, and re-established by the said Dom Pedro in 1833. The Constitution of 1822 was, however, restored in 1836; but it was destined to give place to that of Dom Pedro in 1841. Parties put themselves into accord in order to bring about reforms by the additional Act of 5th July 1852, but they were not substantial. The Constitution was again revived on

25th May 1884. The peers have been reduced to 150 —100 nominated for life by the king, and 50 elected by the people. Of these 50, 45 are elected by indirect vote of electors met in districts with the obligation to choose the nominees out of twenty-one classes or categories (very like those of the Italian Senate), the categories being determined by the law relating to the peerage of 3rd May 1878; and the other five peers are appointed by the scientific bodies, according to the law of 24th July 1885, relating to the election of temporary peers. The peers of their own right are the royal princes, the patriarchs of Lisbon, the archbishops and bishops. The Portuguese Chamber of Deputies contains 173 members. The new electoral law of 24th May 1884 has lowered the suffrage, and it admits cumulative voting for those candidates who have obtained 5000 votes in all the colleges of the kingdom.

We have already said that ITALY has been distinguished by the development of municipal franchises; but this did not prevent a true Constitutional Government finding place in Sicily. The causes may be found in the great number of the nobles, who were not very powerful. They knew, however, how to maintain their own independence. After the expulsion of the House of Anjou a great reform of the Parliament of Palermo was decreed in 1286, and from this began the collection of the statutes called the Chapters of the Kingdom of Sicily. The Chapter of Frederick II. of Arragon, a second of Martin I., and a third of Alphonso the Magnanimous, enlarged and consolidated the power of the Parliament, so as to leave nothing to envy in that of England. Even Charles V. and Philip II. did not touch the Sicilian Constitution, which was reformed in 1812, and then violated by the Bourbons. Frederick II. of Swabia assembled a Parliament at Foggia in 1232 and another at Lentini in 1233, summoning to the first, besides the bishops and

nobles, two citizens for every city, and to the latter four citizens for every city, and two for every district or village. The centralising despotism and the preponderance of the capital, extinguished every germ of liberty in the provinces on the mainland. In Piedmont, from 1286, assemblies were held attended by nobles and legates of the cities, to recognise the cession which Louis of Savoy made of his territories to his brother Amadeo. Soon thereafter, in the beginning of the fourteenth century, we see regularly formed Estates composed of ecclesiastics, nobles, and mayors. These institutions did not receive a complete development; and after the unhappy experiment of the Constitution of Cadiz, which was adopted in 1821, they waited for the animating spark of 1848, when Charles Albert, with the loyalty of a king and the affection of a father, sanctioned the Constitution of 4th March, which has become the sacred ark of Italian liberty.

The communes flourished not only in Italy but in the LOW COUNTRIES, where they were likewise suppressed by the Spanish domination. The Dutch Republic formed a federation of various cities and provinces, until the country was conquered by France. In 1815 the Dutch provinces were united to Belgium under a common Constitution. This Constitution was modified in 1831, after separation from Belgium, and it was again revised in 1840 and 1848. It admits two Chambers: the first nominated by provincial councils from among the larger contributors to the taxes, and the second elected without any other conditions of eligibility than being full thirty years of age, and being in enjoyment of civil and political rights. The two Chambers are renewed, the first every three years by the exit of a third of its members, and the second every two years by a half. Only the Second Chamber has the initiative in bringing forward new laws along with the Government. The functions of the First Chamber consist in approving or rejecting laws without

amending them. The king may dissolve either of the Chambers, or both of them.

Belgium was less fortunate, for after the Spanish rule it fell under the Austrian domination, from which it passed in 1794 only to be annexed first to France and then to Holland. After its glorious revolution of 1830, on 7th February 1831 it adopted a Constitution with two Chambers, both elected by the people in a different way and under different conditions of eligibility. This Constitution has formed a source of happiness to the country, due in a very great measure to the extensive communal and provincial franchises, which render the task of the central government more easy.

## § 8. General Considerations.

We have looked at the birth and the development of representative constitutional government, and have followed the applications of it among the various peoples. It remains for us now to consider whether it is likely to be durable in the parliamentary form, the last which it has assumed, or should return again to its original principle.

In the beginning of the last century the Ministry did not form an integrant part of the majority of the House of Commons, and the House even believed that it would secure its own independence by excluding the Ministers from their seats. This provision was abrogated in 1705, but the responsibility of the Crown and the responsibility of the Ministers were only clearly established by public discussion in 1739.[1] Notwithstanding this, the Ministry did not form a homogeneous whole till the end of the century, and the king often introduced favourites into it in opposition to the majority of the other members. We have seen (in § 2) that the influence of the House of Commons in the change of the Ministry had been indirect

[1] Hallam, *The Constitutional History of England*, iii. 171, note. 1827.

until 4th June 1841, when, on a motion of Sir Robert Peel, it was declared that the Ministry of Lord Melbourne no longer possessed the confidence of the House. A similar vote was carried in June 1859, on the motion of the Marquis of Hartington.

The absolute impartiality of the sovereign is a supreme principle; and it is often called into exercise by pronouncing between the Ministry and the Chamber. The Ministry, being formed from the majority, may contain orators and bold men, but not unfrequently unskilled administrators. Where there is continual changing of the Ministers, the secrets of the State are not well guarded. These two inconveniences are lessened in England by the strong organisation of the parties and by the long experience of public affairs. As we have said, the Cabinet is formally unknown to the English Law; and hence the sovereign could govern by means of the Privy Council, and public opinion would not be moved if circumstances rendered this necessary.

The alternative thus spontaneously rises: *Constitutionalism* or *Parliamentarism?* The former binds the sovereign not to promulgate a Law without the co-operation of the two Chambers. It leaves him, however, the free choice of Ministers, who are responsible to the Houses of Parliament for every transgression of the law; but they owe them only a moral account for all else, and are glad to obtain their approbation. The Chambers may refuse to grant supplies for variable expenses, which take the place of the ancient *subsidies;* but they have not to vote the fixed expenses which were formerly maintained by the king out of his own patrimony. The other system makes the Ministry a Committee of the House of Deputies, which carries on the administration in the interest of those who appoint them, and keeps the other Chamber in check by the threat of batches of new peers. Under this Parliamentarism the sovereign becomes a mere abstraction.

The question of the alternative being reduced to these terms, we believe the time is not distant when there will be a return to Constitutionalism, if the Monarchy is to be retained, or if a Republic is to be proclaimed with, at its head, a hereditary President for life, or for a limited time, according to the character of the country and its traditions.

In ancient times the only distinctions recognised divided men into philosophers, warriors, and slaves,—the greater part of the human species being relegated to a condition unworthy of humanity. The Middle Ages included in its three orders only a part of the labourers. The modern epoch has gradually advanced to juridical equality, which, however, does not cancel natural inequality. The electoral franchise cannot, therefore, be assigned to all indiscriminately, but only to those who are in a position to use it well in the interest of the civil community. Nor ought single citizens exclusively to be represented, but also social groups. Hence of the two Chambers which we have found to be necessary in every good constitutional system, one ought to be elected by the individuals who are presumed to be capable and independent, and it would form the Chamber of Deputies; and the other, which would form the Senate, should be elected by the social groups.

## CHAPTER VII.

### *THE SOCIETY OF THE STATES AND INTERNATIONAL LAW.*

In the last chapter we have seen that the constitutive elements of a State consist of a people, a territory, and autonomy. We also found that its personality consists in the sovereignty or legislative power, and that its mission is to secure to the individual the attainment of his rational ends, for which it gives him as much aid as it can. We have thus far considered the State in itself, or as regards the individuals which compose it, and have, therefore, not insisted much on its personality. But no State, however great it may be, can live isolated; and hence we must return to its personality, which is better determined by considering it in its contact with other States.

The attributes of the personality of States are Liberty, which translates itself into independence; Equality, which manifests itself in the diplomatic and maritime ceremonials; and Sociability, which expresses itself by legations and treaties. These are the same attributes that distinguish the human personality; but in States, Liberty is more extensive than in the individual, finding them, as it may be said, in the state of nature, and recognising above them no other superior but God. Sociability is less extensive in States than in individuals; States being bound only by custom, by maxims more or less accepted, and by treaties. Hence arises the principal difference between internal and external public right: in the former coercion is effected directly by means of armed

force and tribunals, while in the latter it is effected only indirectly by means of reprisals and war.

International Right and Law were very late in being developed. In patriarchal times the sentiment of hospitality secured the reception of the stranger; but as society extended, interests came into conflict, and the terms "barbarian," "stranger," and "enemy," became synonymous.

Among the Romans the *Jus gentium* corresponded to our natural right. Their *Jus feciale* had a semblance of international right, as it specially concerned embassies, public treaties, and war. The Fecials were the interpreters, and, in a sort, the priests of the public faith. Writers have confounded the *Jus gentium* of the Romans with what we call International Right. Grotius first distinguished it clearly; Zouch gave it the name of *Jus inter gentes;* and Bentham called it *International Law.*

International Right is *public* when it is occupied with the rules which direct the activity of States in their relations as collective beings; and it is *private* when it regulates the relation of the individuals composing the different States.

In ancient times we find that the relations of the peoples to each other were of a rude kind. Aristotle and Plato believed it lawful to pillage the goods of an enemy, and to reduce him to slavery. The Greeks and the Etrurians regarded piracy as legitimate; and the Romans and the Carthagenians only limited the places where it was to be exercised. In battle quarter was not granted to an enemy; prisoners were slain and were left dead without burial. In the course of time, however, these practices were modified. In Rome the College of the Fecials was instituted, and it declared war; and, as Livy observes, from the formalities prescribed it evidently was desired to show that the war sprang from just motives. Cicero considered war as a barbarous thing, and he wished to

limit it to simple defence. He says: "*Bellum geramus ut pacem habeamus.*"

Notwithstanding this, antiquity has not left us any special treatise on International Law. Christianity declared all men brethren in Jesus Christ, and the religious idea gathered Christendom into a single family in opposition to the infidels. In many authors we find statements regarding international relations, but they are in a manner incidental; and the very writers who in the Middle Ages cultivated the juridical sciences, such as Thomas Aquinas in his *De Regimine Principum*, and Dante in his treatise *De Monarchia*, hardly refer to these relations. The questions which arose between the States were resolved by the jurisconsults according to the rules of the Roman Law. The canonists and the casuists—especially those of Spain, like Vittoria and Ayala—occasionally dealt with these questions. Alberico Gentile, Professor at Oxford, was the first to treat the subject specially in his *De Jure Belli* and his *De Legationibus*, thus paving the way for Grotius. The celebrated Grotius is considered the true founder of International Right and Law; and his book *De Jure Belli et Pacis* has been revered as the Code of the Nations. He and Zouch derive international right from the sentiment of sociability; Machiavelli, Montesquieu, and Bentham derive it from interest well understood. Hobbes founds it on force, declaring men to be in a perpetual state of war. Bynkershoek, Moser, Kant, and Martens give as its basis the will expressed by laws, traditions, and jurisprudence. Rachel, Textor, and Wheaton derive it from the will manifested by international acts, as well as from the necessity of things and the position and relations of the State, which imply a certain *ratio naturalis*. Hegel considers it a product of human liberty, which generates both individual and social rights; while Pufendorf, Thomasius, Wolf, Vattel, Pinheiro Ferreira, and Heffter found it upon absolute justice,

which was the view of the canonists and casuists of the sixteenth century above referred to.

As the States stand in relation with each other, it is necessary to examine the nature of these relations. States are born, grow, and die like individuals; and so, too, they have rights: primitive, originary, and absolute rights; and relative or derivative rights.

State personality or sovereignty is acquired with the foundation of a State, or by its withdrawal from foreign domination. In order to be valid it is not requisite that it be recognised or guaranteed by the foreign powers, but that the possession of it be not defective or faulty. It is not usual to acknowledge the insurrection of a people, or the usurpation of a prince, so long as the sovereign who is regarded as legitimate is not supposed to have renounced. The sovereignty ceases with the destruction of the territory of a State, whether it be by the dissolution of the social bond, or by incorporation, union, or total or partial subjection to another State. When a State depends on another in the exercise of one or several rights inherent in the sovereignty, but is free in the rest, it is called dependent or semi-sovereign. This limitation usually applies to the rights of external sovereignty, the exercise of which belongs in whole or in part to another State, and it depends upon the conventions which it has contracted. The external relations are regulated by such conventions and by the state of possession.

A Protectorate is another form of semi-sovereignty, by means of which a State that is weak or has no civil power voluntarily puts the direction of its external affairs under a State which is better able to look after them. This form has been much abused in our day, from the time of the Protectorate assigned to England by the Congress of Vienna over the Ionian Island, which it soon changed into direct government, until out of homage to the principle of nationality it ceded them to the Kingdom

of Greece in 1864. A Protectorate is validly retained only after diplomatic notification has been made of it, and only so long as the stipulated compacts are not violated.

A Plurality of States may be united under a common government in various ways. This union may stand under the same sovereign, with laws that are totally different, and then it is called a *personal* union. It may appear in different stages, but without maintaining a distinct personality, and then it is called a real union. In both cases the sovereign represents the States in foreign relations, so that it is not legitimate to inquire into their internal prerogatives. Again, several sovereign States may associate themselves with each other by forming a Confederation or a Federated State. In a Confederation every State preserves entire its own sovereignty, and is bound to the other confederates only by the obligations arising from the federal compact. The other States recognise the individual sovereignty of the confederated peoples, as well as the federal sovereignty thus constituted by them. In Federal States, like Switzerland and the United States of America, a great part of the sovereignty is ceded to the Federal Power, especially in regard to external affairs. International Law is regulated in conformity with the different kinds of association among the States.

The rights referred to are Absolute Rights, because they constitute the personality of the States. We shall discuss them in the following First Section.

There are also Relative Rights, such as those which war confers on the belligerent States, and which cease with the ceasing of the extraordinary circumstances which have given birth to them. We shall treat of them in the following Second Section.

But before proceeding to this discussion it is proper to remark that the State is different from the Nation. For

while common interests and a common will are sufficient to form a State, it is necessary for a nation to have had a common origin in order to have the same thought and the same sentiments, and to speak a language which serves to express these thoughts and these sentiments in common.[1]

The distinguished Pasquale Stanislao Mancini has well explained that nationality is nothing but liberty extended to the common development of the organic aggregate of the individuals who form the nation. "Nationality," says Mancini, "is the collective explication of liberty, and consequently is as holy and divine a thing as liberty itself. The juridical relations which are spontaneously and necessarily generated by the fact of nationality have an essentially twofold mode of manifestation: namely, the free internal constitution of the nation, and its autonomy in relation to foreign nations. The union of both manifestations constitutes the naturally perfect state of a nation, or its ethnicarchy." Again he says: "A State composed of heterogeneous nationalities always acts in its international relations by placing its centre of gravity in that part of its territories and populations which is the principal nerve of its force and power, in which it consequently lives and acts inevitably as a nation, and from which it draws the most important contribution of its being. Accordingly, it is necessary to admit that there are in the world two kinds and qualities of States: those which are the product of force or consent, which form aggregates of provinces and territories belonging to different nationalities, and those which are the creation of nature or national States. Both are included in the jural community of humanity, but with an indubitable difference of prerogative and juridical solidity. The

[1] We have discussed the Principle of Nationality in a separate treatise entitled, *Del principio di nazionalità guardato dal lato della scuola e del diritto publico*, Napoli, 2nd ed., 1864. We shall return to the subject in the last chapter of this work.

first, in virtue of the principle that the institutions and obligations of men are dissolved by the same means with which they are founded and established, may be unmade, may receive alterations, and may perish under the influence of the same causes, namely, force or consent: *eodem modo dissoluti quo alligati.* It is otherwise with national States, as the principle of their existence, and therefore of their duration, is outside of the accidental and contingent action of treaties and wars. Neither the issues of war, nor compacts, nor heredity, nor the successions of princes, can juridically decide their secession or their incorporation into other States. The national State may truly call itself immutable and eternal, according to that eternity which is known in human history."[1]

## SECTION FIRST.

### THE ABSOLUTE RIGHTS OF THE STATES.

#### § 1. LIBERTY OR INDEPENDENCE.

The State being a free society composed of persons who set before themselves a rational end, ought to possess all the means requisite to secure its own preservation. It has therefore the right of legitimate defence, that is to say, the right to arm its own subjects, to erect fortresses, and to maintain a navy by taxes raised from all those who dwell on its territory. No limit can be imposed on such means of defence, except that arising from the security of other States, and from special conventions. Hence should the said preparations for defence give evidence of a danger of aggression, this would give the right to demand explanations which loyalty and a well-understood interest would counsel those who are asked not to refuse. The right of preservation carries with it

[1] Mancini, *Diritto internazionale. Prelezioni.* 1873.

the right of intervention when there is no other way of avoiding an imminent catastrophe.

The State as a free person may exercise any sovereign act, provided it does not injure the rights of other States. No foreign State is entitled to oppose an internal change of the form of government, or of the head of the State. Exceptions to this rule are constituted by special conventions to that effect, or by necessary regard for the security of the interfering State. Non-intervention is the general rule, and all exceptions to it ought to be justified by an absolute necessity.

Every State is invested with an exclusive power of legislation in what concerns the personal rights of its subjects, although residing abroad, and the immovable goods dependent on its territory, whether they belong to natives or to foreigners. The law of the country is imperative not only on its native subjects, but on those who come to put themselves under its protection in matters that concern the public order and security. The form of the Acts ought to be that of the country in which they are enacted, according to the ancient aphorism, *Locus regit actum.* As the rule for competency and procedure is taken from the law of the place in which the judgment is given, we may glance at the historical development of their principles.

In the East the stranger was regarded as under the protection of religion and of hospitality, and he had no determinate rights. In Greece and Rome, as a general rule, he was regarded as a barbarian and an enemy. At Lacedæmon he could have no participation at all in the civil existence. In Athens the treasury took the sixth part of the succession of a foreigner, and of all the sons of his slaves. At Rome the statement in the text of the XII. Tables was: *Adversus hostem aeterna auctoritas esto.* With regard to the goods of foreigners, Cicero says: "Mortuo peregrino, bona aut vacantia in peregrinum co-

gebantur, aut privato adquirebantur si peregrinus se ad aliquem veluti patronum adplicuisset eique clientelam dedisset: tum enim, illo mortuo, patronus, iure applicationis, in istius peregrini bona succedebat." By degrees equity triumphed over strict right, and in the time of Justinian the foreigner was assimilated in almost all points to the Roman citizen.

With the great mingling of the Germanic peoples on the fall of the Roman Empire, the principle of the laws affecting the person became recognised, so that every one was judged according to the law of the nation to which he belonged. But when the territorial sovereignty was consolidated, the territorial system was introduced, in accordance with which every State claimed the right to judge private international questions according to the laws which regulated its own subjects. During the ascendancy of feudalism foreigners were reduced to a state of servitude by the lord on whose lands they dwelt, or by the king. They were distinguished into two classes: *Aubains* (*alibi nati*) and *Epaves* (from *expavescere*). The *Aubains* were those born in neighbouring lands, and the *Epaves* were those born in distant kingdoms of which nothing was known. They were able to acquire and possess property, but not to transmit or receive it by donation, succession, or testament. At their death their goods devolved on the king, who also detracted or appropriated a part of the open successions in France, which he permitted foreigners to receive from another foreigner. Various treaties were entered into in the second half of the last century, to abolish the right of *Aubainage;* and the Constituent Assembly abolished it without exception or reciprocation by the decree of 8th August 1790.

The state of war in which France became immersed caused a retrograde step in connection with the juridical principles of this subject. The Arts. 726 and 912 of

the Code Napoléon granted foreigners no other rights than those enjoyed by the French in their respective countries. But on the 14th July 1819 there was issued a law abolishing the right of *Aubainage*, and of "detraction." This law admitted no other exception but the case in which a succession, common to foreigners and Frenchmen, included goods situated abroad where the foreign law did not entitle the French heirs to succeed in the same proportion as the foreign relatives; in that case the Frenchman was to be compensated from the goods existing in France.

The civil laws are distinguished into personal and real: the first are applicable to native subjects, although residing in a foreign country; and the second to all the goods situated in the territory, whatever may be the origin of the ownership. Count Portalis, in an account read to the Institute of France on the work of the distinguished Italian, Nicola Rocco, entitled "Of the Use and Authority of the Laws among the Various Nations,"[1] thus expressed himself on this subject:—"The national law, that law which protects the cradle and the constitution of the family, follows the citizens into the foreign country and regulates their status, while the foreign law binds them in what concerns the police, security, the form of their acts, and the goods which they possess on that territory. Everywhere and always, the law of the situation of immovables (without exception of persons, and the change of domicile forming no impediment to it), regulates what concerns the goods in general. By a sort of prorogation of sovereignty in both cases, the law knows no limits of frontier. As a personal statute, it passes the confines of its country to regulate the capacity of the persons who have their status recognised by it; as a real statute, it passes them also in order to protect and govern the stipulated acts and the goods acquired and possessed in its

[1] *Dell' uso e dell' autorità delle leggi presso le varie nazioni*, &c. Napoli, 1856.

territory and under its dominion." The Italian Code modifies these principles, for it admits in Art. 8 that legitimate and testamentary successions—whether as regards the order of succeeding or the measure of the successory rights and the intrinsic validity of the disposition—are regulated by the national law of the person whose inheritance is in question, whatever may be the nature of the goods and in whatever country they are found. The right of succession is thus retained as essentially a law of the family, and as consequently following the person. By Art. 9 it prescribes that the substance and effects of donations and of dispositions by last will are considered regulated by the national law of the disponents. It gives the right to disponing and contracting parties to abandon the form of the place and to follow the national form of the acts, provided that this is common to all the parties; so that even the aphorism *locus regit actum* is modified when a contrary will appears and the contracting parties are of the same nation. In order to remedy the consequences, which might spring for the social economy, from such latitude, Art. 12 prescribes that in no case shall private disposition or convention derogate from the prohibitive laws of the kingdom which concern persons, goods, and acts; nor from the laws which in any way bear upon the public order and good morals. The Italian legislators appear to have had a confused idea of territorial sovereignty; for while Art. 7 consecrates the principle that immovable goods are subject to the law of the place where they are situated, it is destroyed by way of exception, whereas it might have left free the will of the disponent and contractors except as to what is prescribed in Art. 12. The same confusion reigns with regard to movable goods. Arts. 7 and 8 lay it down that considered in themselves they are governed by the law of the country where they are found, but their transmission by succession or testimony is regulated by the law of the country of their owner. Art. 10 declares that the com-

petency and the form of the procedure are regulated by the laws of the place in which judgment is given; that the means of proving the obligation are determined by the laws of the place in which the acts occur; that the sentences pronounced by a foreign authority in civil matters shall not have execution in the kingdom, except when they have been declared executable in the forms established by the code of civil procedure, unless it has been differently agreed upon in a diplomatic way; and that the modes of putting acts and sentences into execution are determined by the law of the place in which the party proceeds to execute them.

Formerly, certain restrictions were considered necessary when the stranger was the institutor of the action, and was obliged to furnish caution for the expenses of the trial and for the losses and interests which might result from the suit, when he did not possess sufficient immovable property in the State, and when a treaty did not permit the execution of the sentences in his country of origin, or dispensed him expressly from caution. The foreigner, in consequence of any condemnation whatever, was subject to personal arrest by a simple order of the judge; and this even before the judgment, when he was found to be a debtor; and he could not be admitted to the benefit of *cessio bonorum*, except there was a different provision established by treaty. The new laws of the Italian procedure have abolished the obligation to give caution; as also arrest of a foreigner in civil causes, prior or subsequent to the judgment.

The laws which concern the public order and security are obligatory both on natives and foreigners. This principle is established by Art. 3 of the French Civil Code and by Art. 11 of the Italian Code. It follows therefrom that the penal laws and the rules of civil procedure are obligatory on all the inhabitants of a country, whatever may be their origin; and that delinquents are to be judged in the place where they have committed the offence

This does not prevent a State from claiming any of its subjects accused of a crime committed previously, and the extradition of the accused then takes place. It is disputed whether Extradition is an institution of natural right or of positive law. Grotius, Burlamaqui, Vattel, and the American Kent maintain that extradition belongs to natural right, and therefore that it is obligatory. Pufendorf, Voet, Kluber, Martens, and Wheaton maintain that it is a matter of positive law, and therefore that a special convention is required in order that it may be carried out. This opinion seems to us confirmed by fact, seeing that almost all the States, from the end of the last century, have come to such conventions. The principles which regulate extradition are the following:—

1st. Extradition is never granted in the person of a subject of the State itself, for this would be contrary to the autonomy and dignity of every State.

2nd. Extradition is not usually granted in the case of political offences, nor in the case of simple delicts, but only for crimes.

3rd. A judicial sentence of accusation or of condemnation is required, in order to obtain extradition. The demand is made directly from Government to Government, after the necessary papers have been obtained from the magistrates.[1]

4th. If extradition is demanded by several Governments at the same time, preference is given to the country of the accused; and in cases when all the Governments are foreign, preference is given to the one which demands it for the gravest crime.

5th. If the accused is found guilty at the same time of a delict and a crime, he ought to be condemned only

[1] The treaties are not all uniform on this point. For example, Belgium is satisfied with an order of arrest, while in England extradition is granted only after the accused and the representative of the demanding State are heard before English magistrates. See the learned work of L. Durand on the subject, *Essai de droit international privé*, which we have translated into Italian (Napoli, 1887).

for the crime, the penalty for the delict being absorbed in it.

6th. If during the process there arise proofs of a new crime, the accused will have to be judged only for that one alone for which the extradition was obtained, it being requisite to ask it anew for the new crime; and if during the process instead of a crime the accused is found guilty of a delict, he has to be restored to the State which had granted the extradition.[1]

7th. Extradition is also applied to facts anterior to the Treaty, for the reason that it can be granted even without a treaty which does nothing but regulate the exercise of it.

The extradition of deserters is a kind of extradition which is carried out by more rapid form. A large number of treaties between neighbouring peoples stipulate for the extradition of military deserters. In the case both of soldiers and sailors, commanders, diplomatic agents, and consular agents have assigned to them the right of claiming and immediately obtaining the delivery of fugitives. In the case of marines who desert from ships of war or from merchant vessels, the usage universally followed is, that after information has been given by the consuls of their nation, and in their absence by the captains, the authorities of the country give assistance to bring about the arrest of deserters.

Even before 1789 the practice of not delivering up political delinquents was established, but under certain conditions. From 1802 De Bonald raised his voice against extradition for political matters. In England Sir James Mackintosh stood up as the defender of this doctrine, and it was maintained afterwards by many others until it was consecrated for the first time by the Belgian Law of 1st July 1833.

[1] When the case has not been formally provided for by the Extradition Treaty, it is not always admitted that the tribunal ought not to judge of the new crime or delict without the express consent of the other State. See L. Durand, *op. cit.*, pp. 492–501.

The right of property is the highest manifestation of the human personality. Now the States, being so many juridical personalities, have a right to the appropriation of external things for the rational ends which they have to attain. There also arises in other States the correlative obligation not to put an obstacle in the way of the use which a people may be able to make of all that belongs to it. In virtue of this right every State may prohibit foreigners from possessing immovable goods within its territory, and may impose conditions on their sojourn, and on the exercise of the industry and commerce which they intend to undertake. It may deny the passage of armed men through its territory, and the entrance of ships of war to its harbours, except in case of tempest or shipwreck. This does not imply that it may interrupt all relations with foreigners, or that it may hinder the *inoffensive* use of certain parts of its territory, as in the case of navigable rivers which were declared open to common use by the Treaties of 1815. The principle of these treaties was extended to the navigation of the Danube by the Treaty of Paris of 1856, in making which part was taken by Turkey, which had not been previously admitted into the concert of the Great Powers. For carrying out the Treaty there was instituted a European Commission and a permanent River Commission: the first, to see that the necessary works were executed for securing the complete navigation of the river; and the second, to draw up secret regulations. This was not confirmed till the 10th November 1875, after the powers of the Commission had been reconfirmed by the Conference of London of 1871, which was convoked at the instance of Russia to revise certain clauses of the said Treaty of Paris. Thereafter, at the Congress of Berlin in 1878, the Regulation was modified by the admission of Roumania, and this came into force on 1st July 1881, to be again modified on 16th November 1882 by the interposi-

tion of the delegates of Servia and Bulgaria, so that the Regulation Order was not definitively formulated till 10th March 1883.

Broader principles were applied in the Conference of Berlin of 26th February 1885 to the two great African rivers, the Congo and the Niger, and their affluents or tributaries. Not only was there stipulated liberty of navigation for ships of every nationality, but also freedom from any tax on the merchandise or goods carried, except for such expenses as might be considered requisite for promoting commerce, to which the natives should also be subject.

International Law, therefore, includes the right on the part of a nation to use and dispose of its territory to the exclusion of other nations, and to exercise over it all sovereign power. The territory of the State includes the public possessions and patrimony (called the domain of the State), not less than the goods of the private citizen, which, in virtue of this principle, answer for the nation in war and in reprisals. The territory and all that it contains, and whatever is done within its circumference, is subject to the jurisdiction of the State, whence the maxim: *Quidquid est in territorio est de territorio.* The same principle cannot be applied to goods which a State may possess in a foreign territory which are subject to that sovereignty.

The surface of a territory is composed of land and water.

The ownership of the State extends not only over the inhabited parts of the country, but also over the uncultivated lands, and over seas enclosed within its confines; and all the natural and industrial products which are derived from them belong to the State. The confines or frontiers of a State are natural, such as a chain of mountains, the middle of the bed of a river, valleys, shores, &c.; or artificial, such as marches, fosses, &c. On the

sea it is usual to trace an imaginary line corresponding to the degrees of longitude and latitude. Sometimes distances are measured by the shot of a cannon, or in maritime leagues. Rivers, as we have said, take as their line of division the half of their bed, unless undisputed possession assigns to a single State the whole course of the river. The same holds of lakes and of islands existing in rivers or lakes, which an ideal line divides equally between the two States.

The Roman Law, which drew its definition from the nature of things, reckoned the sea among the common things which belonged to nobody. In the sixteenth century Spain and Portugal claimed the sovereignty of the seas of the New World, in virtue of a concession of Pope Alexander VI., founded on the right of discovery and conquest. England claimed the sovereignty of the four seas which bathe its coast (*the narrow seas*), just as Venice and Genoa had laid claim to the exclusive domination of the Adriatic and Ligurian seas. Against these pretensions Grotius in 1609 wrote his celebrated treatise, *Mare Liberum*, to which Selden replied with his work *Mare Clausum*, published in 1635. These pretensions were successively abandoned, although England continues to demand a salute to her flag in her seas; but by some authors this is not regarded as a recognition of her right of dominion.

Two other reasons—one physical and the other moral—prove that the sea, since it cannot be possessed, cannot form a subject of proprietary ownership. The moral reason is that it is necessary for the communication of all the peoples. There are, however, certain parts of the sea which can be possessed, and which are therefore capable of proprietorship and dominion. These are:—

1. Ports and harbours for anchorage, which belong to the nations who are owners of the coasts. Every nation

may therefore declare its ports closed or open, except in case of forced entrance by a tempest. Generally a conventional agreement is come to as to ships of war, some powers not permitting the entrance of more than six, four, or three ships of war at a time.

2. The same applies to gulfs or bays, and all capes which belong to a nation, when they do not extend beyond cannon shot, and when the entrance to them can be defended by artillery, rocks, or sand-banks.

3. Enclosed and internal seas which communicate with the ocean by means of straits, whose shores belong to the same nation, and whose entrance can be effectively prevented by artillery, come under the same condition. Both these conditions are necessary in order to establish ownership or dominion. If the shores belong to several proprietors their agreement would take the place of the second position. The Treaty of 13th July 1841 between France, Austria, Prussia, Russia, and Turkey, prohibited foreign vessels of war from entering the Straits of the Dardanelles and the Bosphorus. The Treaty of Paris of 30th March 1856 neutralised the Black Sea, declaring it interdicted to vessels of war of every nation, and limiting the maritime forces which Turkey and Russia might maintain in it. These clauses were modified by the Treaty of London of 13th March 1871.

4. The passage through straits which put two seas into communication is reputed free and common to all nations when it can be accomplished out of the range of cannon shot, as holds, for example, in the case of the Strait of Gibraltar. In opposite cases the strait is subject to the sovereignty of the States that are masters of the two shores. Nevertheless, it is not lawful for any people to prevent the inoffensive use of such a passage. No dues may be imposed, except what usage admits, for navigation and fishing. The dues of the Sound and Belt, which an exceptional usage had established in favour

of Denmark, were redeemed by the various powers by the Treaty of 14th March 1857.

5. The territorial seas, or those parts which are nearest the coasts commencing where the sea is navigable to a conventional line which closes the territorial sea, are also included. Baldo, Bodin, and Zarga fix this "line of respect" at sixty miles from the shore, Casaregi and Abrea fix it at a hundred miles, Loccenio at two days' journey, Valin at where the bottom can be reached with the lead, and Gérard de Reyneval at the visible horizon. Other writers, with more reason, fix it at the point which is reached by cannon shot, whence the maxim of Bykershoek: *Terrae potestas finitur ubi finitur armorum vis.* When the coasts are intersected by little bays or capes, the fictitious line for measuring the range of cannon shot is calculated from one promontory towards the other. Large gulfs are considered free like the High Seas.

International Law recognises Occupation, Accession, and Cession as the modes of acquiring national ownership in property. Authors are divided as to the recognition of prescription.

*Occupation* is applicable only to things which are without an owner. It consists in two elements, namely, the intention to appropriate them, and the effective possession of them. The simple discovery of a country is not sufficient for this; nor are other recognisable signs, such as inscriptions, crosses, &c., sufficient. Effective possession is here understood in a broader sense than in private law. In the case of an unoccupied region occupation extends only to the part effectively occupied, and not to the whole. Hence the General Act of the African Conference of Berlin of 26th February 1885 prescribes, in Art. 34, that the power which shall take possession from that date of a territory on the coasts of the African continent situated outwith its own possessions, or which, having no possessions, may come to acquire such, as well as a power

which may assume a protectorate there, shall accompany the Act with a note addressed to the other Powers confirmatory of the Act in order to put them into a position for asserting their claims as may be necessary. Military occupation during war is considered as mere possession, and the occupier enjoys only the rights of mere administration. A treaty of peace is required to render such occupation definitive, and to give the rights of ownership to the occupying power. Conquest can only form an occasion for acquiring ownership. Occupation may be made in name of a third party, in virtue of a general and special mandate; and the dominion over the property is acquired from the moment of taking possession. The occupation effected may be validated by a *negotiorum gestor;* and then the *dominium* is acquired from the moment of the ratification after cognisance has been taken of it, in virtue of the axiom: *Ignoranti non acquiritur possessio.*

Natural increments or transformations are embraced under the designation of *Accession,* which is a second mode of acquiring ownership. In cases when a river makes alluvial deposits on one of its two banks, the middle line of the river does not cease to mark the boundary between the two States, and the increment goes to the benefit of the owner whom nature has favoured. If a part of the territory has been violently detached by the current of the river, and if it is perfectly recognisable, the original owner is entitled to claim it. If a river diverge from its course, the middle line of the abandoned bed would continue to serve as a boundary. When islands arise in a river, the ownership is to be divided by the middle line, or it would belong entirely to the nearest proprietor; and even if the river changed its course, the rights of ownership would receive no change, everything having to be regulated by reference to the old bed of the river. The

same rules are applied to lakes—alluvial deposits belonging to the territory to which they go to unite themselves; but if the lake should enter into a valley, and there form a gulf, the half line of the lake would not be displaced, and the gulf would belong to the country in which it was formed.

There is also a species of artificial accession which arises from the provisions required for the purposes of the State, as in constructing fortresses, bridges, roads, &c., no account being taken of whether it may be prejudicial to other States; for, *Qui jure suo utetur nemini facit injuriam.*

We have said that *Cession* is another mode of acquiring ownership. It may come about by pacific ways, or in consequence of a war. It is asked whether a mere agreement of wills is sufficient to effect transference of ownership, or whether tradition or delivery is necessary. Heffter maintains that without delivery international ownership cannot be transferred.[1] But if the civil code does not require delivery in private law, where it might give rise to infinite disputes, how is it to be held necessary in international law, where such cessions rarely occur, and where they are surrounded with so many solemnities? Would it perhaps be feared that a cession might be made to two States in the interval which usually passes between the contract and the consignation? In practice, however, it is usually declared that the transmission takes place at the moment of the ratification of the treaty. The modes of alienating international propery are those of the Civil Law, with the addition of the Feudal Constitution, which is a remainder of the law of the Middle Ages. In case of sale or hypothec it is only the patrimony of the State which is bound; and the goods of subjects are bound only in cases of extreme necessity.

It is questioned whether *Prescription* can be a mode

[1] *Droit international public de l'Europe*, p. 159. Paris, 1866.

of acquiring national property. Grotius, Pufendorf, and Wheaton are for the affirmative; Klüber and Heffter are for the negative, although the latter recognises immemorial possession. To resolve this question it is necessary to reflect that it is not intended to legitimate the violent domination exercised over a people, but the pacific possession of a territory which has not been claimed for a length of time. The action of the new possessor destroys the rights which the old proprietor left in operation. Although the principle seems incontestible, nevertheless no precise term has yet been assigned to this sort of prescription.

International ownership may be limited by certain restrictions of the rights of sovereignty over the territory. These restrictions generally apply to the public, and not to the private property of the State, and to the goods of private individuals which could only be indirectly affected. Such restrictions are called international servitudes. They constitute real and permanent rights, and are distinguished into *servitutes juris gentium necessariae*, and *servitutes juris gentium voluntariae*. The former relate to the obligation to receive the waters which flow naturally from a contiguous piece of land; to concede a passage to citizens, and even to unarmed troops belonging to a State which has no other exit; and prohibition of the construction of works which tend to alter the course of a river, and such like. Voluntary servitudes are those which are consented to, in the interests of the sovereignty of another State, such as the obligation imposed on France by the Treaty of 1815 to demolish the fortress of Huningue, or that imposed on Russia by the Treaty of 1856, to maintain only a limited fleet in the Black Sea, a clause which was abolished by the Treaty of London above-mentioned. The neutrality of a part of Savoy before 1860 was a servitude of this kind.

## § 2. Equality.

Men are equal because they possess the same faculties, although in different degrees. States are equal because the essence of the juridical personality is one, although it may manifest itself with different force in the external world. One of the first corollaries of equality is the respect which is due to all both in reference to the physical personality and to the political and moral personality. The physical personality of the States ought to be respected to the extent that they should not be denied the means of procuring subsistence for themselves and of ameliorating their own condition. The political and moral personality is to be respected in all that is ordained by their internal constitution, and in the susceptibility which every State ought to have for its own honour. This respect is manifested in a negative manner by abstaining from all action contrary to it, and in a positive manner by observing whatever is prescribed by the diplomatic and maritime ceremonial.

The usages of courts have introduced forms which constitute those *grave trivialities*, as Flassan calls them, non-observance of which is considered a grave offence. Various conventions have sanctioned them in great measure.

These forms relate to :—

1. The direct relations of sovereigns and their families, both personal and by writing.
2. The diplomatic correspondence.
3. The correspondence of the authorities of the various States.
4. The saluting of ships at sea.

Besides these public ceremonials, special ceremonies may exist in the various courts, and also rules of etiquette, the violation of which would give occasion for

complaints or reprisals, but would not constitute an offence.

Several times the attempt has been made to draw up a general regulation regarding the order or rank of sovereigns. That of Pope Julius II. of the year 1504, which sanctioned what was practised in the councils where questions of precedence came continually into discussion, was largely accepted. A commission on the subject was nominated at the Congress of Vienna, but not being able to come to an agreement, it limited itself to drawing up regulations as to the grades of the diplomatic agents.

The highest distinction which sovereigns can enjoy are the royal honours which are granted to monarchs and grand dukes. In these the great republics participate, as those of Venice and Holland once did, and the Swiss Confederation, the United States of America, and the French Republic now do. They consist in the power to wear the crown, the title of brother in relation to other sovereigns of the same rank, and specially the right to send ambassadors. Among sovereigns who have the honours of royalty, it is always customary to give place and precedence to those who possess an imperial or royal title, while they receive such precedence from sovereigns who do not enjoy these honours. Republics usually give the first place and precedence to emperors and kings, but not to sovereigns who only enjoy royal honours. In congresses the Ministers of the mediating Powers have the precedence over the Ministers of the Powers who are in dissension, whatever may be the rank of the sovereigns whom they represent.

Every sovereign may assume in his own State whatever title he please, and demand from his own subjects whatever honours he wishes. But it remains for him to obtain the recognition of the other States, which is attended with difficulty when he assumes a more elevated title.

The title of *Majesty* is bestowed on emperors and kings, that of *Royal Highness* on grand dukes, that of *Most Serene Highness* on princes and dukes, and that of *Holiness* on the Pope.

Usage has determined the places of honour. In meetings it is necessary to distinguish whether parties are seated or standing, in the lineal order (where several persons follow one after the other), or in the lateral order (when several persons are placed one beside the other). In the first case, when the parties are seated at a square or round table, the first place is usually over against the entrance of the apartment, and the precedence goes from right to left. The last places are those opposite the first. Whether parties are seated or standing the hand of honour is the right one; and he who, ascending by a staircase or entering into an apartment, precedes him who comes on the left, occupies the place of honour.

In the lineal order, the importance of the places is estimated in different ways. Sometimes the first place is reckoned the most honourable; and sometimes the last place is so reckoned, with due gradation in the preceding or subsequent places. Often the importance of the places depends on the number of the persons who go in file. For example, if there are *two*, he who precedes occupies the more distinguished place. If there are *three*, the middle position is the best; then comes the one in front, and the one behind is in the third place. If there are *four*, the first place is the third one, then comes the second, then the fourth, and lastly the first. If there are *five*, the middle place is the best, that which precedes is second best, and that which leads is third; the next less important is the fourth place, and the fifth is inferior to all the rest. The same rules are applied when the persons are *six*, or more.

In the lateral order, if there are many persons placed together in a straight line, the following distinctions are

observed. Sometimes the place at the extremity is regarded as the first, whether it be on the right or on the left; then that which follows is the second place, and so on. Sometimes the rank of the persons is considered, and this requires a different order. If there are *two*, the first place is on the right. If there are *three*, the first place is in the middle, the second place is on the right, and the third on the left. If there are *four*, the most important place is the second to the right; then comes the first, also on the right; then the first on the left; and lastly the second, also on the left. If there are *five*, the most honourable place is in the centre; then the place to the right; then the place to the left; then the last on the right; and finally the last place on the left. When there are *six* persons or more, the reckoning always proceeds in the same manner, beginning from the centre, which is the place of honour.[1]

In public acts, whoever is named first, is presumed to have the place of honour. Signatures are usually arranged in two columns, and the first place is considered the one on the right (in the heraldic sense, that is to say, to the left of the reader); the second is the one in the opposite column, and so on.

When a dispute arises, it is usual to have recourse to the following expedients:—

1. Dispensing with all formality by declaring every place honourable, or making a reservation for the future, called *a reversal*.

2. Alternatively, by assigning the first place to each of the parties in the copy of the act destined for them.

3. By determining it by lot.

When sovereigns visit each other, the host gives place to the foreigner, if they are of the same rank, and this is observed also by the Ministers.

[1] These particulars are transcribed literally from Klüber (*Droit des gens moderne d'Europe*, Paris, 1861).

A sovereign who enters a State has a right to all the traditional ceremonies which are paid to his rank; and hence the necessity of a previous intimation to announce his arrival. An important prerogative is reserved for foreign sovereigns who visit a friendly State: that of being exempted from the laws of the State which they have come to visit, and to be able to maintain jurisdiction, both contentious and voluntary, over their own subjects who accompany them. However, the authorities of the country may always protest against the exercise of such jurisdiction and demand that it cease. A foreign sovereign is exempt from all imposts both for himself and the things which belong to him. These privileges are included in the *exterritoriality* which sovereigns enjoy, and in part their representatives too, as we shall see at its proper place. This is a product of modern law, there being no lack of instances of bad treatment to which foreign sovereigns were subjected in ancient times and in the Middle Ages. According to usage the members of sovereign families do not enjoy the benefit of *exterritoriality*, but only co-regents and regents. These privileges are renounced when travelling *incognito*, *i.e.*, under a name assumed for the occasion.

By a fiction of law the ships of war of a nation are considered as a floating part of its territory, and as a continuation of it. The equipage or crew forms, therefore, a particular society which continues to be regulated by the laws of the State to which it belongs; and it enjoys the privilege of *exterritoriality*. This privilege extends to vessels employed exclusively in the service of the sovereign, or accidentally in the transport of them or of their representatives. Merchant ships are not exempted from the territorial jurisdiction, except when they are found on the high seas, or are compelled by a greater force to enter the waters of a State. In this last case some authors maintain their exemption from the civil jurisdic-

tion only, and not from the penal jurisdiction and the police.

In order to render honour to the different States there has been established a maritime ceremonial which has to be observed on the high seas and in territorial waters. This ceremonial includes the saluting of ships of war by each other. This salute consists in lowering or hoisting the flag, or lowering the sails, or in firing a determined number of guns or cannon.

Every State has the right to regulate the maritime ceremonial which has to be observed between the different vessels of its own fleet, and towards the navy of another State, both on the high seas and in its territorial seas. England demands that ships of commerce belonging to other nations shall lower their topsails before English ships of war. In a treatise of 1674, concerning the salute claimed by Cromwell from the Dutch, we read:— "That England having acquired this right by the edge of the sword over all nations, ought not to tolerate that another flag besides its own should appear on the ocean without its express consent." France, under Henry II. in 1543, under Henry III. in 1584, and during the reign of Louis XIV., made similar pretensions; but as these sprang from her pretended sovereignty of the seas they failed with the establishment of a contrary doctrine of liberty. The maritime ceremonial then became a simple sign of courtesy, which the protocol of the Congress of Aix-la-Chapelle of 3rd September 1818 wished to get sanctioned by a general regulation established among the powers. The practices now in use are these:—

1. If an isolated vessel meets a squadron, she ought first to give the salute.

2. The same holds when an auxiliary squadron comes to join its principal.

3. When two vessels of war meet, the one of lower

rank salutes the other of higher rank; and if the rank is equal, the salute ought to be given by the one which sails under the wind. The ship which carries the admiral's flag, whatever be its rank, has to receive the salute.

4. If a ship transports a sovereign or a royal prince, or even an ambassador, it ought to receive the salute, even from forts and fortresses.

5. Merchant ships ought to be the first to salute vessels of war, except when they are sailing with full sails. Their salute consists in lowering the sails or the flag, and sometimes in firing the cannon.

## § 3. Sociability.

The system of Hobbes and Rousseau regarding the state of nature no longer needs refutation. Sociability is universally admitted to be one of the fundamental attributes of the human personality. The various political agglomerations which have taken the name of States, have not less need than individuals to exchange their ideas and conjoin their several forces in order to attain the end assigned to humanity. The first relations between the peoples were determined by violence; and it may be said that the society of the States commenced with war.

In antiquity, war was considered a normal state, and peace an exception which required to be sanctioned by treaties. The ancients seem to have been ignorant of the fact that a bond of right and humanity unites the peoples. The duties which we are wont to derive from human nature were believed by them to have their origin from convention; and hence the great importance which they gave to treaties which were considered as the basis of the social order.

But the sentiments of sympathy towards our fellow-

men cannot be entirely quenched. Hence hospitality tempered the rigour of strict right. In India, the legislator considered hosts as on a level with the gods. In Persia, the care of strangers was entrusted to a minister chosen from among the magnates of the court.[1]

In Greece, hospitality was so sacred that Pindar placed it among the virtues immediately after the love of country. At Rome, it became almost a juridical obligation, and it was assimilated with the clientship which gave rise to determinate rights and duties. The jurisconsult Sabinus even gave the preference to the obligations of hospitality over the obligations to clients, placing guests immediately after pupils.

Acts of hospitality were individual acts, but the theocratic peoples did not cease to form a world by themselves. The Greek city, although founded on the principle of isolation, began to concede some rights to foreigners. The most conspicuous citizens often disputed the right of lodging strangers and representing them in the courts. These generous men took the name of *proxeni*, and they had a certain analogy with our consular agents. Sometimes a city granted to some of its members the status of *proxeni* with the consent of the city in which they were to exercise their function, and this still more approaches the position of our consul. But mostly the *proxeni* did not hold any public character, and could not exercise the influence of our diplomatic agents. When two cities wished to form a stronger bond with each other, they stipulated that their respective members should enjoy all the rights of citizens, and such an alliance was called by the name of *hospitality*. But although these conventions speak of "participation in all things divine and human," yet in the enumeration of the rights we find only private rights enunciated—such as those of ownership of property and marriage.[2]

[1] Plut. Tem. C. 28, 29, 31.
[2] Laurent, *Études sur l'histoire de l'humanité*, vol. ii. c. iii.

Rome showed herself more sociable; and from the time of her foundation she gathered men of diverse origin, as if to found an asylum. In the course of the first wars there was introduced into the city a portion of the conquered peoples as the most precious booty; and when this became materially impossible, she began to concede in different degrees the prerogatives of citizenship. Thus the inhabitants of Ceres obtained participation in the Roman civil rights without political capacity, since they had neither the right of suffrage nor that of eligibility to public offices. In this connection it may be useful to recall the rights of the Roman citizens. The *civis optimo jure* enjoyed private rights, *jus Queritium*, and public rights, *jus civitatis*. The civil law had reference to *connubium*, the *patria potestas*, the *jus legitimi dominii*, *testamenti*, *hereditatis*, *libertatis*. The political law related to the *jus census*, *suffragiorum*, *honorum et magistratuum*, *sacrorum*, *militiae*. A city to which the whole of those two kinds of rights had been conceded was called *municipium*. Its members could take part in the comitia at Rome and aspire to its magisterial offices. Many cities, in order to retain their domestic institutions, renounced in whole or in part the exercise of the political rights conceded to them in their quality of municipia, and they only received the plenary exercise of the civil right.

Again, there was the *jus Latii*, *jus Latinitatis*, which indicated the condition of the peoples of Latium, who preserved their territory, their laws, and their alliances, and who could become Roman citizens after acting as a magistrate for a year in their own country, and transferring their domicile to Rome, provided that they left children in their native city.

In the third place, there was the *jus Italicum*. The Italians had obtained less advantageous conditions, as they were interdicted from entering into an alliance with

each other, and they had not the condition held by the Latins of becoming Roman citizens. It was necessary for this that they should first have acquired the right of the *jus Latinitatis*. The name of Italy did not then extend beyond the Arno and the Rubicon; those countries which formed Gallia Cisalpina and Liguria being excluded from it.

Both the right of full citizenship, enjoyed by the municipia, as well as the more restricted rights of the Latins and Italians, became abstractions, and were applied to countries north of Italy, according to the merits which they had acquired in relation to Rome. In general the peoples out of Italy were divided into four classes, under the name of *provinciales, dedititii, foederati, socii*. The Province (as we have already seen in Chapter v.) lost its old institutions, its magistrates, and its tribunals; and it was subjected to a formula, the *lex provinciae*, which every proconsul published on entering into office. The soil was partly taken away from the old inhabitants, and partly left to them in usufruct under the burden of a ground-tax. The *deditio* was a unilateral act, and meant that that people gave itself up to the good faith of the Roman people, or surrendered at discretion. According to the primitive rigour of the time, dedition only left life to the enemy; and if he was not considered a slave, yet his state rather approached servitude than liberty.

The regime of the free or confederated territories had as its basis autonomy, or the right to preserve the ancient laws and also to make new ones. Rome exercised a right of patronage, but her representatives strangely abused their office. The kingdoms which were friendly or allied were legally only subject to tribute; but their condition did not vary much in fact from that of the free or confederated peoples.

But in the midst of this apparent confusion everything

was advancing to unity. Towards the end of the Republic, in the year of Rome 664 (90 B.C.), the Julian Law (*Lex Julia de Civitate Sociorum*) granted the right of citizenship to the free men of Italy. The Empire was received with enthusiasm by the provinces, as it checked the rapacity and arrogance of the proconsuls. The emperors who were most inexorable to the aristocracy, such as Tiberius and Nero, favoured the provinces. With the extinction of the families of the Julii, the Claudii, and the Flavii, the Empire passed into the hands of provincials; and the provinces took advantage of this for themselves, until, by the Constitution of Caracalla, all the free men of the Empire obtained the right of citizenship. Then the distinction of Latins, Italians, Federates, and Dedititians was abolished.

Moreover, the influence of Rome continued to be exercised beyond the frontiers of its vast empire. The allied barbarians were distinguished into three classes: *socii*, *federati*, and *ospites*. Each of these categories implied different rights and obligations, but all recognised the fundamental principle of maintaining the reverence and submission due to the majesty of the Roman people (*imperium, majestatem P.R. conservate sine dolo malo*). The *socius* or friend bound himself in general not to make peace or war without the consent of the Roman people, and to assist it against all its enemies. The *federatus* did not cease to be free, for he preserved his laws and his national government; but he was considered a member of the community, and the violation of the alliance was regarded as a rebellion. The jurisconsult Proculus compared the federate with the client. The peoples who were honoured with the title of *ospites* enjoyed greater prerogatives; for by a legal fiction their territory was considered entirely Roman in some of its juridical effects; and when any of them was on the soil of the Empire, he enjoyed privileges denied to the ordinary foreigner.

Other kinds of inequality were introduced in the last times of the Empire, for whole barbarian populations were admitted to make part of it, to whom the Constitution of Caracalla was not applied, and who therefore kept the name of *federati*. Prisoners of war who were taken with arms in their hands, and who surrendered voluntarily, were not made slaves. They formed a class apart under the name of *dedititii*, and were assimilated to the freedmen. They were gathered into agrarian and military colonies, or formed special corps in the army. Frequent emigrations of whole families carried with them a multitude of individvals to whom the name of *laeti* was given; and they formed a sort of barbarian colony alongside of the Roman colonies, and also owed the Government the duty of military service and a rent for the land they received. The *laeti* could become citizens, whereas the *dedititii* were always considered as slaves of the Roman people.[1]

The invasion of the barbarians broke the unity of the Empire. Twenty different peoples settled themselves beside each other with diverse laws and customs. This confusion gave origin to the Feudal System, and everything became local—right, law, custom, ideas—a thousand political centres being formed, and barely united with each other by a common dependence on a supreme head. But a more spiritual unity was founded by Christianity, which made a single family out of so many diverse peoples. Christianity took the place of the Roman Empire; and this vast unity was regulated by the Pope as its spiritual head, and by the Emperor of the Franks, and then of Germany, as its temporal head. International relations were founded on the true basis, namely, the unity of the human species; but the passions of the time prevented the application of such a doctrine to heretics and infidels,

[1] On these interesting points see A. Thierry, *Tableau de l'empire romain*. Paris, 1862.

who were considered as outwith all law. On another side the thousand feudal societies were enemies of each other, and proscribed each other mutually by the monstrous rights of *aubinage* and shipwreck. But when the central power became stronger, the king took strangers and foreigners under his protection, and the relations between the people began to be permanently established.

In the ancient world international affairs were treated as they arose, and diplomacy was an art accessible to all, consisting as it did in each one giving good reasons for his own cause. The Pope began to maintain at the courts of the French king and the emperors of the East permanent missions under the name of *apocrisarii* or *responsales*. The system of permanent ambassadors was introduced into the various courts of Europe after the Peace of Westphalia, following the example of Italy. The mission of the diplomatic art is to watch over the external development of the State, and to guard the rules necessary for the preservation of their rights and their prosperity. It therefore conduces to maintaining general peace and to favouring commerce and good relations between the peoples. In order to fulfil his commission, the diplomatist has to keep before him the conditions of the State which he represents, as well as those of the State to which he is accredited. Without affecting a tone of superiority, the representative of a great State should be filled with a sense of the importance of the Power which he represents, and he ought to make his voice heard in all affairs of general interest, and always in the cause of justice. States of second rank who happen to have great Powers as their neighbours should study how to win the friendship of some of them in order not to be overwhelmed in the complication of events. States of the third rank ought to care only for making their neutrality respected, and developing their internal prosperity.

We have said that the chief sovereign prerogative is the right to send or receive ambassadors. This prerogative extends to semi-sovereign States within the limits of their political constitution. There is no positive obligation on the part of States to receive the diplomatic agents of another power, but refusing to receive them in time of peace would show a want of consideration of convenience. There may be reasons for not receiving a particular person invested with this office; and hence it is customary to communicate the nomination so as to give information of it. By the Act of Vienna of 19th March 1815, diplomatic agents were divided into three classes: (1.) ambassadors, legates, and nuncios; (2.) envoys or ministers accredited to sovereigns; and (3.) *chargés d'affaires* to Ministers of Foreign Affairs. Only ambassadors, legates, and nuncios have the representative character, and enjoy generally the honours due to the sovereign who sends them. The protocol of Aix-la-Chapelle of 21st November 1818 added between Ministers of the second division and *chargés d'affaires*, an intermediate class formed of Resident Ministers. Governments frequently accredit diplomatists to foreign courts, to whom they grant the title of Envoy Extraordinary and Minister Plenipotentiary; and as a certain superiority is assigned by usage to these titles, they are assumed even by permanent Ministers. According to the rules established by the Congress of Vienna and generally accepted, the Ministers of this class take their places among each other according to the date of the official notification of their arrival at the court to which they are accredited. The rules as to places of honour are also applied to the diplomatic agents.

In order to protect commerce in the Middle Ages, there were elected in various cities of the Mediterranean magistrates, who, under the designation of Consuls, judged the disputes between the various foreigners settled there,

and also between foreigners and natives. Similar concessions were specially obtained by the Italian Republics in the various ports of the Mediterranean and of the Black Sea, before and after the Crusades. In other countries, as in France, special judges were instituted under the name of Consuls, to whom was intrusted the office of judging of matters of commerce even between foreigners; so that except in the ports of the Levant the territorial jurisdiction predominated, and there remained for the special agent sent by the foreign Power only the protection of the commercial interests of their own subjects and the police regulation of them. Most writers, including Wheaton, deny to Consuls the qualification of public ministers, as they do not enjoy the immunities granted to the diplomatic agents, except in the States of the Levant where special stipulations are in force, and where the two offices commonly go together. No State is constrained to receive foreign Consuls, unless it be by obligation sanctioned by special treaties.

In order to exercise their functions, Consuls required an *exequatur* from the Government in whose country they reside. As to civil and penal matters, they are subject to the jurisdiction of the place, like all other resident foreigners who owe the State a temporary obedience. They are, however, exempt from personal services, so that they may be able to attend freely to their functions.

The Italian consulate is regulated by the Law of 15th August 1858, which was published for the Kingdom of Sardinia, and which was extended to all Italy, with some modifications, by the decree of 28th January 1866, followed by the regulation of 7th June of the same year.

The privileges of diplomatic agents were once numerous and extensive, but they are now reduced to inviolability of the person and exemption from the local jurisdiction. These guarantees are distinguished by the name of *exterritoriality*. By a juridical fiction the person

of the Minister, his family, his suite, and their movable goods, are considered as existing outside of the territory of his residence; and they are therefore exempt from the local jurisdiction. Whoever wishes to raise an action against them has to do it in the Minister's country of origin, and according to the laws there existing. The jurisdiction of the place of residence is held to be accepted for the immovable goods which the Minister may possess, and for suits which the Minister may raise. However, no personal execution, nor any execution against the movables of the Minister, will have effect. This exemption not only embraces the civil and penal laws, but also includes the financial laws. The Minister, his family, and his suite are thus exempt from any taxes, direct or indirect, except real taxes, and those which are relative to the exercise of any industry foreign to the diplomatic character, such as rights of patents, &c. These financial exceptions vary according to the States, no uniform rules having yet been established. In virtue of the same principle there is conceded to the Minister the free exercise of his own form of worship in private chapels, which his fellow-countrymen are commonly also allowed to attend. As regards the conduct of a State in the case of offences committed or attempted by a foreign Minister, Martens says that the constant practice of the European peoples makes it sufficient in ordinary cases to demand the recall of the delinquent Minister; but if the danger is urgent, it is usual to arrest the Minister and conduct him to the frontier.

As a consequence of the principle of exterritoriality, it is considered that the Minister has delegated to him jurisdiction over the persons composing his family and his suite, which he exercises in accordance with the laws and usages of his native country. In practice the Minister restricts himself to civil and voluntary jurisdiction, limiting himself to arresting any one among the said indi-

viduals who may have rendered himself guilty of some crime, in order to send him into his own country to be judged. To avoid all ambiguity, the Minister on his arrival is in the habit of communicating a list of the persons who compose his family and his suite. It is almost unnecessary to state that in the case of the subject of any Power being appointed diplomatic agent to that Power and being accepted in that capacity, the exemptions indicated will not apply. The inviolability granted to Ministers is extended in practice also to messengers and couriers sent with despatches to the legations; in passing through a friendly territory, they are exempt from any examination of what they thus carry with them, provided they are supplied with a passport from their own Government. In time of war, the vessel which transports such messengers is furnished with a flag of truce or provided with a safe-conduct.

Ministers are furnished with a letter from their sovereign as their credential to the sovereign or Government to whom they are accredited, and in it the general scope of their mission is indicated. This letter is usually presented at a special audience. In the case of simple *chargés d'affaires*, the credential letter is addressed by the Minister of Foreign Affairs to the Minister of Foreign Affairs of the Power to which it is sent. Every Minister charged with the negotiation of special affairs has to be furnished with *full powers* in writing, which indicate the limits of his commission, and form the sole basis of the validity of his acts. Before commencing the negotiations the *full powers* are exchanged in order to make sure that they are according to rule. The *instructions* given serve for the personal direction of the Minister; and it is seldom customary, and only by express order of the Government giving them, to communicate them in whole or in part to the other Power. Having terminated his mission, or when he has received another mission, the

Minister presents at a special audience of departure (*congé*) his letter of recall. In the case of a rupture between two countries, the Minister demands or receives his passport, and consigns the papers of the legation to the Minister of a friendly power, who remains charged with the protection of the countrymen of the absent Minister during the suspension of the diplomatic relations.

The diplomatic agents do not always act isolatedly, for they often meet in conferences (called *Ministerial Conferences*, to distinguish them from other meetings), which the sovereigns often attend, and which take the name of Congresses.

These meetings have as their object to decide a special question, to conclude a treaty of peace, to determine the effects of a treaty already concluded, or to settle a point of international law. It is difficult to distinguish a Conference from a Congress, since more than one congress has been only a series of conferences without result, and more than one conference has produced the effects of a congress. The most celebrated conferences are those which established the Kingdom of Greece and the Kingdom of Belgium, and certain others which have several times regulated the affairs of the East. Among the congresses of greatest importance may be mentioned that of Münster and Osnabrück, which led to the Peace of Westphalia in 1641–48, that of the Pyrenees in 1659, that of Utrecht in 1713, that of Vienna in 1815, that of Paris in 1856, and that of Berlin in 1878.

The following rules are applied, according to the circumstances of the case, both to congresses and to conferences. In order that a congress may meet, it is necessary that the parties be agreed as to the basis of the discussion. As soon as the congress has met, the representatives of the various Powers commence by paying each other the usual visits, and then they proceed to the choice of a

president. If the meeting takes place under the mediation of a neutral State, or on the territory of a great Power interested in the transaction, it is usual to elect as president the representative of the mediating Power, or of the Power on whose territory the congress meets. The members exchange their respective credentials and proceed to the arrangement of the matters that have to be discussed from day to day. In the Congress of Vienna, where the questions were almost endless, there were appointed special commissions, on whose reports the vote was taken. For the sake of brevity some questions were decided beforehand by an exchange of votes. Usually secondary questions are decided by a majority of votes; but unanimity is the rule when the matter treated of affects sovereign States, on which the will of others cannot be imposed. An exact protocol or minute of every sitting is kept, and is submitted for the signature of the plenipotentiaries; and if any of them does not find his thoughts faithfully expressed, he may have the grounds of his vote inserted entire, or a statement of his abstention from the vote. The resolutions of a congress are summed up in a final Act.

The function of a diplomatic agent is the conclusion and execution of Treaties. The generic name of Treaty is given to the conventions which are concluded between different States. The definition of the Roman Law applies to them: *Conventio est duorum pluriumae in idem placitŭm consensus.* A Treaty is the expression of the collective will, founded upon a community of interests and sentiments, which makes the obligation valid, and gives the right to demand the direct and continuous execution of what has been promised. It is usual to distinguish conventions from treaties. The word Treaty indicates a solemn contract which regulates grave interests of the State. A Convention has less important interests in view. The most general division of Treaties, according

to Vergé, is into political and economic Treaties. The first are destined to regulate the great interests of supremacy, equilibrium, peace, and war, which are agitated among the States; and the second are directed to determine the interests of commerce, navigation, customs, posts, telegraphs, &c. There is a third species of Treaties relating to certain internal improvements, such as those which aim at the repression of common crimes, and which consist in the reciprocal delivery of malefactors. These are called Treaties of Extradition.

For the validity of Treaties certain intrinsic conditions and certain extrinsic conditions are necessary, as in the case of contracts in general; and these we shall now more precisely determine. The intrinsic conditions of a Treaty are a lawful object and cause, the capacity of the contracting parties, and free consent. A Treaty would be null, because of its unlawful object, which stipulated for slavery, or gave away the rights of a third party, or promised impossible things. The capacity of the contracting parties is established by the respective constitutions of the States. In absolute monarchies the right to stipulate Treaties is delegated to the reigning sovereign; and so, likewise, in constitutional monarchies, except in case of the intervention of the other Powers of the State, when a burden on the finances or a variation of the territory of the State is involved. In republics the right is devolved on the President alone, or the President with the concurrence of the Senate, or on an executive committee, according to the fundamental compact. It is rare, however, that the heads of States exercise this right in person, as they habitually make use for the purpose, of diplomatic agents duly authorised. A tacit mandate is sometimes carried by functions which involve indefinite powers. But all that a mandatory may have concluded in excess of his powers, and that a *negotiorum gestor* may have promised, will become valid only by subsequent ratification. This

applies to an agreement which has been concluded by a subject not authorised by his Government with a foreign government, to which agreement the name of *sponsio* was formerly given. No obligation would result from it for the Government that was not duly represented, nor for the party who had made the stipulation, except for special losses and interests, if he had promised the ratification of his government.[1] We may add that a reigning sovereign only is able to make Treaties, but not a legitimate sovereign who, from any cause whatever, happens to be deprived of his kingdom. The liberty of consent is evident by the absence of those circumstances which would extinguish it, such as error, fraud, and violence. The violence, however, must be such that the strongest and most energetic character would be shaken by it, as would happen in the case of a State by threatening, when it can be easily accomplished, the total loss of its independence; or in the case of a sovereign or his representatives by an attempt on their life, liberty, and honour. This is different from what holds in private law. Another difference is the inadmissibility of rescision on account of lesion, as also the necessity of ratification, even when the contracting party was equipped with *full powers*.

The consent must be mutual, and hence the contract does not exist unless the promise has been followed by acceptance. Consent may be verbal or written; "but," as Wheaton says, "the modern usage requires that the verbal consent be as soon as possible put into writing in order to avoid disputes, and that all purely verbal communications preceding the signing of a written convention be considered as included in the same Act. The parties give their consent tacitly to an agreement concluded with imperfect power as soon as they behave as if such agreement had been regularly stipulated."[2]

[1] Heffter, *op. cit.*, p. 171–172.
[2] Wheaton, *Elements de droit international*, vol. i. p. 288.

For a long time the Latin language was used in diplomatic communications, but after the sixteenth century the French language superseded it without being obligatory. The Ottoman Government claims to use the Turkish language in diplomatic conventions, but in such cases each of the parties signs the treaties and the relevant translation. The style ought to be severe, uniting precision with clearness, but without oratorical pretension.

Treaties are sometimes formed by the aid of one or more Powers. 1. By means of the good offices of some Power which offers them by a spontaneous initiative, or by the request of the parties interested; or, finally, by some obligation previously contracted. These good offices do not lead to any responsibility, unless it has been otherwise settled. 2. By a mediation, properly so called, when a Power, with the consent of the parties interested, regularly takes part in the transactions in such a way that, by its means, the proposals are made and the explanations are given. No Power can impose its mediation, for an armed mediation is contrary to the right of nations. The mediation terminates with the conclusion of the Treaties, or by the rupture of the negotiations. 3. A third Power may, by a formal Act, adhere to a treaty already concluded, either as principal party accepting the stipulations which concern it, or renouncing exceptions against some disposition which might some day injure its own interests, or from simple courtesy, in order to give greater solemnity to the Treaty.

Except in the cases indicated, an international convention has effect only between the contracting parties. For the interpretation of treaties the rules of common law are applied, namely, good faith and logic. When a clause is susceptible of two significations, it must be understood in the less onerous signification. What is deduced as a necessary consequence may be maintained as being tacitly included; and when new and identical

relationships arise, other treaties may be applied to them by analogy, unless they are advisedly limited to the express cases.

There are obligations which result from licit and illicit facts, in the manner of the quasi-contracts and quasi-delicts in Civil Law. In International Law there are no crimes in the sense of internal public law, but offences committed against the fundamental rights of persons protected by the laws of another State, which demand reparation. The reparation consists in an indemnity offered to the offended party, or an explanation, excuses, &c. There are certain facts punishable everywhere, such as piracy, which consists in the seizure and appropriation of ships and objects which are found on them, for a purpose of gain and without commission from a responsible Government. Pirates surprised committing the act, or who have made use of their arms, are liable to capital punishment, and they are judged according to the laws of the Power which has taken them.

The means of securing the execution of treaties are: the clause of damages and interest; hostages; the pledge of movable things (which is little used); the guarantee of a third Power; and what is more common, the occupation of a portion of territory or of certain fortresses. In the case of the guarantee of a third Power, the guarantor is only held bound to give the assistance promised for the execution of the treaty; but if, in spite of his efforts, the end is not attained, he would not be bound to any indemnity. In such a case the guarantee is not equivalent to suretyship. In olden times the most powerful vassals of a sovereign were brought in as guarantors, under the name of *Warrandi conservatores pacis.* Another effective means used was the oath, as in the treaty of Verdun in 843, and in the treaty between Switzerland and France in 1777. The abolition of feudalism and the weakening of the religious sentiment have made these

two modes of securing the execution of treaties fall into desuetude.

Before seeing how treaties are extinguished, we shall examine the different opinions of authors concerning their efficacy. Some maintain that in every treaty the clause *rebus sic stantibus* is understood, and that it is lawful to depart from it: 1. If there supervene a just and sufficient cause; 2. If things are brought back to the point from which they ought not to have departed; 3. If the motive of the compact has ceased; 4. If the necessity or interest of the State so requires. This last doctrine is a very convenient one, as it refers the observance or non-observance of the Treaty to the judgment of the contracting party. Pinheiro Ferreira, in his notes on Vattel, expounds a specious theory on this subject. "The nature of the conventions between Governments," he says, "could not be regulated by the same principles of contract that hold between private persons. Governments do not treat in their own name, but in the name of the nation which they represent. Accordingly, as long as the nation which gave its consent remains the same, and the circumstances which were in view in making the treaty are not changed, the nation is bound to conform itself to it; but if thereafter a new generation, the heir of the rights and duties of the generation which contracted, recognises that there has been surprise or violence, or *that the convention, though equitable at first, now turns out to its prejudice or damage,* it is not obliged to execute it. In vain will the other contracting party object that their ancestors subscribed the convention in name of posterity also. The present generation will be able to reply that no one is authorised to contract in name of a third party who has not given, nor been able to give, a mandate to accept hard and disadvantageous conditions. All that the other contracting party will be able to claim," continues the same author, "is that by a new convention, directed to annul the former, the damage

may be divided, as the advantages would have been divided, if the convention established by the forefathers had continued to be useful, so as to bear together the effects of the imprudence of their fathers and of the changes which time has brought into their relations. It is a great equivocation to confound national identity with individual identity, seeing that this expression is applied in a figurative sense to a people when two distinct epochs are in question. The individual is in reality always identically the same. A people preserves the same name and inhabits the same regions, but it is no longer the people which has contracted."

It is easy to refute the distinguished author by reflecting that no difference can exist between Public Law and Private Law in the juridical bond established between the various generations, seeing that the transmission of rights and duties takes place in the same way in both, so as not to be always recommencing the social labour. In the hypothesis of a treaty vitiated by error or violence, there is no necessity to wait for a new generation, since such a treaty does not exist juridically, and it is annullable from its first moment. On the other hand, when no fundamental rights that are inalienable and imprescribable are alienated, and when the parties possess all the conditions requisite in order to be able to contract, convention ought always to preserve their efficacy. In support of this opinion we may quote the following words of Hautefeuille: "Treaties are in general obligatory on the peoples who have consented to them; but they have not this quality in an absolute manner. An unequal treaty, or even an equal treaty containing the cession or gratuitous abandonment of an essential natural right, that is to say, one without which a nation cannot be considered as continuing to exist as a nation, *e.g.*, even its partial independence, is not obligatory. Such treaties may continue to receive their full execution so long as

the two peoples persist in desiring their existence; but they have both always the right to break them in what concerns the abandonment or cession of an essential right, on apprising the other party and denouncing the treaty. The reason of the inefficacy of transactions of this nature is, that natural rights of this kind are inalienable, and, to use an expression of the civil law, are out of commerce. Unequal treaties which contain no infringement of essential rights, and are concluded for a determinate time, are obligatory for the whole of the time fixed. But if there is no term stipulated for their duration, the party whose consent has been forced by the circumstances, may always free himself from them by observing the due forms. The same holds also even of equal conventions, in which the essential natural rights are respected, and which bear upon the private and secondary interests of the people. They are always obligatory for all the time fixed for their duration; but when no term has been fixed, and even when they have been declared perpetual, they have existence only by the continuation of the two wills which have created them. The stipulation of perpetuity has no other effect than to avoid the necessity of renewing the convention for secure continuation of the same relations, when the two peoples desire that they shall not cease to exist. Even unequal treaties, which contain cessions of territory, or which stipulate pecuniary indemnities, and finally conditions which have as their object a certain definite fact which has to be executed forthwith or within a stipulated term, are always obligatory in this sense, that they not only ought to be executed within the period agreed to, but likewise that the people which has executed them cannot return on the facts accomplished in virtue of the convention. Finally, treaties which are limited to recalling the dispositions of the primitive law, and to establishing and reviving the rights which it confers on the peoples, and

to regulating the exercise of them between the contracting nations, are always obligatory, not only during the time stipulated by the parties, but also during all the time of their existence when no term has been fixed, *i.e.*, till the nations by a common agreement have modified the dispositions relating to their execution. The reason of this difference is easy to grasp; the natural law is by its very nature always obligatory. Treaties which recall its dispositions and regulate their application, ought necessarily to have the same perpetuity; since in any circumstances in which they ceased to exist their principles would not cease to be obligatory, in the same manner as they were so during the time in which their stipulations were in force." [1]

Treaties are *extinguished*:—1. By their complete execution, if they do not involve permanent prestations. 2. By the renunciation of the parties interested. 3. By the proving of the establishment of a resolutive condition, or by the transpiring of the fixed term. 4. By the destruction of the thing which was the object of the contract, when it is not caused by any of the parties. 5. By such a change of status in one of the contracting parties as renders the execution of it impossible; as, for example, in the passing of a sovereign State into a semi-sovereignty, &c.

A general war between the parties suspends the treaties which were not stipulated in view of such a war.

It remains for us to indicate the principal political or economic conventions which have changed the face of Europe. The ancient world has left us very few political treaties, for the principle of the equality of the nations was not perfectly recognised.[2] The invasions of the barbarians and the constant struggles of the Church against

[1] Hautefeuille, *Des droits et des devoirs des nations neutres*, tom. i. p. 13. Paris, 1862.

[2] See Egger, *Traités politiques de l'antiquité*. Paris, 1865.

the Empire arrested the development of International Right and Law. But towards the fifteenth century the nations constituted themselves, and commerce made the extending of their relations always more necessary. The Treaty of Westphalia is considered by all as the foundation of the modern European equilibrium or Balance of Power. It strengthened France by the annexation of Alsace; it recognised the revolutions already accomplished by Holland and by Switzerland against the House of Austria; and it secured the liberty of the Protestant States in Germany. The Treaty of the Pyrenees in 1659 regulated the affairs of the South, putting an end to the preponderance of Spain, and establishing the perpetual separation of the two monarchies of France and Spain. The splendid triumphs of Louis XIV. were followed by the reverses of the War of Succession of Spain; and the Treaty of Utrecht in 1713 put an end to the French preponderance, and confirmed the prohibition of a union of the two crowns of France and Spain established by the Treaty of the Pyrenees.

England then became the preponderating Power down to the French Revolution. The Austrian War of Succession followed the Treaty of Aix-la-Chapelle of 1748. It confirmed the cession, effected by the Treaty of Dresden, of Silesia to Prussia, which was thus elevated to the rank of a great Power, and which served as a support in Germany to the Protestant States against the preponderance of the House of Austria. The desire to recover Silesia gave origin to the Seven Years' War against Prussia. France committed the wrong of supporting Austria, believing that she was certain to unite all the branches of the House of Bourbon by the Family Compact of 1761 against the dispositions of the Peace of Utrecht. She thus caused England to assist Prussia. The Maritime War was concluded by the Treaty of Paris, and the Continental War by the Treaty of Hubertsburg in the same year, 1763.

The Treaty of Paris caused France to lose Canada, the Island of Grenada, and all her possessions in Northern America; as well as Louisiana, which was ceded to Spain in exchange for Florida given to England; and the acquisitions made in India in 1749. The maritime supremacy of England was established in consequence.

The Treaty of Hubertsburg did not change the territorial relations of Europe, but only renewed the Treaties of Westphalia, Utrecht, and Aix-la-Chapelle. The Treaty of Versailles of 1783 with the independence of the United States of America, wiped out the shame of the Treaty of Paris of 1763. Florida and the Island of Minorca were ceded to Spain, and Senegal to France. In the meantime another formidable Power had risen in the North, namely, Russia, which, by the Treaty of Neustadt of 1721, had acquired the Swedish possessions on the shores of the Baltic; and by the first, second, and third partitions of Poland (1772, 1793, 1794) it always advanced farther towards the west.

The French Revolution proclaimed more liberal principles in the sphere of International Law; but France, constrained to repel invasion, got drawn away by the mania for conquest. The Treaties of Campoformio of 1797, of Luneville of 1801, of Amiens of 1802, of Presbourg of 1805, of Tilsit of 1807, and of Vienna of 1809, were cancelled by the Treaties of Paris and Vienna of 1814 and 1815, which partly regulate, even in the present day, the political division of Europe.

These treaties, dictated by the spirit of conquest and reaction, arranged the map of Europe without taking any account of the interests of the peoples. They were accompanied by a manifesto called the Holy Alliance, subscribed at Paris on the 14th September 1815 by the sovereigns of Russia, Austria, and Prussia. This manifesto invoked the principles of the fraternity of the Christian religion, leaving their application, however, to the

absolute power of the princes. The King of England did not sign this declaration from a consideration of mere form, as he was not able to append his signature to it without that of a responsible Minister, according to the English Constitution. But at the Congress of Aix-la-Chapelle, held in 1818, the English Plenipotentiary adhered to these principles, along with the Minister of France. From that time the Five Great Powers constituted themselves into a sort of political Areopagus, for deliberating not only on their own affairs, but also on those of the other States. Hence the interventions of Austria in Naples and Piedmont in 1820 and 1821, and that of France in Spain in 1823.

But so many interests were felt to be injured by it, that the system of the Holy Alliance began to be shaken. The first blow came from Greece, who broke her chains, and public opinion compelled the Governments of France, England, and Russia to succour the rebels. The kingdom of Greece was constituted on 3rd February 1830.

The Revolution of July overthrew the old French dynasty, detached France from the Holy Alliance, and produced another infraction of the Treaties of 1815 by the constitution of the Kingdom of Belgium in 1831. In 1848 the monarchy was destroyed in France, and all Europe became a prey to revolution. The nationalities were set in motion, but they did not succeed in throwing off the yoke. Russia aided Austria in Hungary, defeated the projects of Prussia in Germany, and, when she saw the reaction triumphant in Europe, turned her looks towards the East. France and England could not permit Russia to dominate Europe from the Bosphorus, and they entered into an alliance (in which Sardinia afterwards took part) to defend Turkey as then threatened. The war was successful, and the Treaty of 30th March 1856 gave Turkey admission into the great European concert, and rendered impossible any exclusive interference of

Russia with the dependencies of Turkey and the fate of its Christian subjects. These results were lessened by the Treaty of London of 13th March 1871, and by that of Berlin of 13th July 1878 above referred to. In 1859 France marched into Italy to deliver her from the foreign yoke, but she stopped with the preliminaries of Villafranca. This was followed by the Treaty of Zurich of 10th November 1860, which was not put into execution.

But Italy was able to derive advantage from the circumstances by binding itself closely to the dynasty of the House of Savoy, and arranging her own forces, waiting for a propitious occasion to complete her independence. A difference between Austria and Prussia not long thereafter furnished this occasion, and the Italian and Prussian Alliance was forthwith formed. After a very short war, Germany succeeded in grouping herself around Prussia by the Treaty of Paris of 23rd August, and Italy obtained Venice by the Treaty of 3rd October 1866.

The commercial relations of the peoples have become more extensive in modern times. Commercial conventions were rare in antiquity; for in the East commerce was specially protected by religion and by the feelings of hospitality, and in the West the uncivilised States soon came to be united into a single Empire. The Phœnicians, however, made valuable discoveries; and the Greeks have left us regulations of Athenian origin concerning insurances, maritime exchange, freight, &c., and the maritime laws of Rhodes. From the eighth to the tenth century the Arabs made themselves the masters of commerce, but the Italian cities rose rapidly, and the Crusades brought the East into contact with the West. The ancient military roads of the Alps became commercial highways, and thereby the merchandise of the Levant imported through Venice and Genoa was distributed in Germany, France, the Low Countries, and England. The ancient Roman colonies took new life on the Rhine, as

at Basle, Strasburg, Ratisbon, and elsewhere. Important depots were founded by Venice and Genoa at Bruges and Antwerp in the Low Countries, where their vessels went to exchange the products of the East for those of the North. In the eighth century the Teutonic Order made the conquest of Prussia, and the Knights of the Sword that of Livonia. The population of the shore of the Baltic gathered into free cities, which, binding themselves together around Lubeck, formed the Hanseatic League, and extended their operations both in the Baltic and the North Sea. France and England then held but a secondary rank, and Holland was not yet born.

In the fifteenth century the known lands seemed to be too limited, and voyages and discoveries began. The Portuguese were the first to extend their navigation, and to take possession of new countries. But they were very soon surpassed by the Spaniards, on whom Columbus bestowed a new world. The example was followed by the Dutch, the French, and the English, with whom the preponderance has remained.

Unfortunately these conquests were made under the principles of the mercantile system, according to which all wealth consisted in the possession of the precious metals, and which inculcated an exclusive export commerce in order to absorb a greater quantity of ready money. Hence the colonies were obliged to receive everything from the mother-country, which prohibited their commerce with foreigners; and they were also compelled to produce the commodities which suited the mother-country. But as sound economical theories became propagated, it became understood that wealth does not consist in the precious metals only. These metals are subjects of merchandise like everything else, although they also fulfil the office of serving as a measure of value; but wealth properly consists in the abundance of products and capitals of all kinds. About the middle of the last cen-

tury the practice of monopoly was mitigated even in the Spanish and Portugese colonies, where it had always been most rigorous. In England, from the accession of the Hanoverian dynasty, more liberal principles were followed, until in 1859 Cromwell's famous Act of Navigation was abolished, an Act which prohibited foreign vessels from trading directly with the English colonies.

The beginnings of Commercial Law, as regards both private individuals and nations, are contained in the Fragments of the Rhodian Law, the Tables of Amalfi, the Assises of Jerusalem, the Rôles of Oleron, the Collection of Wisby, the *Justitia Lubicensis* and the *Legisterium Succiæ*. Various conventions with individuals and corporations followed, as we have already indicated in speaking of consuls; but the syllagmatic form was entirely unknown between sovereign and sovereign. The increase of commerce brought with it special treaties, called Treaties of Commerce and Navigation, which related to the maxims of maritime right; the institutions of consulates; the condition and prerogatives of the consuls; the condition of the trading subjects as to their industry, property, contracts, and jurisdiction, when they were found on the territory of the other contracting State; the exportation, importation, and transit of merchandise, and the dues which might be imposed upon them; the admission of ships into the different ports and harbours; the mode of verifying the flag, the ship's papers, &c. In the time of war agreement was entered into as to the free departure of the different subjects within a definite interval; and the renunciation of *embargo* and letters-of-mark. They also regulated the conditions of neutrality when the war took place with a third Power. As regards the rights of the customs and of navigation, it was usual to establish reciprocity, the special treatment of subjects of the most favoured nation, or equality with the natives. More than a hundred and fifty treaties of commerce and naviga-

tion, concluded during the past two centuries or so, established the treatment of the most favoured nation. Equality with natives is rare, being sometimes applied only to rights of navigation, as in regard to anchorage, pilotage, &c.

Since the reforms begun in England by Huskisson in 1825, and continued by Mr. Gladstone and others from 1853 to 1860, the theories of Free Trade have acquired the sanction of experience, and the barriers against it have been everywhere more or less broken down. From 1818 Prussia modified her tariff on a liberal basis, due regard being given to time. She sought the adhesion of other German States in the formation of a *Zollverein* (Customs-Union). In 1828 the Grand Duchy of Hesse adhered, and Hesse-Cassel followed. In 1833 Saxony, Bavaria, and Wurtemberg joined, and the association was constituted for twelve years. The bases of it were uniform legislation on the frontiers, freedom of trade in the interior, a community of receipts, which were to be divided in the proportion of the population of the various States. Other Governments gave their adhesion, and the association was prorogated in 1841 for other twelve years. In 1851 a treaty was concluded with Hanover, Oldenburg, and Schauenburg-Lippe, who bound themselves to join the *Zollverein* for twelve years, beginning from 1854. These States had kept themselves apart, having formed a special Union under the almost similar name of *Steuerverein* (Tax-Union). Luxemburg, Holstein, Mecklenburg, the Free Cities, and Austria remained outside of the Union. A treaty, however, was drawn up between Prussia and Austria in 1853, in which an Austro-Germanic Customs-Union came into view. But the only result attained was a monetary convention in 1857, in which an equalisation of the different German moneys was established, and a common coinage was introduced for the whole Union. After the events of the war of 1870–71, Germany, united into an Empire, entered into

a new commercial convention with Austria, the *Zollverein* no longer existing.

The principles of Free Trade have been also introduced into Holland, Belgium, the Scandinavian States, and Italy.[1] France has applied them in the Treaty of Commerce with England of the 23rd January 1860, and in successive treaties with Belgium in 1861, with the *Zollverein* in 1862, with Italy in 1863, and with Switzerland in 1864. Austria began from 1861 to lower her tariffs, and in 1863 she approximated them to those of the *Zollverein*. The only great States which continue to be supporters of high dues are Spain, Russia, and the United States of America. Innumerable telegraphic and postal conventions facilitate the communications of all countries. The free navigation of rivers which traverse various States was proclaimed in principle by the Treaties of 1815, and has been applied to the Danube by the Treaty of 30th March 1856. On the 14th March of the following year, 1857, the rights of the dues paid to Denmark for the passage of the Sound and the Belts were redeemed; and on 13th June 1863 the same was done for those paid to Belgium for the navigation of the Scheldt. The far East has been opened to the commercial relations of all nations. China made a treaty with England on 29th August 1842, and thereafter other treaties with other Powers. Japan subscribed the Treaty of 21st March 1854 with the United States of America, and did the same successively with most of the States of Europe. The kingdoms of Siam, Annam, and Cambodia (the last being under the protectorate of France) stand also in commercial relations with the States of the Old and New Worlds.

The progress of European civilisation has diminished the importance of the commercial treaties; for on the

[1] Freedom of commerce was traditional in Tuscany. In 1846 the King of Italy adhered to the principles of Sir Robert Peel. Count Cavour introduced freedom of trade into Piedmont.

one hand economic science has demonstrated the utility of free trade, and on the other the universally recognised right of nations has sanctioned the privileges of consuls, the security of merchants, and the principles of maritime right. We may therefore cherish the hope that treaties of commerce will hereafter have to aim only at conquering the resistance of those populations which remain in barbarism.

From what we have seen, it appears that the Society of the States is an imperfect society. Hence men have often thought of a more intimate bond, proposing for this the idea of a Universal Monarchy or a Confederation; but of this conception we shall treat in the next chapter.

## SECTION SECOND.

### War.

Analysing the personality of the States, we found *absolute* Rights, such as Liberty or Independence, Equality, and Sociability, of which we have now treated; and *relative* Rights, which arise and cease with certain given circumstances, of which it remains for us to speak.

The legitimate consequence of the absolute independence of the States, is the right of defending themselves and demanding reparation for the wrongs which they believe they have received. As men have not succeeded in avoiding war, they have sought to determine the rights and duties of the belligerents towards each other and towards third parties. We have referred to the attempts which have been made to decide international questions otherwise than on the field of battle; but war has not wanted defenders, not only in the ancient world where the people considered themselves in a permanent state of hostility, but even in the modern world. Hobbes taught that war is the natural state of men, and that despotism

alone can make it cease. Spinoza maintained the same principle, and added the abominable maxim that the nations ought to observe treaties only so long as the danger, or the purpose for which they were concluded, lasts. De Maistre, proceeding on the idea of expiation, considers war as a great law of the spiritual world. Hegel defends war as a means of preserving the moral health of a nation, as the winds preserve the sea from becoming a marsh.

Milder sentiments were not wanting even in the ancient world. Plato recognised defensive wars only as legitimate, and recommended that they should be conducted with humanity. Aristotle desired that force should be subordinated to the law of reason and justice, and declared that conquests were legitimate only when made as a means of defence, or when they turn to the common advantage of the conqueror and the conquered. The Stoics also showed that they had broader views. Zeno and his disciples, considering the earth as a single city and humanity as one family, condemned war and slavery. Cicero advocated the view that the relations between the nations ought to be regulated by the eternal laws of humanity and justice. In the Middle Ages the Church sought to soften the manners of the time, and it mitigated the horrors of war by opening asylums for the conquered, and imposing religious truces. In the beginning of the seventeenth century, Grotius, turning to account the maxims of the philosophers, the Roman law, and the precepts of the Christian religion, compiled the true code of war in his *De Jure Belli ac Pacis*. This great work deservedly won for him the title given to him by Vico of the "*Jurisconsult of the human race.*" His successors continued to introduce a spirit of humanity and justice into the usages of war, as we shall see in its proper place.

War has as its purpose to repel an unjust aggression,

or to obtain a just reparation for wrongs that have been received. It is *defensive* if the attack of the enemy is awaited; it is *offensive* if that attack is anticipated. In any case, the struggle is no longer considered to be between nation and nation, but between Government and Government, so that the respective subjects to whom the function of arms is not intrusted continue to be at peace with each other. War has no longer mere destruction in view, but the inflicting the least evil upon an enemy, in order to bring him to himself, and to obtain the satisfaction demanded. Accordingly the definition given by Martens of war, that it is "a permanent state of indeterminate violence," is too vague; nor is this other definition, that it is "the art of destroying the forces of the enemy," satisfactory; and Pinheiro Ferreira would substitute for them as a better definition that "*War is the art of paralysing the forces of the enemy.*"

The best writers seek to limit the causes of war. Montesquieu says: "The life of States is like that of men; the later have the right to kill in a case of natural defence, and the former have the right to make war for their own preservation. . . . The right of war therefore springs from necessity. If those who direct the conscience or the councils of princes do not keep to this rule, all is lost; and if they found on arbitrary principles of glory, of convenience, or utility, rivers of blood will then inundate the earth."[1] Frederick II. wrote in his *Anti-Machiavel* (chap. 28): "All wars, therefore, which have as their object only to repel usurpers, to maintain legitimate rights, to guarantee the liberty of the world, and to avoid the oppressions and violence of the ambitious, will be conformable to justice." Vattel teaches the following doctrine: "The right to use force or to make war belongs to nations only for their defence, and for the maintenance of their rights. Now, if any one attacks a nation

[1] *Esprit des lois*, liv. x. ch. 2.

or violates its perfect rights, he does it injury. From that time, and from that time only, that nation is in the right in repulsing the other and bringing it to reason. It has the right even to anticipate the injury when it sees itself threatened."[1] Martens says, with more precision: "No violation of a simple duty of morality, politeness, or convenience can be considered in itself as a justifying cause for making war. But every act which involves an assault on the independence of another nation, or on the free enjoyment of its rights, acquired by occupation or treaty, whether this act be *past*, *present*, or probably to be feared for the *future*, may be a justifying cause of war between the nations when, after having vainly tried milder ways, it comes to this extremity."[2] The thought of the future should not, however, make us aggressors, as Montesquieu held, when he added to the passage just quoted: "The right of natural defence sometimes brings with it the necessity of attacking when a people sees that a longer peace would put another into a position for destroying it, and that attacking it at that moment would be the only means of preventing this destruction. The system of the Balance of Power has arisen from such prevision, and it is admitted or rejected warmly by different authors. Martens lays it down as a principle that every State has the right to aggrandise itself by legitimate means; but at the same time he grants to other States the right to watch for the maintenance of a certain equilibrium. Pinheiro Ferreira attributes the divergences of writers to the variety of cases to which they have wished to apply this doctrine without examining the justice of the means of aggrandisement. Klüber believes that the system of equilibrium is not founded on the right of nations, but that it can only result from special conventions. Wheaton sees no limit to the right of aggrandising by the legitimate and innocent means which every

[1] *Droit des gens*, liv. iii. sec. 26. [2] *Ibid.*, liv. viii. sec. 265.

State possesses, except in the correlative and equal right of the other States to provide for their own preservation. And it is just a compromise between these two rights that gives rise to the system of the Balance of Power. This does not consist in a material equality of forces, but in the security that any one nation shall not be able to depart from the principles of international justice without exposing itself to the opposition not only of the threatened State, but also to that of the other States who form a part of the same political system.

There has been much dispute among writers regarding the disturbance of this equilibrium; but generally increase of the internal power of the States is not regarded as such, seeing that it can only be combated by simple emulation. As to aggrandisement, some writers distinguish between legitimate means (such as colonisation, the voluntary union of territories, or the forced union effected by a just war), and conquest made under specious pretexts which are more or less justifiable by the right of nations. It is difficult to establish such a distinction; for no State which would preserve neutrality can elevate itself to judge of the motives of a war which has broken out between two independent sovereigns. If two powerful countries like France and Spain voluntarily wished to unite (as was almost happening under the will of Charles II., which gave origin to the Spanish War of Succession), would the other Powers have to remain tranquil spectators and to undergo all the consequences of such a union? The question of equilibrium is a moral question, for which no other rule can be prescribed than the sense of the just and honourable. This gives rise to the right of intervention, which, we have said, should be exercised only in case of extreme necessity and for self-preservation.

In the present state of civilisation it is now much easier to obtain reparation for wrongs received, thanks

to the efficacy which the principles of the right of nations have acquired. Public opinion compels Governments to respect these principles, so that the sole causes of war will in future be resistance to unjust aggressors, and the maintenance of a certain equilibrium. The restoration of Nationalities, as constituting real juridical personalities, instead of the fictitious personalities called States, is also destined to render international relations more easy.

### § 1. Acts Antecedent to War.

Before coming to any sort of hostility, it is the duty of every Government to seek to remove the difficulty by diplomatic means. There are three means of attaining this end:—1. To accept the good offices which some friendly power is wont to offer in such circumstances; 2. To intrust this power to make formal proposals, under reservation of accepting or rejecting them, a process which constitutes mediation properly so called according to Art. 8 of the Treaty of Paris of 30th March 1856. 3. To sign a compromise and choose arbitrators to deliver a judgment according to the rules of right or equity. The arbitrators may be private persons or sovereigns. The former cannot be represented by others in the exercise of their functions, whereas sovereigns usually delegate the matter to special judges or to their privy councillors, reserving to themselves the delivering of the definitive sentence. In case of disagreement among the arbitrators, the opinion of the majority has to prevail. In case of an absolute divergence, the Roman Law authorised the elected arbitrators to nominate another; but this arrangement is not admitted in a general manner either in the modern codes or in international jurisprudence. The arbitrators possess no means of putting their judgment into execution, and adjudications do not always include a penal clause.

Political arbitration has a history; for we find that among the Greeks recourse was had to the opinion of a third or allied city, and in the early times of Rome this assumed the name of *reciperatio.* Gallus Ælius in Festus defines it thus: "Reciperatio est cum inter populum et reges, nationesque ac civitates peregrinas lex convenit, quomodo per reciperatorem reddantur res reciperenturque, resque privatas inter se persequantur." Rome had no sooner become the preponderating power than this mode of settling differences fell into disuse, the Senate reserving for itself the right of judging in such cases. In the confederations and unions of the peoples, federal tribunals were instituted, as is seen in the Amphictyonic Council and in the Achæan League. In the case of the old Germanic Confederation, Art. 2 of the Federal Act provided for particular disputes among the States composing the federation, when they could not be settled by simple mediation; and it indicated for such cases the formation of an arbitration court called the *Austregal Court*, whose sentences were to be put into execution by the Diet. When these efforts did not succeed, it was usual to appeal to the public opinion, all the documents being published that bore on the origin and nature of the dispute, and on the efforts made to come to a reconciliation. If the question was not of sufficient gravity, parties were satisfied with a simple protest or reservation, in order to protect themselves from all future false interpretations, provided that this protest was not contrary to their own acts (*protestatio facto contrarii*). Not rarely diplomatic relations were suspended until an agreement was come to. In questions of the settling of boundaries or such like, recourse was sometimes had to the use of the lot.

Retorsion and reprisals are considered as means of avoiding war.

Retorsion consists in inflicting on the subjects of the State with which the difference exists the same or analo-

gous measures to those which have done damage to the subjects of the State. It is a sort of retaliation which has been usefully employed in order to obtain a modification of certain legislative regulations against foreigners, and its use has become less frequent from the time when more liberal principles began to inspire all legislation. But retorsion being a political act, private individuals cannot practise it without an authorisation from their Government, which determines the modes of it and the persons who are to make use of it.

"Reprisals," says Vattel, "are applied by nation to nation in order to procure justice for themselves when it cannot be obtained otherwise. If a nation has taken possession of what belongs to another, or if it refuses to pay a debt or to repair an injury, or give a just satisfaction for it, the nation injured may seize upon anything belonging to that other nation, and draw profit from it, until it has made up for what is due to it, including its losses and interests, and it may hold it in pledge till full satisfaction is got."[1] Reprisals are a remnant of the *Fehderecht*, in virtue of which every citizen procured justice for himself. But from the tenth century it was already stipulated in certain treaties that the subjects of two parties could not exercise reprisals except after having recourse to the preservers of the peace established for that purpose, and having waited for reparation for their losses during a given time. Afterwards an order of the magistrates became necessary, until the Government reserved to itself the right to issue letters of reprisal. When the goods of the person of the offender were no longer found in the territory of the injured party, *Letters of Mark* (from *Mark*, *i.e.*, boundary) were granted, which authorised pillaging even beyond the territory. Later this epithet was given to the commissions which were granted to corsairs to capture the enemy's vessels. The

[1] *Droit des gens*, liv. ii. sec. 342.

*Magna Charta* secured for foreigners liberty to enter, traffic in, and depart from the kingdom, except in case of declared war. An Act of the Parliament of 1353 established that the goods of a foreign merchant should not be confiscated for the payment of damages unless regularly claimed. This principle passed into many treaties, it being expressly stipulated that recourse could not be had to reprisals without first seeking reparation for the sustained damage from the ambassador or the sovereign and his privy council.

Reprisals are divided into negative and positive, general and special. Reprisals are negative when a State refuses to fulfil a contracted obligation, or does not leave to the other State the free exercise of a right claimed by it. Positive reprisals consist in seizing the persons or goods of another State, in whatever place they may be found; and such reprisals are distinguished into general and special. They are called general when they are exercised by all the subjects of the offended State, and they are called special when in time of peace a Government grants letters of reprisals only to the persons injured by another Government, or by its subjects. These letters are now almost fallen into desuetude, and some recent treaties make mention only of the case in which justice has been denied when the facts have been well established. Wheaton, following the opinion of Grotius and Bynkershoek, holds an unjust sentence to be a case of denied justice; but this is an erroneous view, for the deliberation of regular tribunals, when it has passed into a judgment, cannot be thus qualified. Pinheiro Ferreira, inspired by the principle which limits war to Governments only, would also limit reprisals and retorsions to Governments.

The principal reprisals are the following:—

1. Embargo (from the Spanish term *embargo*, which means sequestration) is a conservative or preparatory act,

which consists in causing the ships found in the ports or seas of a State to be provisorily arrested. Sometimes this is a simple measure of precaution in order to avoid the spreading of news regarding the preparations for war, or in order to proceed to justiciary or police investigations, and so far there is no distinction between friendly and hostile ships. But most frequently the ships of the State with which the dispute has arisen are retained, either by way of simple reprisal, or in order to obtain reparation for the wrongs received, or in order to secure an equal treatment for the ships and goods of the subjects of the State if war should break out. Now, however, in almost all treaties of commerce it is stipulated that the following shall not be subject to embargo :—(1) The ships and goods of the enemy which may be found in the State at the moment of the rupture; (2) those which may enter it before the rupture was known in the last port which they left. A fixed time is also granted for selling their goods, or taking them away with a safe-conduct. When an embargo has been put on without good reason, or when it has not been followed by war, the party doing so is bound to make up the damage suffered. In the Crimean War of 1854, both Russia and the Western Powers abstained from applying this preventive measure. Art. 243 of the Italian Code for the Mercantile Marine limits it to simple reprisal.

2. Blockade has for its object to prevent by sufficient force every sort of communication with a coast, or with one or more ports. Sometimes it is preceded by a declaration of war, and sometimes it accompanies hostilities. But it is often employed as a simple reprisal by hindering commerce and all operations of war, and compelling the other party to come to an explication. This took place in connection with the coasts of Greece in 1827 on the part of France; again by Russia and England before the battle of Navarino; by France on the Tagus in 1831;

by England at New Granada in 1836; by France at La Plata from 1838 to 1840; and then again by France and England from 1845 to 1848.

3. Sometimes intimation is given of a claim for satisfaction within a certain time of certain given demands, under penalty of a bombardment, &c. This is a means which is often abused by the strong Powers against the weak, and it ought to be put an end to by modern civilisation. The bombardment of Copenhagen on 7th September 1807 is famous, as is the reply of the English *Chargé d'affaires* to the Prince Royal of Denmark. A few years ago, on 17th September 1880, recourse was effectively had to a naval demonstration at the mouths of the Dulcigno to obtain from Turkey the rectification of the frontier of Montenegro, in accordance with the Treaty of Berlin. Jules Ferry, President of the French Council of Ministers, strangely abused the word *reprisals* when an attack was made upon China without a declaration of war. The prolongation of hostilities induced England to publish the *Foreign Enlistment Act* to prevent belligerents from providing themselves with victuals, ammunitions, and coal in the English possessions. The Treaty of Peace of 9th of June 1884 put an end to the pretended reprisals.

When war has become inevitable, it is necessary in some way to give intimation of it to the enemy, as well as to the subjects of the State itself, and those of the other Powers who might incur damage from it. The case of a defensive war is an exception, since the designs of the enemy are manifestly known to all. In antiquity it was the custom to proceed on such occasions with much solemnity, and often with religious ceremony. Rome sent to the confines a priest of the College of the Fecials to demand satisfaction. With his head veiled he exclaimed: "Audi, Jupiter . . . audiat Fas. Ego sum publicus nuntius populi romani, juste pieque legatus venio,

verbisque meis fides sit." Then he stated his demand, and concluded by calling Jupiter to witness: "Si ego injuste impieque illos homines illasque res dedier nuntio populi romani mihi exposco, tum patriae compotem me nunquam siris esse." These words he repeated to every one he met on the road or in the street; and after having waited thirty-three days for a reply, he declared war in the following manner:—"Audi Jupiter, et tu, Juno, Quirine, Diique omnes coelestes, vosque terrestres, vosque inferni, audite. Ego vos testor populum illum (here he pointed to it) injustum esse, neque jus persolvere. Sed de istis rebus in patria maiores natu consulemus, quo pacto jus nostrum adipiscamur." The Senate again met, and after a final deliberation the Fecial returned to the frontier, repeated with a clear voice almost the same things (whence the term *clarigatio* for a declaration of war), and the war was considered to be declared.[1]

In the Middle Ages there were special heralds-at-arms for declaring war. The last war declared in this manner in 1635 at Brussels, was the war between France and Spain. In the present day the practice is to make a declaration of war by an official manifesto or by communications to the foreign Powers. On the occasion there are published declarations regarding the principles of maritime right which are intended to be followed, with the restrictions which are to be imposed on the commerce of the enemy, as well as on that of the subjects of the State and of neutrals, on contraband of war, and on the use of certain arms.

## § 2. The Effects of War as Regards the Belligerents.

The definition of war shows that its action should be restricted to destroying, or rather to paralysing,

[1] Liv. i. 32; Plin. xii. 2.

the forces of the enemy. By forces of the enemy are meant both the men and the things which directly or indirectly may serve as means of offence or of defence. Hence it is necessary to examine the effects of war as regards the persons, the things, and the acts of the two belligerent parties. We shall commence with the persons, distinguishing those who fight from those who are mere spectators of the conflict.

The military forces by land are composed of: 1. Regular troops; 2. Citizen militia; 3. Volunteers, or free corps duly authorised. There are reckoned as attached to them chaplains, surgeons, military commissaries, quartermasters, musicians, canteen-keepers, vivandieres; and these are not made the object of the fire of the enemy, nor are they entitled to use arms except for simple personal defence.

The forces at sea are composed of: 1. Ships of war; 2. Privateers furnished with letters of mark by those Powers which have not adhered to the declaration of maritime law annexed to the Treaty of Paris of 1856, as Spain, Mexico, and the United States.

It is a subject of dispute whether citizens who rise in mass by order of their Government or by their own authority to repel an invasion, are to be considered as belligerents. There is no doubt that they ought to be regarded as such if they carry on real and regular war.

As to the mode of combating, and the extent of the evil to be inflicted on the enemy, Grotius says: "In war everything is allowable which is indispensable to obtain the victory; so that we undoubtedly have a right to what is necessary for the triumph of our right."[1] This does not appear sufficient to Bynkershoek, who emitted these barbarous propositions: "Every act of force is permitted in war, such as to kill an unarmed enemy, to use poison, assassination, or artificial fire, by any one who possesses

[1] *De jure belli ac pacis*, Lib. iii. cap. i.

the secret of it; in a word, whatever one pleases. For according to the right of nations, everything is lawful against the enemy just because he is an enemy; nor is it necessary to make a distinction as to the motives of the war, as it is a matter of indifference to know at all whether it is just or unjust."[1] And as if all this were but little, he declares that one may kill or spoil the enemy without any limit, being inspired by the maxims of antiquity. On the contrary, civilisation has caused milder sentiments to predominate. In the present day there is a general reprobation of the use of poisoned arms against an enemy, or arms which cause useless sufferings or wounds difficult to be healed, such as double bullets, bullets composed of glass and stone, &c. Equally reprobated would be the use of a mechanical means of mowing down whole lines of enemies, such as Congreve rockets fired against men, or copper balls in a battle by land. The Convention of St. Petersburg of 29th November 1868 has excluded explosive projectiles below 40 grammes, and any containing fulminating and incendiary materials.

Assassination and poison are proscribed by all, as well as the practice of putting a price on the head of an enemy, and massacre of the garrisons of cities taken by assault. Such stratagems of war as bribery and practising the means of getting information or provoking treachery, are hardly tolerated. These and other principles—such as the prohibition of the bombardment of unfortified cities—were formulated in the protocol of a Conference convoked by Russia at Brussels in 1874; but it had no practical result, as but few States took part in it.[2]

[1] *Quaest. Jur.*, Lib. i. cap. i.

[2] The Governments have, however, adopted more humane maxims in the *Instructions for the Government of Armies of the United States in the Field*, compiled by Professor Lieber in 1863, and approved by the Federal Government; in the *Manual of the Dutch Officers*, by Beer Portuafel (1873); in that of

All military action should cease as soon as isolated individuals, bodies of troops, or garrisons manifest the will to surrender; and the conqueror should demand surrender when all resistance seems to him impossible. As regards fortresses in particular, it is the custom to summon them to surrender before and during the hostilities, and to grant capitulations, without claiming surrender at discretion except in extreme cases. Soldiers taken in battle, or who surrender voluntarily, are declared prisoners of war, and they are kept as such till peace is concluded, or till there is an exchange of prisoners. The fate of the prisoner of war in ancient times was hard, for he belonged to the conqueror, by whom he was made a slave (*servus*, from *servare*), and his life was spared only as a matter of grace. He recovered his liberty only by being ransomed. This usage was carried on to a time not very remote, for the third Lateran Council in 1174 definitively prohibited the enslavement of the conquered; yet prisoners of war continued to belong to the person who had captured them, and who liberated them for ransom. But in consequence of the establishment of permanent armies, prisoners were reckoned as belonging to the State, which fixed the price of the ransom with the enemy; and thus a sort of tariff was drawn up for the liberation of military men of all ranks. A marshal of France, a commander-in-chief, or a vice-admiral, was usually reckoned at ten thousand francs *Tournois;* while a soldier or sailor cost six or seven francs. Afterwards the tariffs were brought much nearer each other, the price of a commander descending to fifteen hundred francs, and

Antonio Berti for the Italian officers, and in another by Billot for the French army (1878); in the two Russian regulations of 1877, occasioned by the war with Turkey; in the sketch of a military code by the Swiss Confederation (1878-79); and, finally, in the important *Manual of the Laws of War on Land*, prepared by the Institute of International Law, unanimously adopted at its meeting at Oxford on 9th September 1880, and laid before the Governments to serve as the basis for a legislation conformable to the progress of juridical science and the wants of civilised armies.

that of a soldier or sailor rising to twenty-five francs; and instead of disbursing actual money, they kept accounts respectively, until the idea arose of an exchange of prisoners. To the honour of the French Revolution, it established the principle which was to be followed in this regard, and we may quote the text of the decree of the National Convention of 25th May 1793: "1. There shall be no longer a pecuniary tariff for the exchange of prisoners of war. 2. It is absolutely prohibited that an officer or subaltern officer of any rank whatever, be exchanged for a larger number of individuals of lower rank. 3. The common basis in an exchange shall be to change man for man, rank for rank." These principles were adopted in a Convention of exchange between France and England in 1798, and afterwards by all the Powers. The Convention of Geneva, of 22nd August 1864, in Art. 2 accords neutrality to the personnel of the hospitals, including the attendants, the services of help, of administration, transport of the wounded, and the chaplains, when they are on duty, and so long as there remain wounded to relieve and to succour. This is a humane exception to the principle which considers such persons, along with the musicians, canteen-keepers, vivandieres, &c., as an appendage of the military forces, and therefore subject to be made prisoners. Art. 6 of this Geneva Convention expressly sanctions what was a common practice among civilised nations, namely, that the wounded and sick soldiers shall be picked up and attended to, whatever be their nationality. Commanders-in-chief have authority to consign immediately to the advanced posts of the enemy those soldiers of theirs who had been wounded during the engagement. The pious care of burying the dead, belongs to whoever remains master of the field of battle; and when the action remains undecided, an armistice is concluded, in order that both sides may bury their dead.

In consequence of this Convention there have been formed in several States societies for the relief of the wounded, having as their object to furnish the ambulances with their personal equipment and the necessary material. By the Italian Law of 21st May 1882, the Government of the King has been authorised to form into a moral corps the Italian Association of the Red Cross, represented by the Central Committee resident at Rome; and it is dispensed from the ordinary supervision of pious works, and subjected to the surveillance of the Ministers of War and Marine. A French decree of the 3rd July 1886 establishes the rules of the Society for the Aid of Wounded Soldiers which has been founded in France.

Nevertheless the Convention of Geneva gave rise to grave abuses in practice and to numerous complaints in the war of 1870–71. The fields of battle and the convoys have been encumbered with flying ambulances, which, not being subject to any discipline, incommoded the military operations, and were not always found in those places where their presence was most necessary. These ambulances served as a refuge for persons who desired to withdraw themselves from the military service, and who did not possess any of the knowledge or special qualities required for the service of the wounded. The insignia of the Convention also served to mask acts of espionage, permitting those who were invested with them to move freely in the lines of the operations of the hostile armies; and these very insignia have been employed to protect convoys of ammunition and provisions, and to cover military positions from the fire of the enemy.

In order to obviate these inconveniences, it has been proposed to distinguish clearly the service of the wounded on the field of battle from that of the fixed ambulances. The service of the wounded on the field of battle should belong exclusively to the military ambulances, the personal

members of which are clothed with a uniform that is always recognisable; and private persons who might desire to take part in this service would enrol themselves in the army, and should be entirely subject to the military authority. This authority would intrust the care of the wounded, in whole or in part, to the private ambulances. These ambulances would be fixed and subject to the direction of the military authority, and the personnel of these ambulances, protected by the Convention of Geneva, would be put under the surveillance of delegates of the societies recognised by the States, and provided with authentic commissions and clothed in uniforms. These delegates would be responsible for the conduct of their subordinates; they would be put into relation with the military authority which exercised the actual power at the place where they were; and they would be charged with the duty of bringing up the reliefs and establishing the fixed ambulances on the spots marked out for them by the military authority.[1]

As an exceptional measure, it is recommended in practice not to fire on sovereigns or royal princes engaged in the combat, but they may be made prisoners, special regard being paid to them in such a case. As regards officers, it is sufficient to have their word of honour that they will not remove themselves from the place assigned to them. Actual custody is usually restricted to subaltern officers and soldiers, to whom liberty is sometimes granted when bound under obligation to take no further part in the war. During their captivity prisoners are subject to the tribunals of the State; and if they conspire or threaten to take up arms, they incur the severest penalties. They would be treated in the same way if they fled and were re-taken. The laws of war are not applicable to fugitives and deserters found

[1] Funck-Brentano et Albert Sorel, *Précis de droit des gens*, pp. 272–273. Paris, 1877.

in the enemy's camp. With regard to such, the military commanders possess a discretionary power.

In the case of pacific citizens, it is no longer disputed that their lives and their honour ought always to be respected. But if they fall into the hands of the enemy, they may be subjected to personal services, with the exception of military service.

We have now to examine how far the rights of war extend in regard to the *property* of enemies both on land and at sea, and we shall commence with that which may be situated on the territory of the State which declares war.

In the Digest (Law 51) we find formulated the maxim of the ancient law on this subject: *Et quae res hostiles apud nos sunt, non publicae, sed occupantium fiunt.* Every citizen could therefore validly seize the goods of enemies found on Roman territory. Modern law is milder in appearance, but it tends to the same result; for it allows the State, even before the declaration of war, to put an embargo on ships and to sequestrate movable goods, including merchandise bought or consigned to account of merchants who belong to the enemy. The treaties of commerce, however, have put limits to this rigorous order, granting a period during which it is allowed to sell or export the movable goods of private individuals.

Immovables were always exempt from sequestration when on the territory of an enemy. It is necessary to distinguish the goods belonging to the hostile army, to the State, and to private citizens. In ancient times they were all confused under the maxim: *Occupatio bellica est modus acquirendi dominium.* Immovable goods were acquired by the State, and movables belonged to those who took possession of them, subject to a preference in favour of the treasury and certain temples. Among the moderns, booty of war (*praeda bellica*) is limited to things

which are serviceable to the army of the enemy. Material of war and provisions become property of the State; and money and other precious objects, if there are any, are divided among the soldiers according to established military rules. It was the custom also to divide among the soldiers the movables belonging even to private citizens in a place where, according to the ancient usages of war, pillage was allowed.

It is disputed among authors at what moment property in booty commences. According to the Roman Law, the ownership of anything was acquired from the moment that it was put into safe keeping. As this moment could not be well determined, it has been considered sufficient to have the possession of it for twenty-four hours in countries which are not regulated by the Code Napoleon, which, by Art. 2279, takes away all doubt by establishing the rule that for movables possession is a good title. This question is important in connection with the exercise of the right of *postliminium*, as we shall afterwards see.

As regards the goods which belong to the State, it is necessary to distinguish accurately an invasion from the final conquest (*debellatio, ultima victoria*). In case of an invasion, the conqueror makes use of the movables, of the public taxes (being able also to impose extraordinary ones), and of the revenues of the domain of the State. In case of a final conquest, the conqueror becomes proprietor according to the conditions of the peace. Some writers would confine the rights of the invader to corporeal movables, and to the revenues of the domain of the State, exempting incorporeals. Heffter maintains that the invader cannot demand purely personal debts, seeing that the mere detention or holding of a title does not give the right to put it into execution without the express authorisation of the creditor or the judiciary authority. Hence it follows that the debtor who has believed that he freed himself by paying to the invader, has made a bad pay-

ment, and there would remain for him nothing but to claim an indemnity in the treaty of peace. This solution seems to us too rigorous; for the invader, taking the place of the legitimate Government and exercising its powers, a debtor could not refuse to pay a debt that had fallen due. If, on the contrary, the invader were to sell an immovable property of the State, and did not remain the permanent proprietor of the territory, in that case, at the peace, the purchaser would be obliged to restore the immovable without any indemnity.

The goods of private citizens, whether movable or immovable, ought to be respected as a general rule. Requisitions of objects and contributions of war have remained as a remnant of the ancient right of pillage and devastation, and by many writers they are considered as a redemption of private property. Some raise the question, which belongs entirely to internal public law, whether the State is obliged to indemnify its own subjects for such contributions and for the damages of the war. The answer is in the negative, such evils being considered as accidental incidents which might fall on any part of the territory. When the citizens refuse to furnish the contributions demanded, they are threatened by the enemy with military execution, or with having to receive soldiers into their houses, or even to suffer pillage. The devastation of the country is adopted in very rare cases in order to make the enemy abandon an important strategetical position. The private property of the sovereigns is assimilated to that of the citizens.

By a strange anomaly, private property, which is respected on land, may be seized at sea. This is explained by the great interest which there is in damaging the commerce of the enemy. It is legitimate for vessels of war and corsairs or privateers to take everything on the sea. Private citizens, however, should remain

extraneous to the struggle; for from the middle of the fifteenth century letters of mark were granted in order to make up for the insufficiency of the naval armaments. Even previously, when it had been agreed to exercise the right of private reprisal, the *Breve curiae maris* of Pisa of 1298, and the Statute of Genoa of 1631, bound the privateers to give caution, so that they might do damage only to the enemies of the Republic. The French Ordinance of 7th September 1400 prohibited the arming of any vessel at the expense of private persons to make war on the enemies of the King without the permission of the Admiral of France; and it created a jurisdiction over maritime prizes, assigning to the Admiral the cognition of all facts at sea, and specially the adjudication of the prizes. An Act of the English Parliament of 1414 enjoined privateers to bring all their prizes into the English ports, and to make a declaration of them to the guardians of the peace, under penalty of the confiscation of the prize and the vessel that had seized it; but it did not impose the authorisation of the royal authority in order to arm for the expedition. A privateer, therefore, did not become proprietor of the prize until after judgment. This principle has been extended always more in modern times, as well as that of the preliminary caution to be furnished by the privateer. From the sixteenth century, privateers, not content with destroying the commerce of the enemy, arrogated to themselves the surveillance of the commerce of neutrals. The treaties of the sixteenth and seventeenth centuries recognised this right, and established international conditions for the exercise of privateering.

But if the Governments which were too interested not to have the aid of privateers shut their eyes to their abuses, public opinion was moved by them. Mably in 1748, and Galiani in 1782, demanded the abolition of the practice, and full respect to property at sea. The United

States, in the treaty with Prussia concluded in 1785, promised not to deliver letters of mark in any, even the most remote, case of a war between the two States; but this clause was suppressed in the subsequent treaty of 1799. The legislative French Assembly promulgated a decree on the 30th May 1792, inviting "the executive power to negotiate with the foreign Powers, so as to bring about the suppression in maritime wars of corsair armaments and to secure a free navigation for commerce." The only cities that replied to this invitation were Lübeck and Hamburg; and the National Convention declared privateering abolished so far as they were concerned. In the Spanish war of 1823, France declared that she would abstain from granting letters of mark, and would respect the property of an enemy. The United States seized this occasion to consecrate these maxims in the draft of a treaty which they proposed, but in vain, to France, Russia, and England in the December of that same year. It was reserved for the second half of our century to abolish privateering among most of the Powers by the above-mentioned declaration of 16th April 1856. In a Memoir read to the Academy of Moral and Political Sciences, Cauchy thus summed up the history of privateering: "Privateering was introduced into naval war by the force of things, when there were yet no large military fleets. It continued for a long time after as an auxiliary of these fleets. Privateering was not therefore invented as an act of progress; it was used as an instrument which was found ready at hand while waiting for something better. Although its origin is very ancient, there is no occasion to be proud of it. The second daughter of the piracy of the ancient times, she long bore the name of her mother; and when, at the period of her greatest fortunes, she wished to break with that mother, she preserved in her deeds and in her bearing something that betrayed the original blot on her family."[1]

[1] *Durespect de la propriété privée dans la guerre maritime.* Paris, 1866.

There remained only a last step to be taken, namely, to declare private property inviolable at sea, as it is on land, by accepting the vote of Brazil in adhering to the said Declaration of Paris, and adopting the condition expressed by the United States in 1861, when they saw the Southern States use, with impunity, the privateering which they had not been willing to renounce when the Republic was united. We may cite as generous precedents Art. 3 of the Treaty of Zurich of 10th November 1859, which, in order "to diminish the evils of war," ordered the restitution of the Austrian ships, on which the prize-councils had not yet pronounced, and the Imperial decree of 29th March 1865, which gave the same instructions regarding the Mexican ships which were not yet condemned, and for the sums obtained from the sales made under provisory title and deposited in the treasury of the Invalides of the Marine. In 1860 France and England had agreed to renounce their right of capture over the Chinese mercantile ships without any condition of reciprocity. The treaty of 30th April 1864, which put an end to the war of the two great German Powers against Denmark, did more by annulling all the effects of the maritime seizures, and thus implicitly recognising the inviolability of private property at sea. Besides, there is the Austrian ordinance of 13th May 1866, published before the war, which exempts from capture the vessels of the belligerent Powers which do not transport contraband of war and do not seek to violate a regular blockade, so long as these Powers practise reciprocity. This declaration called forth that of Prussia of the 19th of the same month, which was inspired by the same principles, Italy, on 2nd April 1865, by Art. 211 of the Code for the Mercantile Marine, had proclaimed reciprocity permanently, as resulting from local laws, from diplomatic conventions, or from declarations made by the enemy before the commencement of the

hostilities. But besides the sentiment of equity, economic reasons urge to the complete abolition of privateering. For now that commercial intercourse is so multiplied that the commerce of the belligerents cannot stand still, it would be compelled to employ a neutral flag, and it would thus receive in an indirect manner (paying excessive freights, commissions, &c.) what it might have directly. As a temporary provision, there might be substituted for capture a species of sequestration, with authority to use things captured during the war, so as to indemnify those interested in the treaty of peace. But so long as these generous intentions are not put into practice, there remains the painful duty to determine certain rules with regard to privateering for those nations who have not adhered to the declaration of the Treaty of Paris. We may here formulate such rules in reference to capture, both of the ships of enemies and of neutrals, for those nations who desire to make use of them :—

1. Every privateer ought to be furnished with a letter of mark or a commission, in order that it may not be treated as a pirate. By an incomprehensible inconsequence, a capture made by an unauthorised privateer, instead of being restored, is kept for the benefit of the State.

2. Letters of mark ought to be granted only to the subjects of the belligerents, in order to prevent all the adventurers of the world being able to take part in maritime wars. Many Powers have expressly bound themselves in treaties to forbid their own subjects from using privateers in foreign wars.

3. Every privateer is bound to furnish caution for the losses which it might unjustly occasion, and some Powers even make the captains responsible for them.

As to captures, there are certain general rules applicable generally to all kinds of vessels, and special rules for neutral vessels :—

1. The persons who are entitled to make captures are only commanders of vessels of war and privateers. It is rare that troops by land are able to seize a maritime prize, but such an act would not be an irregularity.

2. The place for capture is the open seas, and therefore territorial seas are excluded, even when the coast is uninhabited.

3. It is a humanitarian principle, when it is not an obligation under treaty, to grant a convenient time for the ships of the enemy which may be *en route* at the moment of the declaration of war. Before the war of the Crimea, the Western Powers granted six weeks to the Russian ships, in order that they might return home, according to the declaration of the 29th March 1854.

4. At the conclusion of a peace, a date is assigned for putting a stop to capture, and it is usually the interval which is strictly necessary for the conclusion of the peace becoming known. But if it can be proved that the captor, notwithstanding the date assigned, had knowledge of the peace, the prize will be declared illegal.

5. It is forbidden to sell a prize which is not adjudged valid by the competent authority. In Italy the judgment as to the legitimacy of the prize and its confiscation has to be given by a special commission to be appointed by royal decree, according to Art. 225 of the Code of the Mercantile Marine.

6. Among many peoples an asylum is granted to prizes. In Italy it is forbidden to receive in the ports, harbours, and roads of the State privateering vessels with prizes, except in a case of necessity or forced delay, according to Art. 246 of the Code of Mercantile Marine, which likewise prohibits the sale, exchange, barter, or gift of the objects captured.

In the past centuries neutral property was subject to confiscation if it was found on an enemy's ship, or on a neutral ship which carried the merchandise of the enemy

on board. Arts. 1 and 3 of the Declaration of Paris have removed all doubt in this respect. Neutrals, therefore, can be subjected to confiscation only in the following cases:—

1. When the vessel is not provided with regular papers to prove its neutral nationality. A proof of the contrary is, however, admitted.

2. When the vessel is surprised in the flagrant act of transporting to the enemy contraband of war. Art. 216 of the Code of Mercantile Marine thus defines contraband of war: "Except as regulated by the conventions of treaties, and by special declarations made at the beginning of the hostilities, the following objects are declared contraband of war: cannons, guns, carbines, revolvers, pistols, sabres, fire-arms, or portable arms of every kind, munitions of war, military equipment of every kind, and generally all that without manipulation may be used for immediate armament at sea or on land."

3. Confiscation takes place also when a neutral vessel tries to violate a regularly declared blockade, or renders a military service to the enemy; for such vessel then of itself assumes the character of a belligerent.[1]

It may happen that a captured ship is retaken, and then the following rules are applied, according to the cases. We shall follow the rules fixed by the Italian Code for the Mercantile Marine, which, besides having the force of law, are conformable to the most generally received principles.

Recapture may be effected by a vessel of war, or by a privateer, or by the crew of the captured vessel itself. Art. 219 of the Italian Code prescribes that when a vessel is recaptured by a ship of war, no indemnification

[1] Thirty-four States, in addition to the seven signatory Powers, have adhered to the Declaration annexed to the Treaty of Paris. But Mexico, Spain, and the United States refused their adhesion, alleging that this would be to deprive them of their best means of defence in a maritime war.

has to be given. But if it is recaptured by a privateering ship, there is to be given an indemnity of a fifth of the value of the objects recaptured, if the capture has remained twenty-four hours in the hands of the enemy, and of a tenth if the recapture took place within twenty-four hours. Art. 220 assigns a gratuity, according to the judgment of the commission on prizes, to the crew of the captured vessel who have liberated it from the hands of the enemy. If a captured ship is abandoned by the enemy, or if, by the force of a tempest or other accident, it falls into the power of subjects of the State, it shall be restored to the owner on payment to the finders of the expenses incurred in recovering it, and of a premium equal to the eighth of the value of the ship and the cargo, if it was found on the open sea, or of a tenth if in sight of land, according to Arts. 222, 134, and 121. But if the captured ship has been already brought into the ports of the enemy (*inter praesidia*), the capture is considered as final, and it will not be recoverable in any way by its original owner.

War always brings hindrances and impediments to the acts of the belligerents. Although commerce is by its nature an individual act, yet it ought to be made subject to the political conditions of the various States. It is the custom of every Government to interdict their own subjects from general or partial commerce with the enemy, under penalty of fines or confiscation. It is also usual to deprive commercial contracts, such as those of the assurance of the enemy's goods, &c., of their effects. It is necessary in the declaration of war to indicate the restrictions which are to be imposed on the commerce of the enemy. But treaties of commerce usually anticipate the case of war, and provide for granting a period to the respective subjects to abandon the territory which has become hostile, and to determine the restrictions which may be imposed on commerce. There have been examples

of the continuation of commerce between belligerents, as in the war between Holland and Sweden in 1674, by express declaration of the States-General. In the Chinese war in 1860 an Imperial decision of 28th March declared commerce free between the French, the English, and the Chinese. An allied Power cannot be bound to abstain in an absolute manner from trafficking with the enemy, unless this is included in the express compact of the alliance. It will be sufficient if the enemy be not favoured in an ostensible manner.

Some writers maintain that war, by putting the existence of the State into danger, annuls all existing treaties. But the general and permanent relations of States do not cease between belligerents except in so far as their will and the needs of war require it. The conventions concluded prior to the war naturally cease to produce their effects in so far as they presuppose a state of peace. When the term stipulated in a convention happens to fall before or during the war, the conqueror may put himself into possession of the advantages which are secured to him by the convention ; but this possession must be ratified by the clauses of the treaty of peace.

Conventions stipulated or renewed expressly in prospect of the war, continue to subsist so long as one of the belligerent parties has not violated them; but in that case the other party may make himself free from them by way of reprisals.[1]

The power of negotiation during war is exercised in granting safe-conducts, in signing notes for the exchange of prisoners, and in capitulations for giving up persons or things, and especially fortresses, to the enemy. Capitulations are obligatory without being accepted or ratified by the sovereign, provided that the commanding officers who have signed it have done so in good faith, and have not exceeded the limits of their powers. There

[1] Heffter, sec. 122.

are treaties of armistice or truces which suspend hostilities for some time. Armistices, properly so called, cause only a partial cessation of hostilities; and they are concluded by generals for that part of the army which is under their orders. General armistices or truces are usually concluded by Governments, and they apply to every kind of hostility. During a truce nothing can be undertaken in the direction of the object for which the war is prosecuted. Armistices have often no fixed term, and a notification is required to bring them to an end.

### § 3. The Effects of War as Regards Third Parties.

Other States may take part in the war between two States as auxiliaries or allies, or they may keep themselves entirely apart from it. Hence it is necessary to determine what are the relations between them, according to these different cases.

The obligations of auxiliaries may consist in furnishing a contingent of men, money, or provisions; the obligation of the allies consists in taking part in the war in a more general manner. The treaties of alliance determine beforehand when the co-operation of the contracting parties may be called for, and the extent of their participation in the war. When in doubt, usage and the nature of things render applicable the fundamental rules of the contract of society, according to which the share of every associate in the benefits or losses of the concern is in proportion to his associated capital and the object to be attained in common (Art. 1653, Code Napoléon, and Art. 1717 of the Italian Civil Code).

The accidental losses caused by the vicissitudes of the war, are borne exclusively by the party sustaining the damage when it is not the fault of the other party.

Each one, however, should restore to his associates what belonged to him when he has succeeded in taking it from the hands of the enemy.

In a case of offensive and defensive alliance, the ally has always the right to examine whether the war entered upon by the other party is just. In the case of a merely defensive alliance, the party ought also to make sure that the aggression has not been provoked. When a Power is previously and generally under obligation to furnish a contingent, without any provision as to the war which is engaged in, it may be considered as in partial war, and may enjoy in all other respects the benefits of neutrality.

Neutrality springs in principle from the mutual independence of the peoples. It consists in remaining in peace when other peoples are at war. According to Cauchy, neutrality is peace constituted in the face of war, and it is obliged to respect the rights of war. It is imperfect in the above-mentioned case of partial succour to be furnished to the enemy, not in view of the present war. It is perfect when a Power abstains in an absolute manner from favouring any of the belligerent parties.

In ancient times neutrality was unknown, and there is no word to indicate it in the Greek and Latin languages. In Greece, by common consent the temple of Delphi was respected in war, and its territory was put under the protection of the Amphictyons. The maritime cities of Asia Minor and Syria, and those of the islands of the Mediterranean, obtained privileges and rights from the great monarchies of the East, not as neutrals, but as vassals. Rome saw around her only tributary peoples subdued by her arms—*dedititii* who had accepted her yoke, allies who had to help her to prosecute her conquests, or enemies whom she struggled to subject; but she saw neutrals nowhere. In the Middle Ages the feudal arrangement bound the vassals to succour their lords, and neutrality

would have been synonymous with felony. The commercial cities of Italy, of the Low Countries, and of the Hanseatic League understood commerce only under the form of monopoly and privilege, and they lived in continual strife with each other. It was only on the fall of the feudal system, when Europe was divided into great monarchies which tended to reduce each other to subjection, that neutrality, like leagues, became a means of equilibrium. Various cities invoked it to protect their isolation. Switzerland was declared to be permanently neutral, as a common advantage to Europe; and this was afterwards done also in the cases of Belgium and Luxemburg.

Neutrality thus requires equilibrium, or the balance of power, in order to exist. But it is not enough to establish equilibrium on land. It is necessary to try to have it also on the sea. Although the sea is generally recognised as belonging to all nations, except those parts which wash the shores, according to the fixed rules given above, yet those nations which are furnished with large maritime forces do not cease to exercise a great influence upon it. After the discovery of America, the trans-Atlantic commerce remained for a long time in the hands of the Spaniards and Portuguese, and the secondary commerce between the different ports of Europe was in the hands of the Dutch. England aspired to become mistress of the two branches of commerce, and proclaimed the servitude of the sea. Holland found allies on the side of liberty in the two Scandinavian kingdoms of Sweden and Denmark. An essential part of this liberty was the free navigation of neutrals, which could not be secured without the concurrence of the great Powers.

In the war of 1778 against England for the independence of the American Colonies, France published a regulation as to the rights of neutrals. On 28th February 1780, Russia published a declaration inspired by the

same principles, and notified it to England, and to France and Spain, the other belligerent Powers. Besides France and Spain, Austria, Prussia, Portugal, the two Sicilies, and the United States, readily adhered to it. England replied that she would continue to hold by the old rules and the dispositions of her commercial treaties. Russia joined in a league on 27th September 1780 with Sweden and Denmark to defend with arms the principles proclaimed, and this league was called that of the *Armed Neutrality*. During the war of the French Revolution, on 18th December 1800, the league was renewed between Russia and the two Scandinavian kingdoms, with the adhesion of Prussia. On the 17th of June 1801, England succeeded in concluding a maritime convention with Russia, to which Denmark and Sweden were constrained to adhere, and in it the rights of neutrals were restricted. But in the war which followed the Peace of Amiens, England gave herself up to every excess against neutrals. France replied by the Decrees of Berlin and Milan in 1806 and 1807, which established the Continental blockade, by which all communication with England was prohibited, and every vessel which had but endured the search visit of English ships was declared to be subject to capture. The treaties of 1815 kept the profoundest silence on questions of maritime right, and neutrality has only triumphed in the Treaty of Paris of 1856. The example of the United States of America was not without influence, when they had been able for so long to remain distant and peaceful spectators of the protracted European conflicts.

In order to determine the rights and duties of neutrals, it is necessary to qualify by each other the two maxims that everything is permitted to belligerents in order to injure the enemy, and that the neutrals, being at peace with the two parties, can take no account of the war. The duties of neutrals are:—1. To prevent every act of

hostility by the belligerents on the neutral territory. 2. To abstain from taking part in the hostilities or in any military operation of the belligerents. 3. Complete impartiality in the relations with the two belligerents, and abstention from giving any aid to the one against the other.

By the application of these principles neutrals are forbidden to transport to the enemy objects which treaties qualify as contraband of war, and which serve directly, without further manipulation, to injure the enemy. Art. 216 of the Italian Code of the Mercantile Marine enumerates the objects that are specially considered in Italy as contraband of war. The violation of a regularly declared blockade is considered as amounting to taking an active part in the hostilities. A right of search is granted to belligerents in order to ascertain the nationality of the ship, its destination, and the cargo which it carries. Search is practised by ships of war or privateers both on their own territory and on the open sea. Vessels of war, and such as are escorted by a ship of war, are alone exempt from it, the declaration of the commander being sufficient to prove the nationality.

Neutrals are further prohibited from permitting in their own territory the levying of soldiers and the construction or arming of ships of war. Asylum may be granted to belligerent ships only in order to furnish themselves with provisions and commodities, or to make repairs so far as is strictly necessary for the subsistence of the crew and the safety of the navigation. They are not allowed to provide themselves with coal till twenty-four hours after their arrival (Art. 249 of the Italian Code of the Mercantile Marine). If there should be in the same port ships of war or privateers of the two belligerent Powers, there ought to be an interval of twenty-four hours at least between their respective departures (Art. 250).

The rights of neutrals should extend to all that is not

formally prohibited by the war. Their territories should be respected, and it should not be subjected to violence under any pretext. For a long time publicists admitted the *transitus innoxius* of troops; and Vattel goes the length of even permitting the occupation of a fortress on neutral territory.

The respect of neutral territory should be extended to all that is found on that territory, *i.e.*, to the goods or to the persons of neutrals, and even to those of belligerents, so long as they abstain, like the neutrals, from all hostilities. A foreign army which enters neutral territory, and on which it lays down arms, is not to be pursued within it. The same respect is also extended to territorial seas, where a ship of war or a privateer receives asylum.

For the same reason the persons and the goods of neutrals on the territory of belligerents, ought to enjoy inviolability. *Embargo* applied to the ships of neutrals in the beginning of a war is to be condemned, as is also the so-called *right of vexation* or concussion, by which belligerents are wont to compel neutral ships to transport troops and munitions of war.

As regards commerce, the ancient system propounded by the *Consolato di Mare* gave belligerents the right to confiscate the property of enemies even on board neutral ships. But it imposed the obligation to respect neutral property on board the ships of an enemy. The following is the doctrine of the *Consolato*, as explained by Casaregi in chap. 273: "When an armed fleet meets a merchant vessel, if the merchant cargo belongs to the enemy, the admiral may compel the master of it to carry these merchandise for him into a safe place, where the prize will no longer be subject to being taken from him, provided he pays him the freight which the said master had bargained for with the merchants, and if there is not found any written document with regard to it, he will be believed

on his oath. But if the master of the vessel refuse to do this, the admiral may sink the vessel if the whole cargo or the greater part of it belong to the enemy, while saving, however, the persons who may be on that ship. . . . But if, on the contrary, the vessel belong to the enemy and the merchandise to friends, the merchants who are on that vessel ought to come to an agreement with the admiral by paying him a certain price on account of the ship; or, if they are not willing to make this agreement, or have not money ready, nor are persons known on whose faith the admiral may trust, he may send this vessel into the place of its equipment, where, having arrived, the merchants ought to pay to the vessel the freight which they had agreed upon to the master, as if they had been carried to their destined place. And if they thereby undergo any loss or damage, they shall not be able to claim anything from the admiral. But if the admiral has failed to make such an agreement, then he shall not only not have a right to claim a charge for bringing them to the place of outfit, but he ought to pay them all the loss which they may thereby have suffered."

These rules, however, were altered by its being made allowable to confiscate neutral merchandise on the ship of an enemy; but the merchandise of an enemy was to be respected on a neutral ship. Hence arose the adage: *The flag covers the cargo,* which has finally triumphed. But from the fourteenth to the eighteenth century the system in vogue in the various treaties was that of the *Consolato di Mare,* and it was maintained by many publicists, such as Grotius, Zouch, Bynkershoek, Heineccius, and Loccenius. It was regarded as a fundamental rule in England, and it may be summed up in the following propositions:—

1. The merchandise of an enemy carried on a friendly ship shall be subject to sequestration and confiscation as prize of war.

2. In that case the captain of the neutral vessel shall

be paid for the freight of the confiscated merchandise as if he had transported it to its place of destination.

3. The merchandise of a friend carried on an enemy's vessel is not subject to confiscation.

4. Privateers capturing an enemy's vessel and bringing it into a port of their country, shall be paid for the freight of the neutral merchandise, as if they had transported it to the original place of destination.

Before the sixteenth century there is no treaty or ordinance of a belligerent nation which establishes the confiscation of neutral merchandise carried on an enemy's ship, nor that of neutral vessels laden with enemy's goods, according to the maxim afterwards received, namely, *The enemy's goods confiscate those of the friend.* The ordinance of Louis XVI. of 1681, so wise on other points, sanctioned this maxim, which in some treaties came to the enormity of this formula: *The enemy's ship confiscates the goods of the friend.* This system rested on the principle that neutrals ought in no way to favour the commerce of an enemy. These maxims were accepted in France, with slight interruptions, down to 1744.

Before the seventeenth century there is no example of a more liberal system. The Hanseatic League had sought by prudent negotiations to obtain larger liberties when it remained neutral, but it practised reciprocity when it was at war. The principle that the neutral flag secures the liberty of the cargo, whoever may be its owner, was consecrated in the treaty of 1604 between Henry IV. of France and the Sultan Achmet. Holland, by the Treaty of 1608, obtained from Great Britain respect for the maxim: *Free ship, free merchandise,* which was confirmed in another treaty of 1763. These principles were accepted for the time by England in the Treaty of Utrecht of 1713, and they were expressly put into force by the Treaty of Paris of 1763.

Among authors, Hübner was the first to assimilate the

ship to the territory, except for objects considered as contraband of war; and as the merchandise of an enemy could not be seized on neutral territory, it was to be respected also on a neutral ship.

The declarations of the first Armed Neutrality of 1780 may be formulated in the following propositions:—

1. Neutral ships may freely navigate from port to port, or along the coasts, of nations at war.

2. The merchandise of the subjects of the belligerent Powers laden on a neutral vessel shall be free, except such as are contraband.

3. Only those kinds of merchandise which have been expressly declared such in treaties, are considered contraband.

4. A port is blockaded only when it is surrounded by vessels of the enemy, to the evident danger of penetrating into it.

The second Armed Neutrality of 1800 added that ships cannot be seized except for clear and just reasons, and that the procedure ought to be uniform and careful; and also that the declaration of the commander of one or more ships of war, which escort merchant ships not objects of contraband of war, should suffice to prevent the visit for search of the escorted ships.

These principles inspired Galiani in his treatise on the *Duties of Neutral Princes toward Belligerent Princes*, published in 1782, and Lampredi, who in 1788 issued a separate treatise on the commerce of neutral peoples in time of war. After the peace of 1815, every nation formed more or less liberal principles of jurisprudence for itself. Many vigorous writers have maintained the cause of neutrals, such as Massé, Hautefeuille, Ortolan, Cauchy, and Vidari. The cause triumphed in the Treaty of Paris, which proclaimed the abolition of privateering, the liberty of the merchandise of an enemy on a neutral ship, that of the merchandise of neutrals on an enemy's

ship, and the efficacy of blockade, which has not only to be declared, but must be made effective. The attention of writers in the present day is directed towards obtaining full respect for private property on the sea, to whatever nation it may belong.

### § 4. The End of the War.

War ceases on the absolute submission of one of the belligerent States (*deditio*), or by the conclusion of a treaty of peace.

The modern laws of war give to the conqueror the sovereign power in the conquered State, but with the obligation to respect the general rights of man and the private rights arising from the laws in force. He ought to take over all the burdens of the old State, succeeding to them by universal title, for *bona non intelliguntur nisi deducto aere alieno.* Usually the conquered country is added to that of the conqueror, and not unfrequently the inhabitants are consulted by universal suffrage. Its union may be accidental or merely personal (*unio personalis*), preserving its own laws and recognising only the authority of the sovereign. It may lose its autonomy and be united to the other States of the conqueror (*unio realis*) with equal rights, or form an integral part of these States with unequal rights (*unio per confusionem*). Instead of being incorporated with the State of the conqueror, the conquered country may lose some of the powers necessary to the full exercise of sovereignty, and become a dependent or semi-sovereign State.

The conqueror has often neither the power nor the intention to preserve the occupied territory. In such a case, his administration is regarded as a mere carrying on of affairs (*gestio*) in a way analogous to the *missio in bona debitoris.* In strict right, the conqueror should not bring about any change on the political form existing in the

occupied territory; and on the conclusion of the peace he ought to give account of his administration. But if he has the intention to preserve, and the will to dispose of, the occupied territory, then the institution of a provisory administration is the beginning of the taking possession of the sovereign power. In this way States are born, grow, become old, and die, like individuals.

The second way of terminating a war is by the conclusion of a treaty of peace. To this kind of convention the rules indicated with regard to treaties in general apply. In the absence of stipulations, the *status quo* resulting from the events of the war is retained. When the date from which the treaty is to be enforced is not precisely determined, it will be understood to begin from the signing of the peace; and every act of hostility which may take place, even from ignorance and in good faith, may be a ground for demanding damages and compensation. The liberation of prisoners takes place *ipso facto* by the peace, as well as the remission of contributions of war not yet exacted. A peace is called "perpetual," by which is meant that the war cannot break out again for the same cause. The private rights of the citizens, as well as of the sovereigns themselves, suffer no restriction unless by an express clause of the treaty. Treaties already existing, but suspended on account of the war, resume their force.

By a juridical fiction the ancient Romans made the rights of persons and things liberated from the hands of the enemy revive. This fiction was founded on the rigorous right of Roman citizenship, so that it has been improperly attempted to apply it to the modified modern international relations. We have indicated how far the rigour of war may be carried against persons and property. Persons who take a direct part in the war may be killed during the conflict, or may be made prisoners on surrendering. The legal condition of prisoners among

all the civil nations of Europe is similar to that of absent persons. Hence they suffer no diminution of status (*minutio capitis*), and the right of *postliminium* is no longer applicable to them, as was the case among the ancient Romans. The prerogatives of the sovereigns and the political rights of the nation, which are only suspended during the hostile occupation, on its ceasing come again into full force, in virtue of the right of *postliminium*.

As to property, the conqueror may seize upon movable goods, and claim the objects which general custom or particular laws consider as booty. As regards immovables, the conqueror may use them as simply the possessor of them; but if he sold them, the right of *postliminium* would apply, and the buyer would have to give them up without any indemnity, provided that the conqueror did not become the legitimate owner of the conquered State by the treaty of peace. The same rule of right is applicable *à fortiori* in favour of a nation which lays claim to its territory; but it does not abolish the legal consequences of the intervening cession and enjoyment.

## CHAPTER VIII.

### *HUMANITY.*

CAN Humanity be a subject of right? It depends on the meaning which is attributed to the word. Certainly there does not exist apart from the individual a separate being called *Humanity*. But over and above the States we can imagine a vaster association embracing the whole human species. This ideal, which has been furnished by Christianity in the idea of "one shepherd and one fold" (*Unus pastor et unum ovile*), has not been belied by science, which has as its basis the unity of the human species in its origin and its identity of nature. Such an association could certainly not assume the form of a universal monarchy, but rather that of a vast federation, or of permanent tribunals of arbitration.

A new science has lately detached itself from Natural History in Anthropology, which studies humanity as it is manifested in space and time. The unity of the human species, its origin, its variations under the influence of environment, the centre or centres of its creation, its relations and differences when compared with the other animal species, are the questions which anthropology examines. But the physical man, the external man, which it studies by preference, is inseparable from the ethical and thinking man.

Nature is divided into two great realms: the inorganic and the organic. The first is subdivided into two kingdoms, the sidereal and the mineral. The second is subdivided into three kingoms, the vegetable, the animal,

and the human. The first realm includes the phenomena which are governed by the laws of Kepler and the physico-chemical phenomena. In the second are contained, in addition, the vital phenomena in the vegetable kingdom, the phenomena of voluntary movements in the animal kingdom, and those of morality and religiousness in the human kingdom.

After having recognised the phenomena which distinguish the different kingdoms of Nature, the first question which presented itself to the minds of the anthropologists was whether there is one or more human species. The polygenists, or advocates of the plurality of the human species, regard as fundamental certain differences of stature, conformation, and colour, peculiar to the inhabitants of several countries of the globe; whereas the monogenists, or advocates of the unity of the human species, see in these differences only the effect of accidental conditions which have more or less modified the primitive type.

The unity of the human species is revealed to us by the Bible, but the subject was not discussed till 1677, when a Protestant gentleman in the army of Condé attempted by certain verses of the Bible to prove that only the Hebrew people was descended from Adam and Eve, and that other men had been previously created, along with the animals, at all points of the habitable globe. The philosophers of the eighteenth century took up the controversy as a means of promoting their anti-religious propaganda, and the polygenists of the present day join hands with them. But the unity of the origin of the human race has been maintained by the most illustrious naturalists (whatever may be the difference of their doctrines), such as Buffon, Linneus, Cuvier, Lamarck, Blainville, the two Geoffreys, Müller, the physiologist, and Humboldt, the great traveller. The celebrated anthropologist, Quatrefages, has studied the question

anew, without any ulterior motive, and in the pure interest of science. He commences by determining the precise meaning of the words *species*, *variety*, *race*. The idea of a species is awakened in us by the resemblance of individuals and by their filiation. The species is, therefore, says the distinguished author, the unity of those individuals, more or less resembling each other, which can be considered as descended from a single primitive couple by an uninterrupted and natural family succession. When an individual belonging to the same sexual generation presents exaggerated and exceptional characters, which distinguish it from the other representatives of the same species, there is a variety; and when the characters of this variety are transmitted by sexual generation and become hereditary, there is a race. The number of races which have arisen directly from a species may be equal to the number of the varieties of the same species, and may therefore be considerable. This law is common to the vegetable, animal, and human kingdoms.

The material proof that the various human groups are races, and not species, is found in the capability which they have to produce crosses, whereas from the union of different species there are produced only hybrids. This is the place to examine how the environment and heredity have produced the human races. At first men were influenced only by the action of the natural modifying agents; and under that influence there were formed the three pure races, the white, the yellow, and the black. Then those races crossed with each other, and gave origin to the red and the olive races. The environment not only includes the climate, but all those conditions under the domination of which the plant, the animal, and man are constituted, and are developed as germ, embryo, youth, and adult. In general the environment modifies and heredity conserves. Nor can the action of the environ-

ment be said to be diminished under the influence of civilisation. The English established themselves in North America about 1620, somewhat more than two centuries and a half ago. Hardly twelve generations have come and gone, and nevertheless the Anglo-American, the Yankee, as he is called, no longer resembles his ancestors. From the second generation the English Creole of North America presents in his features an alteration which brings him nearer the local races. Later the skin dries and loses its ruddy colouring; the glandular system is reduced to a minimum; the hair becomes dark and smooth; the neck becomes thin, and the head diminishes in volume. In the face, the temples become hollow, the cheek-bones become protruding, the cavities of the eyes deepen, and the lower jaw becomes massive. The bones of the limbs become elongated, while their cavities become lessened, so that in France and in England there are manufactured for the United States a separate class of gloves with much longer fingers. Finally, in the woman, the pelvis in its proportions approaches that of man.

The centre of creation is placed by Quatrefages and many other writers in Asia, in the vast region bounded on the south and south-west by the Himalayas, on the west by the Bolor Mountains, on the north-west by the Ala-tau, on the north by the Altai and its offshoots, on the east by the Kingkan, and on the south and south-east by the Felina and the Kuen-lun. The three fundamental types of the human species are represented within this region. The negro races are more distant, but there are marine stations where they are found pure or mixed, from the Kiussiu Islands to the Andamans. On the continent, their blood is mixed in the lower classes on almost all the coasts of the two peninsulas of the Ganges, and it is also found in some places in Nepaul, and on the west of the Persian Gulf, and by Lake Zareh.

The yellow race, pure or mixed with white elements, seems to occupy by itself the area above indicated, as also the circumference of it to the north, the east, the south-east, and the west. The white race seems to have disputed the area with the yellow race. At a remote time there sojourned there the Tu-tai and the U-sun on the north of the Hoang-ho; and in the present day in Little Thibet and in Eastern Thibet there have been found groups of white populations. The Miao-Tse occupy the mountainous regions of China; the Siaputs maintain their ground energetically in the defiles of the Bolor. On the confines of this area there are found on the east the Ainos and the Japanese of the high coasts, and the Tinguiani of the Philippine Islands; and on the south are the Hindoos. On the south-west and west the white element predominates, pure or mixed. Linguistic considerations confirm this conjecture. The three fundamental forms of human language are found in the same countries and in the same proportion. In the centre and on the south-east of the area the monosyllabic languages are represented by the Chinese, the Cochinese, the Siamese, and the Thibetan. The agglutinative languages are found from the north-east to the north-west in the group of the Ugro-Japanese; on the south in that of the Dravidians and the Malays, and on the west in the Turkish languages. And, finally, the inflectional languages reign in the south and to the south-west, with the Sanskrit and its derivatives, and the Iranian languages. Quatrefages after this survey adds: "Palæontological studies have taught us that in the Tertiary period Siberia and Spitzbergen were covered with plants, attesting a temperate climate, and they nourished large herbivorous animals, such as the reindeer, the mammoth, and the rhinoceros, which showed themselves in our Quaternary epoch. Is it not allowable to think that during the Tertiary epoch

man was living in Northern Asia alongside of the species which I have just named, and that he hunted them in order to nourish himself upon them, as at a later time he hunted them in France? The lowering of the temperature forced the animals to migrate to the south; and man would follow them, both to find a milder climate and not to lose his habitual prey. Their simultaneous arrival in our climate and the apparent sudden multiplication of man would be thus easily explained."[1] Gaston de Saporta has maintained the same view in the *Revue des Deux Mondes*.[2] It also forms the subject of the learned work of Mr. F. Warren, professor in the University of Boston,[3] a work which gathers and discusses all that cosmology, palæontology, philosophy, and the science of religions have excogitated relating to the appearance of man on the earth.

The traditions of the chief branches of the white and yellow races, confirm the proof furnished by anthropology and linguistic science. The Hindoos direct their look always towards the north, where is the Uttara-Kuru, a sort of primitive Eden. The Persians place the cradle of the Aryan race, the *Arjanem Vaego*, in a northern region, where Ahriman makes winter reign ten months, and whence the Aryan race set out, in order to be free from the cold, towards the Sogdiana and the southern countries. The mountains and sacred rivers of the Iranians, Mount Bezerat (the Bordj of the modern Persians), the centre of the world and the source of the waters, and the River Arvand which springs from them, carry us to the sources of the Oxus and the Jaxartes. Eugène Bournouf has proved that the Bezerat is the Bolor or Bolortagh, and that the Arvand is the Jaxartes. The Semitic traditions are in harmony with this, for the

[1] Quatrefages, *L'espèce humaine*, p. 131. Paris, 1877.
[2] *Un essai de synthèse paléontologique*, n° du 1er mars 1883.
[3] *Paradise found; the cradle of the human race at the north pole: a study of the prehistoric world.* Boston, 1885.

Pison, which is represented as issuing from the Garden of Eden to the east, is probably the Upper Indus; and the country of Havilah, where gold and precious stones abounded, seems to be the country of Darada (towards Cashmere), celebrated for its riches. The Gihon is the Oxus. Everything leads us to locate the Eden of the Semites at the separating-point of the waters of Asia, in that umbilicus of the world which all the races seem to consider as the cradle of their memories. The Mongolian races derive their origin from the Tian-Chan and from the Altai; and if the Finnish races seem to point to the Ural, it comes from the fact that this chain conceals from them the view of a more distant system of mountains.[1]

The first men who appeared at the centre of the human creation, must have differed only in individual features. For a considerable time humanity could not but be homogeneous, like any other species of vegetables or animals confined to a small area. On issuing from the defiles of the Bolor Mountains to spread themselves to the extremity of the Gangetic Peninsula and to Ceylon, and on the other side to Iceland and Greenland, men have undergone the influence of various modifying agents which formed the pure races, and these, by crossing with each other, have given origin to the mixed races.[2] But the characters which distinguish the pure races, as

[1] Renan, *De l'origine du langage*. Paris, 1859.

[2] In a special work entitled *Les Polynésiens et leurs migrations*, Quatrefages shows that Polynesia was peopled by voluntary migration and by accidental dissemination, proceeding generally from the west to the east. The Polynesians coming from Malasia, and specially from the island of Buro, stopped and settled first in the archipelagos of Samoa and Tonga, whence they spread over the maritime regions which opened before them. The Orientalists have proved that America was known to the Chinese and Japanese before it was known to the Europeans. The current of Tessan and of the Black River of Japan opens a highway for navigators, and even now throws junks driven by the tempest on the coasts of California. The Equatorial current of the Atlantic would bring Africans to South America, as the vicinity of Greenland brought Scandinavians to North America; and thus there are found on the new Continent the relics of all the races of the ancient world.

well as the mixed races, do not indicate any fundamental difference. A mere arrest or an excess in the evolutional phenomena is the cause of the principal differences which separate the races, and especially the two extremes, the black race and the white race. The greatest difference consists in their cerebral capacity. Davis has accurately measured the mean internal capacity of the skulls of the various races, and has found that in Europeans it is 22 cm., 90 mm., and 6 dmm.; in indigenous Americans it is 21 cm. and 81 mm.; in Asiatics, 21 cm., 75 mm., and 2 dmm.; and in the Australians it is 20 cm., 26 mm., and 2 dmm. Would not a better intellectual education make this capacity increase? The notices abounding in the works of Broca, Richard, and Lartet answer in the affirmative.

The moral unity of the human species has been also called in question. Among savage peoples, it is said, there is no morality, and among uncivilised peoples the morality is contradictory. In reading carefully the observations collected by travellers, it appears that among savages there are found at least the germs of morality; and as they rise in civilisation their moral practice becomes uniform, whatever may be their differences in race, in climate, and in social order. For humanity there is a state of nature in which the law of the strongest predominates, and a state of reason in which peace and union reign. Progress consists in passing from the one state to the other. Among uncivilised peoples there is not found a morality that is entirely similar, because moral laws, although absolute in themselves and immutable and universal, do not reveal themselves everywhere and always with the same characters; and the same hold good of every other kind of truth.

The physical and moral unity of the human species having been established, it follows that its juridical state

ought to be recognised. But in what way? By introducing into treaties clauses which gradually oblige all the States to respect the fundamental rights of man, such as civil liberty and religious toleration. Such a practice is not new; an example of it was given in antiquity when the Greek princes Gelon and Hiero imposed on the Carthaginians in Sicily, among other conditions, the giving up of the practice of human sacrifices. In almost all European treaties with the East, there is some article in favour of the toleration and liberty of the Christian worship, or against the slave trade, when they are concluded with African States.

Another example has been left to us by Greece, namely, that of the Amphictyonic Leagues. The Amphictyonic Leagues were political and religious associations of a number of neighbouring States (according to the etymology of the word) with the object of settling in an amicable way all their disputes. In the early times these leagues were numerous. There was one of them for Bœotia at Oncheste; another at the Isthmus of Corinth for Athens, Sicyon, Argos, and Megara; a third in the Island of Caularia for Hermione, Epidaurus, Aegina, Athens, and Orchomenes, as well as for Praxia and Nauplia, which were afterwards replaced by Sparta and Argos. The most celebrated of these leagues was that which met at Delphi in the spring, and at Thermopylæ in autumn, in the plain at Axtela, before and after the agricultural labours. Tradition attributed to Amphictyon, son of Ducalion, the institution of this council, which Strabo says was founded by Acrisius, king of Argos. In any case, its origin is ancient, going back to the time of the power of Thessaly or of the primitive Greek civilisation. The Amphictyonic Councils were composed of two elements: the General Assembly of all the members present belonging to the confederation, which Aeschines calls the community of the Amphictyons, and which was consulted

only in very rare cases; and the Council or Magistrates, appointed by the confederated States as their representatives. These magistrates were called *Hieromnemoni* and *Pilagori*. The Hieromnemoni, as is perceived by their name, were specially invested with a religious character, and perhaps it belonged to them to convoke and preside over the council, and to command the troops to which the execution of its decrees was intrusted, but without taking part in the voting. The others deliberated and voted. So far as it appears, the Amphictyonic office exercised in Greece a function of peace and conciliation; and if it did not succeed in preventing wars, it imposed certain mitigations upon them. It was forbidden for an army besieging an Amphictyonic city to cut the aqueducts, or to turn aside the course of a river which supplied it with water. When the city was taken, the conquerors could not destroy it. In the course of the war they had to agree to truces in order to bury the dead; it was only to the sacrilegious that burial was not granted. After the victory they might not raise any permanent trophy, in order not to make the hatreds perpetual. They had to show respect to those who took shelter in the temples; and, finally, entire liberty was guaranteed to all for consulting the oracles, repairing the common temple, performing sacrifices, and assisting at the public games.

In the Middle Ages the Roman Church took up the work of Greece, and regulated the relations not only of peoples belonging to the same race, but of different nations bound together by the same faith. The civil sovereignty of the Popes, which culminated with Gregory VII., was already initiated under the other Pope who is known as Gregory the Great; and it lasted several centuries, taking the form of a tribunitian dictatorship and arbitration. This dictatorship (which Gioberti called tribunitian because exercised principally in the guardianship of the population) is differentiated from arbitration; for the first

indicates an absolute predominance over every other Power, and is consequently a commanding authority; whereas the second is exercised only by counsels and persuasion. The dictator has a rigorous authority over his own subjects, and recognises neither equal nor superior; whereas the arbitrator is only distinguished by a primacy of honour; for the sentence which he pronounces cannot produce its effect without the assent of those who have subjected themselves to it.

The schism of Luther put an end to this state of things. One of the last acts of the pontifical authority was the partition of the new lands discoverable in the east and west between the two Powers invested with the command of the sea; and it was indicated by a meridian which marked out a longitudinal boundary to the greedy ambition of the conquerors, the Spaniards and the Portuguese. The Reformation annulled the concord even in those countries which persevered in the ancient faith; for the orthodox princes of the sixteenth century were perhaps less sincere, and not more religious, than their heretical contemporaries.[1]

In the midst of a terrible religious war Grotius showed the world the sublime image of right as resting on human nature, and on the precepts of the wise and of the greatest citizens of all times. One of his successors, Puffendorf, proceeded to maintain against the Catholic enthusiasts that natural right and international law are not restricted to Christendom alone, but constitute a bond between all nations, to whatever religion they belong, because every nation forms a part of humanity. Yet it is only in our day that the ideas of Grotius and Puffendorf have triumphed. The Holy Alliance of 1815 admitted, and intended to protect, only an international right that was exclusively Christian. The Catholic Emperor of Austria, the Protestant King of Prussia, and the Emperor of Russia, united

[1] Gioberti, *Del primato morale e civile degli Italiani*, vol. ii.

in name of the indivisible and most Holy Trinity to manifest in face of the world their immovable resolution to take as the rule of their conduct, whether in the administration of their respective States or in their political relations with the other Governments, only the precepts of the Christian religion. These were upheld as precepts of justice, of charity, and of peace, which, besides being applicable to the private life of individuals, ought also to move the resolutions of princes and to guide all their steps, this being the only means for consolidating the human institutions and remedying their imperfections. To these declarations all the Christian sovereigns adhered except the King of England, whose Constitution did not permit him to sign such an act without the countersignature of a responsible Minister. England, however, recognised the effects of this act in the protocol of Aix-la-Chapelle of 15th November 1818. The Pope was not called upon, so as not to grant him a sort of supremacy. Turkey was not allowed to take part in the treaties of 1815 on account of its religion, and it was not admitted into the European concert till the Treaty of Paris of 1856.

With the development of the nationalities there arose the idea of a General League. Recent historical researches have shown that in 1465 George Podiebrad, King of Bohemia, in a war with the Emperor Frederick II. and with Pope Pius II., had, under the inspiration of his councillor Antony Marini of Grenoble, conceived the design or project of emancipating the peoples and kings by the organisation of a new Europe. He proposed a permanent league of the secondary States in order to counterbalance the powers of the Pope and the Emperor, and to avoid oppression and conflicts. He sent an ambassador to Louis XI. of France to induce him to convoke a Parliament of kings and princes. Louis XI. did not show himself opposed to the proposal, but his Ministers

felt a profound repugnance to combating the Pope and the theocracy.

Nearly a century and a half later—about 1595—a similar idea formed the subject of discussion between Henry IV. and his minister Sully, who gave it the name of "the great design." After reducing the power of the Spanish branch of the House of Austria, Henry IV. proposed to turn against the German branch in order to establish a certain equilibrium in Europe. Among the territorial changes in view, he desired to add to France Lorraine, Savoy, and certain provinces of the Spanish Netherlands, assigning the remainder of them to the united provinces of Holland. He proposed to found an Italian federation, while liberating the peninsula from the Spanish yoke, and constituting a strong kingdom in the north for the Duke of Savoy by the addition of Lombardy. He wished to confine the Spanish power to the Iberian Peninsula, including Portugal; and to liberate from the Austrian yoke Bohemia and Hungary by adding to the latter Transylvania, Moldavia, and Wallachia; and finally, to enlarge the Helvetic Confederation by adding certain possessions to it belonging to the German Empire. With these changes Christendom would have been divided into fifteen States: five hereditary, namely, France, Spain, Great Britain, Sweden, and Lombardy; six elective, namely, the Papacy, the Empire, Hungary, Poland, and Denmark; four republican, of which two were to be democratic, namely, Holland and Switzerland, and two aristocratic, namely, Venice, and another to be formed in Central Italy.[1] A council would have to meet in a central city of Europe, such as Metz, Nancy,

[1] The Italian Confederation would have been composed, according to this project: 1. of the kingdom of Lombardy; 2. of the Republic of Venice, with the addition of Sicily, under the condition of doing homage for it to the Holy See; 3. of a Republic of the cities of Central Italy; and 4. of the Pontifical State as it existed at that time, with the addition of Naples.

or Cologne; and it was to be composed of sixty deputies, four for each State. Its object would be to prevent war, and maintain such internal order that tyranny and rebellion should both become impossible. This General Council (which was to be connected with other three Special Councils, each composed of twenty members, to be arranged according to the different groups of the States) was to have taken the name of the Senate of the Great Christian Republic, and it would also have had in view the maintaining toleration among the Christian confessions, and driving the Turks from Europe. These details have been transmitted to us in the Memoirs of Sully (*Mémoires de Sully*), and their authenticity cannot be doubted. Some French historians, such as Sismondé [1] and Poirson,[2] would fain exculpate the memory of Henry IV. from such a chimerical idea; but all doubt about it is now impossible since the appearance of a Letter of the king's to Rosny, published in 1876.[3] Certainly the idea was not brought to any deliberation or negotiation as regards the general Confederation; but so far as concerns the territorial part of the scheme, the view was entertained of a better arrangement of Europe on the basis of nationalities—an idea which it has been reserved for our age to realise.

In 1714 the Abbé de Polignac went to represent France at the Treaty of Utrecht, and he took along with him the Abbé de Saint-Pierre. The latter having witnessed the endless difficulties in the way of establishing the conditions of that peace, published his *Project to perpetuate Peace and Commerce in Europe, followed by the Conferences of Utrecht, &c.*, which he republished in 1717 under the form of *A Treaty of Perpetual Peace to be established between the Christian Princes, &c., formerly proposed by*

[1] *Histoire des Français*, t. xxiii. pp. 235, 264.
[2] *Histoire de Henri IV.*, t. iv. pp. 873, 891.
[3] Drussieu, *Lettres intimes d'Henri IV.*

*Henry the Great.* The principal difference between the project of Henry IV. and that of Saint-Pierre consists in this, that the latter does not propose a new arrangement of Europe, but takes, as a basis, the existing state established by the Treaty of Utrecht. A European Diet would have to maintain peace between the different States, voting by a majority all the general provisions, but not introducing any change on the fundamental articles, unless with the unanimous consent of all the confederated members. One of these fundamental articles prescribed that in arbitral sentences in reference to disputes between State and State three-fourths of the votes of the assembly were to be required. If an allied State would not submit to the decisions of the Great Alliance, and prepared to go to war, it would have to be brought to its duty by the arms of the Confederation.

In 1761, Rousseau, under the modest title of a *Summary of the Project of Perpetual Peace of the Abbé de Saint-Pierre,* set forth with new reasons the necessity of making the people pass out of the state of nature by the institution of a legislative power and of a supreme judiciary tribunal.

Some of the manuscripts of Bentham, which bear the date of 1786–1789, contain inquiries into the principal causes of wars and the proposal of various means to avoid them. The first means would consist in the codification of the unwritten consuetudinary law; the second in new international conventions, which should regulate points of dispute; and the third in a greater precision of the diplomatic style. But as Bentham perceived that such means would be insufficient, he proposed in addition: 1. The reduction of the military forces by land and sea; 2. The emancipation of the colonies. As a more efficacious remedy he also suggested an arbitrational tribunal, even without coercive power; for its just sentences would be confirmed by public opinion, and the self-love of the

States would be safe, because they would yield to the sentence of a judge, if not to the demands of other States. Finally, as an infallible remedy for preventing wars, he declares that a general diet should be established to which every nation would send two representatives, and it should have power: 1. To decide disputes; 2. To cause the publication of its decisions in the contending States; 3. After the expiry of a certain time to put the contumacious State under the ban of Europe; 4. And, finally, to assemble a federal contingent according to established rules in order to have its decision put into execution. This proposal manifestly shows a lack of guarantee for the lesser States in the confederation against the preponderance of the more powerful States.

Soon after the Peace of Basle, Kant published in 1795 a *Project of Perpetual Peace.* Its basis was a confederation of European States, and a permanent congress. Kant required as a first condition that the internal constitution of every State should be republican, meaning by this that every citizen should concur, through the medium of representatives, in the formation of the laws and in any decisions as to war. For then, he says, declaring war by the citizens would be the same as bringing upon themselves all the calamities, and all the burdens which war brings along with it, whereas in a government differently constituted war is easily decided, as it causes no damage, not even the taking away of the pleasure of the head of the State, who is its owner and not its member. In the second place, he proposed that the European Confederation should be formed of the States who might successively and freely join it after the example of the first free governments which proclaimed these principles. Fichte, in his *Principles of Natural Right,* has given his full adherence to these ideas of Kant.

The French Revolution, which stirred all the problems

of the social order, could not remain indifferent to the relations between the various peoples. In a first sketch of a republican constitution presented to the convention by Condorcet, in name of a commission in which the Girondists were in a majority, we find the following propositions: "The French Republic will take up arms only to maintain its liberty, or to defend its allies. . . . It will solemnly renounce the annexing of foreign countries to its territory, except on a vote freely expressed by the majority of its inhabitants. . . . In countries occupied by the French Republic the generals shall be bound to protect with all the means in their power the security of person and property, and to secure to the citizens the full enjoyment of their natural, civil, and political rights. . . . In its foreign relations the French Republic will respect the institutions guaranteed by the general consent of the people." In the Declaration of the Rights of Man presented by Robespierre to the club of the Jacobins, we read: "Men of all countries are brothers, and the different peoples ought to help each other mutually with all their power, as citizens of the same State." The Constitution of 1793 briefly declares that the French People is the friend and natural ally of all free peoples. On the 21st April 1795, in one of the last meetings of the Convention, the Abbé Grégoire was allowed to read a Declaration of the Right of Nations in twenty-one Articles, which he proposed to have inscribed at the head of the republican laws parallel to the Declaration of the Rights of Man. This declaration contained the supreme principles which every government should be obliged to respect. We may note the following Articles: "Art. 4, In peace peoples ought to do each other the greatest good, and in war the least evil possible; Art. 5, The particular interest of a people is subordinate to the general interest of the human family; Art. 6, Every people has the right to regulate and change the form of its government; and, finally, Art. 7, No

people has the right to interfere with the government of the other peoples." Owing to the remonstrance of the Committee of Public Well-being, the printing of this project, although already ordered, and the discussion of it, were suspended as inopportune.[1]

On the fall of the Empire, while the three allied sovereigns of Russia, Prussia, and Austria were proclaiming the sublime precepts of the Christian religion as the principles of internal and external public right, a little work by Dr. Worcester, entitled *Solemn Review of War*, published in England in 1814, gave occasion to the founding in the United States in August 1815 of the first Society for the Propagation of Peace (the New York Society of Friends), which was followed in September by the similar societies of Ohio and Massachusetts. The English Society for the Promotion of Permanent Peace was founded at London in 1816; and the Society of Christian Morality, which included the propagation of peace among its other ends, was constituted at Paris in 1821. A similar society was founded at Geneva in 1830; and, finally, in July 1842 the Peace Society of the two worlds sent delegates to London to hold a first great meeting, and to give greater unity and extension to their ideas. They drew up an address to the civilised governments which was well received by Louis Philippe and by the President of the United States. A second still more numerous meeting, which took the name of a Congress, was held at Brussels in September 1848, and it formulated an address to Lord John Russell, which was received with great satisfaction. On the 12th June 1849, Richard Cobden, one of the most celebrated members of this association, presented a motion to the House of Commons advocating the introduction of the principle of arbitration into all the treaties which England might have to conclude with the other Powers, and this motion obtained 72

[1] *Le Moniteur universel, 7 floréal, an. III.* (26th April 1795).

votes as against 288. After a few weeks, on 22nd August, there met at Paris a new Peace Congress, in which the most eminent politicians took part, and which obtained the most sympathetic reception from De Tocqueville, the Minister of Foreign Affairs. A deputation presented the resolution adopted to Louis Buonaparte, the President of the Republic, who showed himself disposed in favour of a simultaneous disarmament, but the moment did not appear to him opportune. Besides numerous popular meetings held in England, other congresses met at Frankfort in 1850 and at London in 1851. Under the pressure of events the influence of these societies diminished, but they did not cease to make their voice heard on great occasions, as before the Crimean War in 1854.

On 4th November 1863 the Emperor Napoleon III. addressed a letter to the Princes and free cities of Europe, and invited them to a congress at Paris, in order to reconstruct the general state of Europe. "Europe," he exclaimed, "would be pleased to see the city from which the signal of so many revolutions has gone forth, become the seat of conferences destined to lay the bases of a general pacification." But the questions involved were so intricate and interests so opposed, that the proposal was received with warmth only by the Powers which had nothing to lose or gain by it.

More practical, it seems to us, was the proposal of Lord Clarendon in the Protocol XXIII. of the Congress of Paris of 1856, to extend to all the Powers the application of Art. 8 of that Treaty as thus formulated: "If there should arise between the Sublime Porte and one or more of the other signatory powers, a dispute which may threaten the maintenance of amicable relations, the Sublime Porte and each of the Powers, before having recourse to force, will act so that the other contracting parties may be able to interpose with their

mediation." No formal obligation was signed in connection with this proposal; but we believe that an obligatory trial of conciliation, followed by an opinion of the mediating power, would opportunely delay war, and would give the support of public opinion to the party unjustly attacked. This remedy, already indicated by Bentham, as we have above shown, conjoined with the other of free government to be introduced among all peoples according to the proposal of Kant, appear to form the only barriers that can be opposed to unjust aggressions without disturbing the autonomy of the States. The colossal development of industry and commerce have besides so fused the interests of nations with each other that it becomes very difficult for governments to drag them into a fratricidal struggle. These causes will not be able to act with all their efficacy until a natural equilibrium, founded on the basis of nationality, has been substituted for that of the treaties of 1815. There are, however, certain questions which may be settled justly by means of arbitration, because they do not affect either the existence or the natural development of the States. The proposal of Lord Clarendon has since found a happy application in Art. 12 of the General Act of the African Conference of Berlin of 26th February 1889.

Arbitration was not unknown in antiquity.[1] In the ancient treaty of alliance between Argos and Lacedemon, it was stipulated that whatever question might arise between the two allied nations, it should be submitted to the judgment of a neutral city. Pyrrhus, on disembarking in Italy, wished to assume the part of arbitrator between the Romans and the Tarentines. In Sicily, as in Eastern Greece, arbitration was frequently practised; and the institution of judicial arbitrators was sanctioned

[1] E. Rouard de Card, *L'arbitrage international dans le passé, le present et l'avenir.* Paris, 1877.

by a solemn act or a sort of regulation (which bears the name of *Lex Rupilia*) compiled by a commission nominated by the Senate under the presidency of P. Rupilius, and which was still in force in the time of Verres. Cicero mentions the respect with which the Romans conducted themselves towards the conquered people: "Meminerimus autem, etiam adversus infimos justitiam esse servandam" (*De Officiis*, I. 1. 13). Under the Empire, the provinces were no longer governed, but merely administered. The disputes between cities were mostly resolved by an imperial rescript, but the employment of arbitrators was not forbidden.

About the close of the Middle Ages, and more particularly in the thirteenth century, there began to spring up a desire to have recourse to pacific means in secondary questions; or, in other words, to the arbitration of princes and renowned jurisconsults. In 1546 the Kings of France and England agreed to submit a pecuniary question to four jurisconsults. In 1570 the King of Spain and Switzerland referred the rectification of the frontiers of Franche Comté to the decision of arbitrators.

At a time nearer our own the Treaty of 19th November 1794 between the United States and England expressly stipulated for arbitration to settle all questions of boundary. From the beginning of the present century till now there have been about forty international arbitrations, of which the following have been the most important. In 1835 the King of Prussia settled a question which had arisen between France and England concerning certain ships captured on the coasts of Morocco; and in 1843 the same sovereign decided on certain pecuniary claims of the United States against Mexico. In 1853 the confines of Florida were determined by agreement between three English and three American Commissioners. After the Treaty of Paris of 1856 arbitrations became more numerous. The King of Belgium in 1858 recon-

ciled Chili with the United States, as he had formerly succeeded in terminating a dispute between Brazil and England. In 1863 a commission of arbitrators was appointed by England and by the United States, who disputed for many years the ownership of a territory near the Strait of Puget. The commission gave its sentence on the 10th September 1867, and it was accepted by both parties. The President of the United States was chosen arbitrator in an analogous question in 1869. The matter under examination was the title of Great Britain or of Portugal to the ownership of the Island of Balama, on the western coast of Africa. In 1870 the arbitrators gave judgment for Portugal.

In 1872 there were three arbitrations: the first by the Emperor of Russia between Peru and Japan with reference to a captured ship; the second by the Emperor of Germany in reference to a dispute between England and the United States as to the possession of the Island of San Juan; and the third by the Geneva Tribunal between the same Powers in reference to the arming on the English coasts of the *Alabama*, a ship of war belonging to the American Confederates. In 1874 a dispute between Persia and Cabul was settled by two English generals; and in like manner the war which was about to break out between China and Japan was avoided by the arbitration of the English Ambassador at Pekin. In 1875 the President of the French Republic succeeded in bringing England to an agreement with Portugal regarding the possession of the Bay of Delagoa. In 1885 Pope Leo XIII. acted as a friendly mediator between Spain and Germany regarding the possession of the Caroline Islands and Palaos. The English Houses of Parliament and the Chambers of the United States, Italy, Belgium, Holland, and Sweden have voted motions recommending to their governments the adoption of international arbitration.

Bluntschli would establish a permanent Tribunal of

Arbitration such as once existed in Sicily; and there would have to be submitted to it all questions arising from the diplomatic ceremonial and questions of damages and interests. The value of what is in dispute is generally out of all proportion with the expenses of a war and with the inevitable evils which are its consequence. But how are good arbitrators to be found? In choosing a neutral Power parties are not always sure of its impartiality, nor is it certain that the prince or president shall entrust the honourable charge to capable counsellors. The ordinary tribunals do not, as courts, possess special knowledge of International Law, nor have they practice in such matters. When the United States demanded payment for the damage and loss caused to them by the privateers of the South that were armed in England, Professor Lieber proposed to submit the question to the judgment of a University Faculty. Bluntschli, on the other hand, desires that the Ministers of Justice in the different States should draw up a list of jurymen skilled in International Law, and that from this list juries should be chosen who should decide the question under the direction of a neutral sovereign.

In Italy, Mancini has carried his hopes further regarding the arrangement of a system of international justice. He exhorted writers to draw up a system of rules to remove the difficulties concerning the mode of selecting and nominating the arbitrators, to determine the forms in which their functions were to be exercised, and to propose remedies for determining the nullity of a sentence of arbitration given out of or beyond the limits of the compromise. His faith in human progress did not allow him to regard as impossible the constitution of permanent international courts, which might be multiple and limited in their respective competency to special matters. Thus the danger which might threaten the independence of the single States, and especially of the

minor States, from the omnipotence of supreme and universal judiciary powers being assigned to a single international court, would be avoided. As regards the juridical sanction, besides the fact that the terms of submission, if there existed a cause of reasonable distrust, might previously secure the execution of the judgment by cautioners, or by the stipulation of other special cautions and guarantees, it might be stipulated, and even without express convention, that it would be competent by right to subject the recusant party to the grave consequence of falling away from the benefits secured by the existing treaties. And, finally, every means having been exhausted, if the gainer in the arbitral cause shall have to take recourse to arms, he will always have the public opinion in his favour by showing that his claims or pretensions are supported by a judgment of the arbitrators. To push our demands at the present time further than this, would, according to Mancini, be Utopian. A federative government applied to the whole human species would not be able to act on account of the vastness of the functions it would involve.[1]

The solicitude of contemporary writers to prepare institutions for the future organisation of Europe, has also been shown by the founding at Ghent, on 10th September 1873, of the Institute of International Law, and a month later at Brussels of the Society for a Codification of International Laws. The two associations complete each other. The Institute, in order to aid governments in the application of arbitration, discussed and approved a system of rules during its meeting at the Hague on 28th August 1875. It afterwards turned its attention to tribunals on prizes. It found the cause of their imperfection in the dual nature of national tribunals with international juris-

[1] See Mancini's *Della vocazione del nostro secolo per la riforma e la codificazione del diritto delle genti e per l'ordinamento di una giustizia internazionale*, discorso pronunziato all' università di Roma nel 2 novembre 1874.

diction. Belligerents, in jealously defending the existing legislation, have not denied its international character. Hence the Institute in the session of 12th September 1877, at Zurich, adopted these three conclusions proposed by Bluntschli: 1. To formulate by treaties the general principles that are to hold in the matter of prizes; 2. To substitute for the tribunals composed of judges belonging to the belligerent States, international tribunals which would offer to the subjects of a neutral or hostile State greater guarantees of impartiality; 3. To take measures for bringing about a common procedure in the matter of prizes.

The Institute at the same meeting passed two important resolutions. It recommended earnestly the insertion in future international treaties of a compromissory clause, making it obligatory to have recourse to arbitration in case of difference regarding the interpretation or application of such treaties. If the contracting States were not agreed in principle by other dispositions regarding the procedure to be followed before the arbitral tribunal, the Regulations laid down by the Institute in the above mentioned session at the Hague, on the 28th August 1875, should apply.

In 1883 the Institute met at Monaco to solve the grave problem of the Consular Tribunals in the East. In what limits and under what conditions is the unwritten international law of Europe applicable to the Oriental nations? It must be acknowledged that the principal international juridical rules took their origin or were sanctioned by Christianity, and therefore that they are not readily applicable to all the nations. In Asia the legal situation of women and children is regulated very differently, and justice is very badly administered. As regards private international right, it is impossible to put European subjects unconditionally under the laws of the place. Hence it is necessary to substitute mixed tribunals for the consular administration of justice; and these must

be composed in the first instance of natives and foreigners in equal numbers, and in the appellate court of four natives and six foreigners, as has been practised in Egypt since June 1874. The meeting at Monaco desired to see the consular system of justice preserved, only constituting courts of appeal composed of foreigners and natives.[1]

Almost at the same time there met in Milan, on 14th September 1883, an International Juridical Congress, and occupying itself with the execution of sentences in foreign countries, it formulated the following resolutions: —1. That the sentence shall be given by a competent judge, his competency being established by international convention; 2. That the parties be duly cited, and in case of contumacy that it shall have been possible for the party to get knowledge of the cause, and time to put in the defence; 3. That the sentence shall contain nothing contrary to morality, to the public order, or to the public right of the State in which it has to be executed; and it shall only be applied if the above-mentioned conditions are fulfilled. Thus besides the executive force which it preserves where it is pronounced, it ought to produce everywhere the effect of a national sentence, whether the execution is demanded or it pass as a *res judicata*. The forms and the means of execution should be regulated by the law of the country where it has to be put into execution. In the case of those States which might not wish to bind themselves by an international convention, the Congress expressed the wish that they should adopt these fundamental positions by introducing them into their respective legislations.

The Congress charged its President, Travers Twiss, to communicate these resolutions to the Minister of Foreign Affairs of Italy, with the prayer that he would recommend them to the other governments. The Minister,

[1] F. P. Contuzzi, *La institutione dei consolati ed il diritto internazionale Europeo nella sua applicabilita in Oriente*. Napoli, 1885.

Mancini, by his circular of 19th March 1884, proposed the assembling of a Conference at Rome. The attempt succeeded, the following Powers having given their consent, namely, the Argentine Republic, Austria and Hungary, Belgium, Columbia, the Republic of Costa Rica, Denmark, France, Great Britain, Greece, Guatemala, Honduras, the Netherlands, Peru, Portugal, Roumania, Russia, Salvador, Servia, Spain, Switzerland, Sweden, and Norway, and the Republic of Venezuela. Some governments were not able to adhere unreservedly on account of the impediments which the federal regime imposed upon them; but they promised to give the most sympathetic consideration to the results of the conference. The proposal, however, proved abortive from its giving way to the conference already convoked for the compilation of an international sanitary code.

What could not be realised in Europe was carried out in America. On the invitation of the Argentine Republic and the Republic of Uruguay, a Congress was assembled at Monte Video on the 28th of August 1888 to establish a uniform system of right regarding the various matters falling under private international law. There took part in it the Republics of Chili, Paraguay, Peru, Bolivia, and Brazil. After long discussions, in the month of February 1889 they agreed upon special rules concerning international law—penal, civil, and commercial—which dealt with the law of process, and literary, artistic, and industrial property, and resolved to communicate them to the other States that did not take part in the Congress, so that they might be able to adhere to them.[1] And in the Pan-American Congress held at Washington, the United States, Ecuador, and Hayti actually adhered to them in the Treaty of 28th April 1890. Count L. Kamarowsky

[1] See Pasquale Fiore, *Il dritto internazionale codificato e la sua sanzione giuridica*, p. 595. Torino, 1890. Contuzzi, *Manuale di dritto internazionale privato*, cap. 10. Edit. Hoepli, 1889.

notes another mark of progress in the more or less judiciary character assigned for about twenty years to the mixed commissions as stipulated between the United States and the other American Republics, and also in their relations with certain European States, such as Spain and England. According to the spirit of the treaties which he cites, these commissions were to be complementary of the ordinary tribunals and of diplomacy. They approach the tribunals when they decide private disputes; they do diplomatic work when they resolve questions which directly interest the States. Kamarowsky regards them as a still imperfect form of arbitration, which he would like to see constituted in a permanent and obligatory way. But the question is—How is this result to be attained without constituting at least an executive committee?[1]

This is the great difficulty in the scheme of the late Professor Lorimer of Edinburgh, who in 1877 elaborated a project of International Government in which the executive power was to be entrusted to a Bureau or Ministry, and the legislative power to a Senate and a Chamber of Deputies. The Bureau was to consist of fifteen members, five of them nominated every year by the great Powers, five by the Senate, and five by the Chamber of Deputies. The Bureau was to elect out of its own members its president, who should be at the same time President of the Senate. The Senate should be nominated by the Upper Chamber of each State, and by the Crown, or other central authority, in the absence of an Upper Chamber. The senators should be appointed for life, and in number equal to the deputies which every State should send; and they should be elected by the Lower Chamber if there were two chambers, by the single assembly if there was one, or by its highest

[1] L. Kamarowsky, *Le Tribunal International*, traduction. Par S. Westman. Paris, 1887.

authority if it was not governed by a representative body. The number of the deputies should be thrice that of the senators. The six Great Powers would have ten senators and thirty deputies; and for the other States the number would be fixed in the proportion of the population, the extent of territory, and the financial means. The duration of the mandate would be determined by the State which sends the representatives. Every purely national question would be excluded from the deliberation of the two chambers. The assent of the president would be necessary to give the force of law to the resolutions of the two chambers; but in default of this the assent of the majority of the committee would suffice. The expenses of the International Government would be covered by an international tax to be distributed among the States in the proportion of their representation in the Legislature. Every State would be bound to furnish a contingent of men, or an equivalent in money, also in the proportion of its legislative representation. This armed force would be at the orders of the Bureau, for the execution both of the laws voted by the two chambers and of the sentences of the international tribunals. There would be a Court of Justice divided into two sections, the one civil and the other penal, composed of fourteen judges and a president appointed for life by the committee, six from among the subjects of every Great Power, and eight from among the subjects of the other States, and in case of an equal division, the vote of the President to be decisive. The civil section would interpret the treaties, would decide all disputes about rectification of the frontiers, and would judge the questions of private international law on appeal. There would be a procurator-general both for the civil section and the penal section, and they would both be appointed by the committee. The seat of the

international government should be at Constantinople, which would be made a free and autonomous city.[1]

The project of Bluntschli for the regulation of the union of the European States was published in 1878, and it is somewhat more practical than that of Professor Lorimer. He respects the independence and liberty of the several States, and wishes the existing Law and the actual relations to be altered as little as possible. Leaving out the small States of Andorra, Monaco, and Lichtenstein, which would be preserved as they are as a historical reminiscence, he enumerates in Europe seventeen sovereign States, and one semi-sovereign State—namely, the six Great Powers of Austria-Hungary, France, Germany, England, Italy, and Russia; seven Western States, Spain, Portugal, Belgium, Holland, Switzerland, Denmark, and Sweden-Norway; five sovereign Oriental States, Turkey, Greece, Roumania, Servia and Montenegro, which he unites into one; and Bulgaria (a semi-sovereign State). Each of these natural members of the European Union should be represented with equality of right, but not of fact. There would be a Federal Council composed of twenty-four members; two for each Great Power, and one for the other States. The councillors would vote in conformity with the instructions received from the governments. Besides, there would be constituted a Senate which would have from 96 to 120 members, according as four or five representatives were granted to each State, and eight or ten to each Great Power. These senators would be chosen by the legislative chambers, and in their absence by the supreme authority of every State; and their vote would be individual. The Great Powers would act as an executive Committee. The Senate would hold session every two or three years; the Federal Council and the Chancellory would be permanent, residing alternatively in certain great

[1] Lorimer, *Institutes of the Law of Nations*, vol. ii. p. 279. 1884.

cities, not capitals. The grave questions of international politics which concern the existence, the independence, and the liberty of the States, the vital conditions of the peoples, their development and their security, would be resolved by the Federal Council by a majority of two-thirds, and by the Senate by an absolute majority. The minor interests, such as those relating to treaties of commerce, or customs, railways, posts, sanitation, extradition, &c., would be put under permanent tribunals, one of which would judge all questions relating to maritime prizes.

It is evident at the first glance that the difference between the schemes of Lorimer and Bluntschli is immense; for Lorimer would constitute a Federal State in the manner of the United States of America, equipped with armies and finances, whereas Bluntschli would only establish a Confederation of States to decide in an obligatory way on minor interests and potentially on the greater interests, so that wars would become less frequent, although they would not be entirely eliminated. For a federal decision might remain unapplied so long as it pleased the college of the Great Powers, somewhat like what happens at present in grave European questions.

Professor Pasquale Fiore also tries to reduce to a simple form the future regulation of the Society of the States. He would exclude all permanent tribunals, there being a great difference between private disputes and those of the States. He desiderates a Congress, with a military power, to promulgate a common system of right, and to resolve questions of general interest. The Congress would be composed of diplomatic agents appointed by each of the States which would spontaneously join the Association, and of the agents of the Great Powers even if they remained outside of the Union. Conferences would be convoked for the exercise of collective mediation, and arbitral tribunals would be held as

occasion required to adjudicate on the juridical disputes involving particular interests between two or more States. The conference would be convoked whenever there arose any difference between two States which could not be resolved by diplomatic means; and it would be constituted by all the Great Powers, and by those States of the Union which had a direct or indirect interest in the question, so as to resolve it according to the common legal right. It would proceed under the forms of a judicial tribunal, being able also to include in its sentence penal sanctions, and providing otherwise against the party which refused to submit to the execution of the judgment. It would also be able to refer to an arbitral tribunal the decision of a particular question of fact or right between the parties themselves. This would not exclude the States from being able to have recourse advantageously to voluntary arbitration by way of compromise. War would not be thereby entirely eliminated; but it would be substantially transformed and reduced to a mere means of executing judgments.

With the view of promoting the realisation of the new tribunals, the American jurist, David Dudley Field, proposed at a meeting of the English Society for the Promotion of the Social Sciences, held at Manchester in September 1866, the appointment of a commission to compile an International Code, which, after mature discussion, should be transmitted by the Society to the Governments in the hope of obtaining their sanction. The proposal was accepted, and a commission was appointed composed of jurists of different nations, who divided the work among them. The project was meant to embrace the rules actually existing in international law, leaving aside those that had fallen into desuetude, and proposing new ones required by the needs of modern civilisation. The external difficulties of distance and other impediments prevented the commissioners from

communicating to each other their respective labours, but Mr. Dudley Field, in January 1872, published a complete sketch of an International Code of public and private law, which he republished in an amended form in July 1876. This project contains 1008 Articles, of which the first 538 relate to public international law during peace; the Articles from 539 to 702 deal with private international law; and the remaining Articles regulate the state of war both by land and by sea. The mercantile marine, the maritime signals, the longitude, quarantine, the railway, telegraphic and postal service, the coinage, weights and measures, literary and artistic property, patents of invention, trade marks, and bills of exchange, are all dealt with by the distinguished author.

The code published by Bluntschli in 1868 is more limited in its range. It consists of 862 Articles, and is divided into nine books: I. Fundamental Principles, Nature and Limits of International Law; II. Of the Persons in International Law; III. Organs of the International Relations; IV. The Sovereignty of the Territory; V. Persons in their Relations with the State; VI. Treaties; VII. Violations of International Right and Means of repressing them; VIII. War; IX. Neutrality.

International right is going through the same process as has been experienced in the case of internal right. Written laws were gradually substituted for customs, and the multiplicity of the latter contributed to give great importance to the treatises of the jurists who had classified and explained them. The disparity of the laws in the fourth century became such as to compel the Emperor Constantine to appoint the jurisconsults of the greatest authority, to whom recourse could be had for an interpretation of the law. A hundred years later Theodosius II. made a similar provision for the Eastern Empire; and it acquired the force of law in the Western Empire under Valentinian III.

Papinian Paul, Gaius, Ulpian, and Modestin, as well as the older jurists whose opinions had been accepted by them, became the authorised interpreters. When their opinions were different, that of the majority prevailed; when they were equally divided, that of Papinian prevailed; and if he was silent on the point, the judge pronounced the decision. Nevertheless, the Imperial Constitutions had become so numerous that a regular collection of them became indispensable. The jurisconsults, Gregorius and Hermogenius, applied themselves to the work. The *Gregorianus Codex* contained the Constitutions from Adrian to Constantine; and the *Hermogenianus Codex*, which was probably a continuation of the Gregorian Code, added the Constitutions of Diocletian and Maximian. Of greater utility was the *Theodosianus Codex*, in which Theodosius II., by the aid of Antiochus, who was then consul and pretorian prefect, collected the imperial edicts and the most important rescripts, and published them as a code in the Eastern Empire. He sent a copy of them to his son-in-law, Valentinian III., who promulgated it in the same year, 438, in the Western Empire. All these attempts led to the codification of Justinian.

In the fourth century the need of a written law was also felt among the barbarian peoples. The *Leges salicæ*, *ripuariæ*, *Alemanorum*, *Longobardorum*, alternated with the *Lex Romana Burgundionum*, *Lex Romana Visigothorum* down to the *Capitola* of Charlemagne, which closed the barbaric period. During the feudal period we have in France the *Etablissements* of St. Louis and the *Assises de Jerusalem*. A sort of codification is found in the Ordinances of Blois (1539), Orleans (1561), and Moulins (1566). The code of Henry III. of Brisson, and the code Michaud or Marillac, are private compilations. The Ordinances prepared by D'Aguesseau on donations, wills, and substitutions, were published under

the title of *Code Louis XV.* The legislative movement of the modern epoch issued in the *Code Napoléon*, which has been adopted with slight modifications by most of the States of continental Europe, and in parts of America.

In Germany the first attempts at codification may be considered to be the *Constitutio Criminalis Carolina* of 1532, and the collection of the judiciary laws of the Electorate of Saxony of 1622. In the last century there were published the *Codex Juris Bavarici Criminalis* of 1751, and the *Judiciarius* of 1753; the *Codex Maximilianus* of 1756; the *Theresiana* of 1769; the *Josephina* of 1788; and the *Landrecht* of 1794, a more systematic compilation of the public and private law of the Kingdom of Prussia. After the Code Napoleon the most important was the Austrian Civil Code of 1811.

In 1848 the German Diet enacted a law of exchange, and in 1861 a Code of Common Commerce. The re-established German Empire unified its penal law in 1872, and its civil and penal procedure in 1877. A commission of eleven members was appointed in 1874 for dealing with the Civil Code.

Collections of laws abounded in the old kingdom of the Two Sicilies. The oldest was that of Alfano Vario, to which Francesco Leggio added a notable supplement. The second collection, which was intended to correct the first, was published by Lorenzo Giustiniani. It is furnished with useful summaries, which give a clear abridgment of the meaning of every section. Very different from the compilations of Vario and Giustiniani is that of Francesco Jorio, who aimed not only at collecting the legal rules, but also at illustrating them with suitable historical explanations. Diego Gatta, on the contrary, confined himself to collecting the decrees and letters of Charles III. and Ferdinand IV., without taking any

trouble to arrange them. Very much superior is the Commercial Code of Michele Jorio, the most learned jurist of his time in commercial matters. We cannot give the same praise to the *Codice Carolino*, drawn up by a body of jurisconsults, notwithstanding the elegance of its composition, and its bearing the name of Cerillo on its front. Both these codes were undertaken in consequence of a public decree, but they did not attain the end in view. The legislative movement in the Two Sicilies was arrested by the French Revolution.[1]

It is therefore not unreasonable to hope that an International Code will yet be imposed by public opinion, in whole or in part, on the governments of Europe and America. As to the other parts of the globe, it will be necessary to wait till our civilisation has propagated itself there directly by means of colonies, or indirectly by diplomatic and commercial contact.

So long as such extrinsic means were not excogitated, the States, in order to preserve their independence, had striven unconsciously to provide themselves with such a means of equilibrium. Before the Roman Empire we find Carthage in hostile opposition to the Arabs, Greece to the Medes and Persians, Egypt to the Africans, the kingdoms of Pontus to the Mongols, the Dacians to the Scythians, and the Gauls to Germany. Before the Treaty of Westphalia, the England of Henry VIII., the Spain of Isabella and Ferdinand, and the France of Charles VIII., as united and allied nations, formed an equipoise to the German Empire, which was a federated State; and it was only from the want of a little wisdom in the Italians that the equilibrium was broken. But if the Treaty of Westphalia did not devise the balance of power it raised it to a system; and hence the principal States of Europe thought to arrange their boundaries and to

[1] See the celebrated monograph of Giovanni Manna, *Della giurisprudenza e del foro napolitano dalla sua origine.* Napoli, 1839.

ncrease their population in order to make them counter-weights in the system. This system produced the wars of succession of Austria and Spain, and the iniquitous partition of Poland; and it led directly to the Treaty of 1815. The equilibrium maintained being wholly material, took no account either of nationality or of historical traditions in the make-up of the States. So long as the government was not centralised, it did not matter much to the people whether they belonged to one State rather than to another, provided they were able to preserve their customs. But when the increasing needs of civilisation necessarily brought about a certain centralisation, the latent sentiment of nationality awoke, and the co-existence and reciprocal independence of all the nations under the universal law of right has become the new principle of the political aggregations.

The existence of Nationalities distinguished from each other by a peculiar character impressed upon them by nature is not an indifferent and accidental fact, but reveals a providential law belonging to the constitution of our species, and from which as a matter of fact rights and duties spring. The juridical capacity is an essential attribute of every human being, and therefore of every regulated collective aggregation of men, and it cannot stop at the State or at the nations. It must, however, advance by degrees, and not *per saltum*.

Universal monarchy, in the sense of the subjection of all the peoples to a single sceptre, was tried in antiquity by the Assyrians, by the Persians, by Alexander the Great, and by the Roman Empire. In the Middle Ages it was tried by the Pope and by the Emperor. In modern times it was tried by Charles V., who understood it not so much as a material domination but as moral assimilation, and the annihilation of all dissension in favour of a certain political and religious unity. History has registered the vanity of these attempts.

The abolition of the idea of a fatherland or special country was proclaimed in a moment of philosophical prostration by the Stoics. "This world," says Seneca, "which thou seest, and which includes divine and human things, is only one, and we are the members of a great body. . . . Man is nowhere a stranger; his spirit suffers no limits, and it expatiates in immensity like God. Man recognises no land here below as his peculiar country; his true country is the sphere of the universe. Particular States are only members of the great Republic of the Human Race. As man ought to prefer the general interest to his own or other individual interest, it follows that the duties toward the human race are to be placed before those imposed upon him toward particular cities, just as the latter ought to be fulfilled in preference to the obligations which originate in the bond of the family." *Epist.* 95, 102.

Towards the end of the eighteenth century cosmopolitanism found not a few followers of the stamp of Anacharsis Clootz, who called himself a "Citizen of the human race." The communists and internationalists of to-day have brought into repute those ideas which lead to the annihilation of the individual man and the peoples, and from which there issues no such result as a humanity composed of equal and free individuals. The principles developed by us point, on the contrary, to the union of the liberty and equality of individuals, of the groups of nationalities, and of humanity as a whole. Man is free, because he is man; and he associates himself spontaneously in the family, in the community, in the nations, and in humanity as such. To harmonise those sentiments, to fulfil at the same time the manifold forms of duty, and to exercise the rights inherent in his fourfold quality, is what renders man truly man, and constitutes him a jural person. And the way in which these duties and these rights are to be subordinated to each other, has

been thus elegantly indicated by the Italian poet, Giuseppe Giusti :—

"First, in my house, as only mine, I'm lord ;
Then citizen within my city too ;
Italian in Italia ; in accord,
As man with all mankind the whole world through ;
And thus from stage to stage I life unite,
Embracing all, a true Cosmopolite.

# *SUMMARY OF THE SECOND VOLUME.*

## PART SECOND.

### *SUBJECTS OF RIGHT.*

#### Chapter I.—The Individual.

The rights of persons considered in their general capacity are absolute or relative: absolute because they belong properly to every man considered as an individual or particular person; relative when they are enjoyed in their quality as members of the civil community. The absolute rights are those which are inherited from nature, and which all men ought to enjoy. Antiquity had no clear idea of this distinction, as liberty was then confounded with sovereignty. Christianity attributed greater value to the individual. The barbaric invaders of the Roman Empire brought with them the need and the passion of individuality, but they modified the rights of the State by embodying the sovereignty in the ownership of property. This abuse was corrected by the English Constitution, and by the principles proclaimed by the French Revolution . . . . . 3

Hitherto we have considered the whole sphere of ethics, looked at from the juridical side. The ethical whole is realised by man individually and in society. The isolated individual is an abstraction; history offers us only families, tribes, nations, peoples, or States. It is necessary to look at the individual, not as a whole by himself, but in relation with the whole . . . . . 3

The *minimum* of individuality is found in the inorganic world, commencing with the stars, which are perfectly distinct bodies. Observing a mineral carefully we come to a central point around which the chemical affinities in certain circumstances conjoin new elements. Carrying the analysis to its last point, we find the molecules of simple bodies composed of atoms of ether, which, by uniting, form the composite bodies. In the organic world the minimum of individuality is in the cell which goes to the composition of the vegetable and animal tissues. The plant has life, but it does not feel; the animal, in a measure, destroys the law of gravity, which chains it to the soil by moving. The realm of mechanism is succeeded by that of spontaneity, of which the animal has a vague consciousness which is called instinct. At the head of the animal kingdom is man, who thinks himself, and conceives the abstract and universal. Man, by means of reflection, can excite in himself motives that are wholly rational and independent of the instinctive impulses. Intelligence creates in us liberty, which is spontaneity liberated from the influence of the impulses and of physical vitality . . . . . 4

Man is called in juridical language a person, *i.e.*, a sensitive, intelligent, and free being, and therefore capable of right. Analysing the human personality, we find three fundamental attributes: Equality, Liberty, and Sociability. Men are equal, because they are of the same nature, not because they have identical faculties or powers; they are free because they are intelligent, endowed with will, and operate with full consciousness; and they are sociable, because they tend to an end of which they are cognisant. The first two of these attributes—equality and liberty—are developed in proportion as sociability increases. Besides physical persons, there are moral and juridical persons, who are collective entities in whom the Law recognises rights. Physical or moral persons have a right to their complete development in so far as they do not infringe the right of others. Positive Law determines their juridical capacity . . . . . 6

## Chapter II.—The Family.

Down almost to the middle of this century the origin of man was sought in the cosmogonies. In 1847 there were found certain utensils and arms which gave rise to the supposition of a fossil man, and such was found in 1860. The naturalist Quatrefages admits not only quaternary man, but also tertiary man. But he combats the idea of the man-beast, recognising in all human remains purely human characters. He also admits the descent of the whole human species from a single couple, and holds that the family is a primordial fact . . . . . 9

The family is, as it were, the tissue of the social organism It is composed of the father, mother, children, and other relatives, and has as its basis a patrimony of which slaves and servants at first formed a part. It springs from marriage, is maintained by the paternal power, and is perpetuated by succession . . . . . 12

Marriage was well defined by the Roman jurisconsult Modestinus. Christianity added to the ancient idea the notion of indissolubility. The constitutive principles of the matrimonial union ought to regulate also the patrimony of the spouses. The French Code maintains communion (*communio bonorum*) relative to movables and acquired goods, not less than to the fruits of immovable goods properly so-called. Under this regime all the rights of the wife are reduced to the hope of dividing the usufruct if there is any. On the other hand, the arrangement of the *dos* intends to guard the interests of the wife and of the offspring against all possible prodigality on the part of the husband. The Italian and French Codes permit adding to the dotal system an association for acquisitions that may be hoped for during the marriage, which would constitute the rational system advocated by Ahrens 12

The father is the head of the family, and, failing him, the mother, whom the Italian Code makes participate in the paternal power. The parents are bound to sustain, educate, and instruct their offspring; and when they have not sufficient means this obligation should attach to the

ascendants in the order of proximity. Parents have the legal administration of the goods belonging to the children, with enjoyment of the usufruct after having satisfied the obligations above mentioned, without being bound to give an account thereof. They also enjoy a right of correction, and are entitled to obtain from the magistrate the removal of the child from the paternal house. The paternal power lasts until the children have reached an age when they are able to regulate themselves. The children in return, whatever may be their age, ought to honour and respect their parents. They owe them, as well as other ascendants who have need of them, the means of support, and in certain circumstances they ought also to relieve each other, and this holds particularly between brothers and sisters. Failing parents, the paternal power is transmuted into guardianship. Sons have a right and title to receive the means of support from the parent who has recognised them; and they also ought to be trained by the parent to a profession or art. The question of the rights of adulterine and incestuous children is a disputed one . . 24

The patriarchal family had a patrimony consisting of flocks and slaves, which was transmitted from first-born to first-born. When the tribe was transmuted into a village there was added to movable property also property in stable things, as has been described by Sir H. Sumner Maine. In the ancient city the family became a political and religious association, and hence the order of succession was by agnates only, that is, through relatives by the males, and failing them, by *gentiles* or members of the *gens*. Something similar still survives in Eastern Europe among the Slavs of the South, in the village-family called *Zudruga*. Gradually the close organisation of the city was dissolved; and the family becoming a natural association, cognates or relatives through the females were also called to succeed. The succession is now regulated according to the presumed affection of the deceased. Under the same presumption the liberty of disposing of property by irrevocable donation *inter vivos*, or by act of last will, has been restricted. Under

Alexander Severus the principle became valid that no one could by an act *inter vivos* or *causa mortis* deprive his descendants or ascendants, or his brothers and sisters, of the fourth part which would have fallen to them if they had succeeded *ab intestato*. Justinian regulated this portion, which was called the *portio legitima*, otherwise. The French and Italian Codes retained the legitim for descendants and ascendants. The Italian Code made the surviving spouse a sharer in it, and assigned to a natural son the half of the legitim falling to a son born in marriage . . . . . 27

Some recent writers whose views are gathered up by Giraud-Teulon do not stop at the patriarchal family, but go back to the horde when the child had for father all the fathers of the community. The horde separated into little groups; and marriage, or the more or less lasting union of a larger or smaller number of individuals, presents the first idea of the family which is grouped around the mother. According to these authors, filiation by males and the notion of paternity, do not appear till after the constitution of a separate property. Le Play has proposed certain reforms in order to give greater stability to the family . . . . . 30

CHAPTER III.—THE ORDERS AND CLASSES OF SOCIETY.

With the progress of agriculture, the patriarchal family segregates, and the individuals become naturally divided into Aristocrats and Plebeians . . . . . 33

The juridical institutions which combined with the Germanic invasions brought forth Feudalism . . . . . 35

Emancipation of the Communes. Municipal right gradually overcame feudal right . . . . . 36

The warriors, the clergy, and the citizens form the three orders of the Middle Ages. In England the great ecclesiastical vassals became subject to the same burdens as their lay colleagues, and in consequence society was divided into the Aristocracy and the People . . 37

The Revolution of 1789 abolished the Orders of society,

weakened the bond of the Family, and dissolved the Corporations . . . . . 38
Opinion of Savarese regarding the social order. Prof. F. Persico corrects what is excessive in the work of Savarese. . . . . 39
Some illustrious writers have censured the excessive individualism of the present social order. A. Prins proposes to restore autonomy to certain groups of the social organism . . . . . 43
This subject will be afterwards dealt with in speaking of the composition of the First Chamber and of the election of the Second . . . . . 45

## Chapter IV.—The Commune.

The Commune is the family grown large. It existed before the State; the political law finds it, but does not create it. It has passed through three stages—the village community, of which the Russian *mir* is a survival; the sovereign city in the Greco-Roman antiquity, and the semi-sovereign city in the Middle Ages; a fraction of the State, as in most of the modern States . . . 46
In the eleventh and sixteenth centuries the municipal franchises almost everywhere disappeared in Europe in order to give force to the central government. Centralisation culminated in France with the Consular Law of the year VIII., which was introduced into Italy by the French invasion, and was preserved with a few modifications by the restored governments, except in Lombardy, where an order was introduced in 1816 which had revived the ancient Lombard system. The communities of greatest importance had a council which was convoked in secret twice a year. In the others, which were numerous and very small, the possessors of property inscribed on the roll were convoked publicly, a delegate also intervening to represent the contributors to the personal tax. When Lombardy was united to Piedmont, the idea of unifying the municipal administration led to equalising the small with the great communes, by the law of 23rd October 1859, which was almost a literal translation of the Belgian Law of 30th

March 1836. The Italian Parliament amended what was excessive in this law by another law of 20th March 1865. There is a distinction in the suffrage between large and small communes, and between the urban and rural communes . . . . . 51

The commune ought to be now and always what it was at its origin, an association of families; and hence the possibility of granting the right of suffrage to all heads of families, restricting the action of the commune, however, to the administering of the most elementary necessities, such as primary instruction, management of roads and streets, sanitation, and such like . . . . . 56

## Chapter V.—The Province.

The State has no sooner ceased to be a union of communes than there arises a new order, the Province, which therefore is not a primitive natural association, but a secondary and artificial one. The States or provincial assemblies became communes in the thirteenth and fourteenth centuries, and in the beginning of the fifteenth century. The bishops and the members of the high aristocracy dominated in them, being members *jure suo*, while the cities were represented in them only by a mayor, bailiff, or special deputy. The populations were not greatly disposed to them, but aimed rather at acquiring influence in the Parliament and in the States-General . . 58

The conception which we ought to form of the Province is that of a union of communes rendered more or less homogeneous by their situation and by an amalgamation of the local with the general interests. This was kept in view by the Italian Law of 20th March 1865, which opportunely corrected the previous Law of 23rd October 1859, which had reduced the province almost to a simple territorial district. The same law put the district as an intermediate division between the commune and the province. As the progress of the means of communication leads to the suppression of districts the requirements of the province will probably lead to the introduction of Regions. The functions of this new organ may be

determined rather by the method of exclusion. The administration of justice, the supervision of the police, public works of a national character, the postal department, the telegraphs, the central academy, a completing institution with observatory, laboratories, &c., the regulation of the finances, war, marine and foreign affairs, will belong to the State; the remainder will be under the competency of the regional administration . . 69

The Province being an association of communes, it should be administered by a delegation of the communal councils; and for the greater part of its expenses it should have recourse to communal rates, as in the law of 12th December 1816 of the Kingdom of the Two Sicilies, which distributed the expenses of the public provincial works in a ratio compounded of the revenues of a commune and the utility which it derived from them. In creating the Region, the provincial council should be assimilated to the council of the French *arrondissement*, and restricted to apportioning the taxes among the communes, giving their votes specially with reference to highways, and addressing remonstrances, through the medium of its president, as to the conduct of the public services. The regional council, on account of its importance, ought to be elected by direct suffrage . 74

## Chapter VI.—The State.

The work of the individuals and of the minor associations is not sufficient for the full realisation of the human ends; these also require the State. The distinction of society from the State is cardinal. It serves as a criterion of the duties of the State and as a limit to its sphere of action. The State exists only for society, and it should interfere only in a subsidiary way with the human development . . . . . 76

In the first part of this work the boundaries between the State and society have been objectively indicated; it remains to trace out the mode of guaranteeing subjectively the persons who are united in society . . . 81

## Section First.

*Guarantees of the individuals united into Society in relation to the State.*

The analysis of the human personality brought to light three fundamental attributes: Equality, Liberty, and Sociability . . . . . 81

To safeguard Equality in a well-regulated society, the tribunals ought to be accessible to all; or in other words, justice ought to be administered without privileges and without cost; the judges ought to be permanently appointed, and the rules of judging fixed; and every individual ought to have the sacred and inviolable right to approach the constituted Powers with petitions . . . . . 81

The attribute of Liberty is guaranteed by the right to be arrested and judged only in accordance with the rules of law, by the inviolability of domicile and property, by the secrecy of correspondence, by the liberty of publishing one's own thoughts through the press, by teaching, and by freedom of worship . . . . . 90

Sociability completes the development of the individual, and is secured by the right to hold meetings and to form associations. These guarantees, however, would be stipulated to no useful purpose without a body of institutions putting them under the guardianship of the greater part of those interested; and this is not to be attained without a good organisation of the State . . . . . 108

## Section Second.

*Functions and Organs of the State.*

The political organisation should correspond to the social organisation. The State has the mission to guard the development of the men united in Society; and in this sense it is the organ of right, the mediator of the social life. In order that the State may be able to realise its mission, it needs must have the power requisite for it. The origin of power is confounded with the origin of the

right which is called to rule. Power springs from God, but is exercised by means of human reason and will according to right, and it belongs only to the most worthy to exercise it . . . . . 120

Power is synonymous with sovereignty, and sovereignty consists in the power that has authority to make laws. This power or sovereignty may be entrusted to a single individual, to many individuals, or to all the members of a political society, with greater or less restrictions. Hence the distinction of the forms of government generally received, into Monarchy, Aristocracy, and Democracy, and into governments pure or absolute, and mixed or limited. Another particular characteristic has been added to the modern States in representation . 123

As a greater guarantee it has been devised to separate the execution of the laws from their formation, seeing that to will a thing is different from the practising of it. The executive power is subdivided into the administrative and the judiciary power . . . . . 126

The organs of the State are :—1. A Head, King, or President of the Republic, or an executive committee; 2. One or two Assemblies which discuss and approve the laws; 3. An order of Officials who apply the laws in the general interest, or who settle particular disputes according to the laws. The result of the government should be security and respect for the fundamental rights of man. In order to obtain this a share in the sovereignty ought to be assigned to the more capable and to those who have most interest in the maintenance of the social order . 134

In a monarchy, as well as in a republic, the executive power is entrusted to a hereditary or elective head (but in some republics to a commission). The king is head of the State, the first in rank and in power, which he possesses at least for life; and he is irresponsible for his actions. In the present day monarchy is a dignity, the effective power being entrusted to a sort of *Maire-de-palais*, who is the first minister, and who is removable always at the will of the parliament. Some writers, like Laferrière, distinguish what properly belongs to the king, such as the command of the forces by land and sea, the right to

convoke the Chambers, to dissolve the Chamber of Deputies, to make treaties, to declare war, to appoint ministers, and to grant pardons; and they maintain that the signature of the ministers is not necessary in these kinds of acts, unless it be to certify that of the king, without which those acts would have no effect or influence. But in other acts, such as appointments to public offices, which involve the exercise of executive power properly so-called, the signature of the ministers is essential, as they have all the responsibility. It seems, however, that the king is properly autonomous in the appointment of the ministers, in the dissolving of the Chamber of Deputies, and in conferring titles of rank and of nobility, as well as in the exercise of the right of pardon; but in all the rest he ought to proceed in accord with the ministers on whom the responsibility devolves . . . . . 134

The personal function of the king has its necessary complement in the responsibility and power of the Ministers to whom the king entrusts the exercise of the executive power. It is difficult to determine where the responsibility of the ministers begins, and where the special jurisdiction ends which they have to sustain as such. The French Charter of 1814 determined that the ministers could only be accused for treason or concussion. In their other acts, where the ministers are not proceeding by the express mandate of the law, they may commit delinquencies like every other citizen, and should be punished by the common laws. Although the Italian Statute is expressed in general terms, yet the principles developed by aid of the dispositions of the French Charter seem applicable. The responsibility of the ministers extends to the subordinate agents, with this difference, that while the ministers are responsible for legally using their power to the advantage of the State, the subaltern agents, not being able to enter into such considerations, are only responsible for the legality of their several acts. All public functionaries, however, are held responsible for any attempts against security, liberty, and property, as they cannot be shielded in these relations by any superior authority . . . . . 143

History shows us in all the western monarchies a supreme head or king, minor heads who form his council, and an assembly of freemen which approves or disapproves the resolutions already taken, as we see in the primitive organisation of Rome and among the German peoples. After the conquest of the Roman Empire the minor chiefs became scattered here and there, and it became difficult, if not impossible, to get together the assembly of the freemen. In the midst of the universal disorder the king bound himself to the minor chiefs by means of the feudal bond, which was frequently very loose. The Saxons when they passed into England carried with them the spirit of liberty which reigned in the forests of Germany. Their social institutions, which had assumed the form of a confederation of tribes, took a more rigid form in order to maintain the new conquest. They founded a large number of principalities and kingdoms, which at need were united under a supreme head. But all the assemblies of all the freemen capable of bearing arms were superseded by an Assembly of large proprietors and public officials called the *Wittanagemot*. This state of things lasted down to the Norman Conquest, when the Saxons were deprived by the Normans of all their possessions. William the Norman, however, maintained the democratic judiciary and administrative institutions, with the sole difference that he himself directly appointed the public officials which before were elected by the people. The fiefs which he constituted for the Norman barons were somewhat restricted and in distant regions, and he granted them only a civil and penal jurisdiction of very small importance, as their decisions could only be executed by the sheriff. William did not exempt the Normans from the taxes, and the common oppression united the conquerors and the conquered against the royal power. The barons at Runnymede in 1215 forced from King John the *Magna Charta Libertatum*. Not only the barons but all the knights, the immediate vassals of the king, or freeholders, had the right to take part in the National Assembly. The only distinction was that the

barons were summoned individually, and the knights *en masse* by means of the sheriff . . . . . 149

In 1213 every county was enjoined to send to Oxford four wise knights *to treat of the affairs of the kingdom.* This was the origin and first beginning of parliamentary representation. Under Edward I. the cities and boroughs were also invited to send deputies in order to grant subsidies. The knights were conjoined with the deputies of the cities and boroughs, and the parliament was divided into two Chambers, the House of Lords and the House of Commons. This division is held to have been introduced in 1377, when the House of Commons began to appoint a special Speaker or President . . . . 150

The House of Lords corresponds to the Wittanagemot to which the king called the most important men, and hence sprang the heredity of the peers and the right of the Crown to create peers for life . . . . . 153

The judiciary function of this Chamber had the same origin; for the barons, alone attending the National Council, laid hold of the judiciary matters and retained the function thus appropriated . . . . . 154

The English House of Lords, as a Chamber of Peers, contains the type of every similar institution on the continent. A second Chamber is indispensable in order to temper the ardour of a single assembly and to give another point of support to the Crown . . . . . 155

The Statute of the Italian Constitution limits the royal selection of peers to twenty-one categories or sections, made up mostly of high functionaries, with the exception of the twentieth, which authorises the appointing as senators of those who have brought lustre to the country by their services or eminent merits; and the twenty-first, which allows the choosing of them from among those who have been paying for three years 3000 francs of direct taxes on account of their possessions or their industry . 155

The Italian Senate, like most Upper Chambers, is constituted into a court of justice in order to judge offences imputed to its members, crimes of high treason, or attacks against the security of the State, and in order to try ministers when accused by the Chamber of Deputies. Certain

proposals of reform have been made regarding the composition of the Italian Senate . . . . . 156

At first the English House of Commons was restricted to voting supplies and directing petitions to the King and the Lords. Thereafter the right to vote the supplies was extended to a specific examination of the budget and of the whole administration of the State, as well as of the conduct of the councillors of the Crown. Instead of formulating petitions, they deliberated on bills or statutes, both in the House of Commons and in the House of Lords . . . . . 157

The practice was afterwards introduced for the king to change the ministers when they lost the confidence of the House of Commons, so that the ministry under that aspect may be called a parliamentary committee. The ministers in their capacity of members of parliament present projects of law on which the Crown can impose an absolute veto. The liberty of speech and the inviolability of the members of parliament were gradually recognised . . 158

The eyes of France and of Europe turned towards the English constitution. All accidental parts in it were eliminated, and the Houses of Lords and of Commons were reproduced as they are in the Chambers of the Italian Constitution. The Italian Chamber of Deputies possesses a part of the legislative power, and a simple precedence in the matter of taxation. It has the control of the executive power; for besides the specification of the budget it may call the ministers to account regarding any act of administration, and it may inflict a censure which, according to the established usage, would oblige the king to change the ministry. It refers the petitions of the citizens to the respective ministers, calling the attention of the executive power to them. It puts ministers under accusation when it considers that they have violated the constitution or any law whatever . . . . . 159

The House of Commons and other Chambers of Deputies take their origin from popular election. The first electors in England were the freeholders in the counties, and those who exercised municipal rights in the city. In the old parliaments every county figured as a unity, and its repre-

sentatives were bound by instructions. As for the cities and boroughs, it was not the population but the corporation which was represented. The deputies of the counties, as well as those of the cities and boroughs, were bound by their constituents by instructions, of which the House of Commons no longer took account after it attained to the position of an independent and irresponsible body . 165

The Constituent Assembly of France introduced election at two stages. The other electoral laws require in the electors conditions which secure their independence and capacity, as does the Italian Law of 1882; and they recognise universal suffrage, as in France and in the United States of America. As to the persons eligible, the Constituent Assembly did not lay down any condition, the confidence of the electors being regarded as sufficient guarantee. In Italy the age of thirty years was made requisite, and the enjoyment of civil and political rights . . . . . 168

In order to make the suffrage general, John Stuart Mill proposed the giving of a plural vote to the more capable. Thomas Hare, in order to provide greater protection for minorities, would divide the country into large departments, and the electors in the proportion of the deputies to be appointed, the number of votes necessary for making a deputy being used as the quotient . . . 172

A good electoral system ought to aim at securing capacity and independence in the electors, and therefore cannot cut off any from the suffrage in an absolute way . . 173

The accessory guarantees of a constitutional government are the irremovableness of the magistrates, the publicity of the sittings of the tribunals, and of the meetings of the two chambers, and a citizen militia, which, however, is now falling into desuetude . . . . . 174

In ancient times the citizen was a soldier, and hence the soldier could not repudiate his being a citizen. During the Middle Ages the military organisation was feudal, except in the autonomous cities, where the citizen militia arose. With the progress of strategy standing armies were instituted almost everywhere, and nothing was left for the communal soldiery but the humble office of main-

taining order. But they reacquired their importance under the designation of the National Guard in the French Revolution, when the armed force was divided into three categories—the Army, the National Guard, and the Gendarmerie. The Army was destined to guarantee the external security of the State; the National Guard to guarantee the internal public security; and the Gendarmerie to guarantee the security of private persons . . . . . 175

After the Civil War in America and the battle of Sadowa, the military organisation was changed almost everywhere, and in Italy as well. The rapid means of communication have permitted great numbers of soldiers to be transported and fed. In some countries all the citizens, divided into three classes, are personally bound to military service from the twenty-first to the thirty-ninth year of their age. The voluntary service of a year conceded to educated young men, and the short duration of the active service for the first class in general, have lessened the injury which the obligatory service entails upon the sciences, arts, industry, and commerce . . . . 177

Europe is inhabited by three principal races: the Latin, the German, and the Slavonic; and all three are descended from the Aryans, who had a supreme head or king, minor heads who formed his council, and an assembly of freemen who approved or disapproved the resolution already taken. This type was preserved in the German forests . 178

The State gradually ceased to be a community of tribes and became a community of citizens. For the authority of the head of the tribes, the Council of the Elders and the assembly of freemen capable of bearing arms, there came to be substituted the unopposed power of the head of the State, the adhesion of the Council of the Elders, and the formal approbation of the popular assembly . . . . . 178

In Sweden we find about the ninth and tenth centuries Assemblies called *Worf* or *Thing*, which were convoked by the king or by the magnates who took part in them. Down to 1448 the cities and rural districts had been promiscuously represented, but the cities then began to have their

special representatives. The law of 22nd June 1866 has abolished the representation of the four orders . 179

Norway, which depends on the same sovereign as Sweden, has a single assembly, which was formerly triennial, but is now annual . . . . . 180

Denmark has two chambers: one of them having its members partly appointed by the king and partly elected by a double suffrage, and the other having its members chosen by universal suffrage . . . . . 181

The ancient German Empire has become a republic of princes with a hereditary head, formerly its President, now the Emperor. The legislative power, according to the constitution of 6th April 1871, is entrusted to two assemblies: the *Bundesrath*, composed of representatives of the various States; and the *Reichstag*, elected by universal suffrage . . . . . 182

Switzerland belongs ethnographically to Germany; the federal compact of 29th May 1874 has considerably restricted the autonomy of the cantons . . . . . 185

The English Constitution has been sufficiently described in paragraphs three and four. The English when they crossed the Atlantic left behind them the monarchy, the aristocracy, and the official church. The Federal Constitution of the United States of 17th September 1787 established a President elected by indirect suffrage, a Senate composed of two senators appointed by the legislative assemblies of the confederated States, and a House of Representatives elected by universal suffrage . . . . . 187

In Hungary the Golden Bull granted by Andrew II. established a general Diet composed of all the nobles. Under King Sigismund, the cities were admitted by representation. A Palatine count, appointed by the orders out of four candidates proposed by the king, acted as a mediatory between the governor and the governed. In 1848 Hungary modified its ancient constitution on a basis of juridical equality. In virtue of the *Ausgleich* of 28th June 1867 it has preserved its ministry and its two chambers . . . . . 189

Austria has likewise conceded to the countries on this side

the Leitha the constitutional regime, with two chambers and two delegations which examine the budget common to the whole empire . . . . . 191

Contiguous to Hungary there arose two Slavonic kingdoms, Poland and Bohemia. The Polish Constitution rested upon an elected king, a senate, a general diet, and the particular diets in the various Palatinates. The general diet was convoked by the king, and was composed of the representatives of the nobility of the Palatinates, who took the name of *nuncios*. The king was judge between the senate and the nuncios; but as his power would have become absolute if he had remained unopposed, every senator and every nuncio had thus the right to set himself in opposition to the royal decision, if he found it contrary to the law and the liberties of the kingdom. This right was called the *liberum veto* . . . 192

The Constitution of Bohemia also presents an elected king, a senate, general and particular diets, and a Burgrave who has much resemblance to the Palatine of Hungary. The general diet was convoked by the king, and in an interregnum by the senate. It was composed of the high clergy, the barons, the nobles, and the deputies of the free cities. The king opened the diet surrounded by the senate and by his principal officials, expounded his projects, and then withdrew in order to leave the orders to deliberate. Each order deliberated separately, then the votes were united, and they approved of the royal proposals, or made observations upon them. The king also sent his observations; the united orders deliberated upon them, and drew up the decree which was proclaimed by the diet after having prayed the king to be present at this proclamation. This system was new because it gave the king a mere right of initiating measures and proposing amendments, leaving to the diet the decision and the promulgation of the law . . . . . 194

The Constitution of Servia of 1833 gives a better representation of the political traditions of the Slavs. It assigns the legislative power to the prince and to a senate which sits permanently, and whose president has to sign along with the prince the law already voted by the senate. The

*Skupcina*, composed of deputies of the villages, did not take part in the discussion of the laws, but met every year in order to approve, modify, or reject the budgets. The ministers had to present every year a minute relation of all their acts, and they could be put under accusation by the *Skupcina* for any violation of law before the senate, which was declared the supreme tribunal between the prince and the *Skupcina*. The Senate was transformed into a Council of State . . . . . 195

Among the populations of the Latin race there prevailed either absolute monarchy born of the imperial Roman Law, or popular government, a reminiscence of more ancient times. Towards the close of the last century all eyes began to turn to England, but the Constituent Assembly of France had not the wisdom to imitate the English orders to the extent that was possible. The Constitution of 1791 assigned the executive power to the king, and the legislative power to a single assembly. The republican constitution of the year 1793, which was never put into application, established a single assembly to make decrees of public administration, and to approve the laws which were submitted to the suffrage of the sovereign people in the primary assemblies. The executive power was entrusted to a Council of twenty-four members. The constitution of the year III. introduced a double representation—a Council of Five Hundred and a Council of Elders, both elected by the people in the same comitia, but under different conditions of elegibility. The executive power was entrusted to a Directory of five members appointed by the Council of the Elders from a list presented by the Council of Five Hundred. After the *coup d'état* of the 17th Brumaire anno VIII., a new constitution was promulgated according to a project of Sièyes, with a Legislative Body, a Tribunate, a Senate, and a Grand Elector, so constituted that they watched and neutralised each other in turn. Buonaparte removed the Grand Elector, and there remained a conservative Senate, a Council of State for proposing the laws to the Tribunate, which on approving or disapproving them in principle elected three speakers to maintain or combat them (concurrently with

the speakers of the Council of State) before the Legislative Body, which listened in silence to the discussion, and then approved or rejected the proposed law by their vote. The executive power was entrusted to a First Consul, assisted by other two with a merely consultative vote. Under the First and Second Empire the right of discussion was given to the Legislative Body, which, however, could not amend the law unless its amendments were accepted by the Council of State. The Senate continued to be a conservative body which watched over the public liberties, and it belonged to it alone to modify the constitution by means of senatus-consults. The Charter of 14th June 1814 preserved to the king the initiation of the laws, and established two Chambers, one of them elective, and the other in part hereditary and in part appointed for life. The Charter of 14th August 1830 restored the initiative to the two chambers, making the first for life, and providing better security for some of the popular liberties. The Second Empire reproduced the constitution of the year VIII. slightly modified, but it afterwards gradually approached the parliamentary regime. The law relative to the organisation of the public powers of 25th February 1875 entrusts the legislative power in France to two assemblies—the Chamber of Deputies, elected by universal suffrage; and the Senate, composed in accordance with the special law of the day before. The executive power belongs to the President under the responsibility of his minister, and he differs from a constitutional monarch only as regards the duration of his power . . . . . 196

In Spain the Constitution of 30th June 1876 is in force. The Senate is composed of senators by right, or the royal princes, the grandees of Spain, and the high functionaries; senators nominated for life by the king; and others elected by the corporation and larger proprietors. The other Chamber offers nothing of particular interest . 202

The Portuguese Charter of 12th April 1826 has been modified by the additional Act of 5th July 1852, and by another law of 25th May 1884. The Chamber of Peers is very like the Spanish Senate . . . . . 205

Italy is governed by the Statute which enacted the Constitution of 4th March 1848. Certain reforms are under consideration regarding the Senate . . . 206

Belgium has two Chambers, both elected by the people, in different ways and under different conditions of elegibility, in virtue of the Constitution of 7th February 1831 . . . . . 207

The degeneration of parliamentary government is a subject of interest. Things are to be traced to their origin; and constitutionalism is distinguished from parliamentarism. Juridical equality does not cancel natural inequality, and hence the electoral rights of the franchise cannot be assigned indiscriminately to all, but only to those who are in a position for making a good use of them in the interest of the civil community. Nor ought individual citizens as such to be exclusively represented, but the social groups should also find representation, some in the Chamber of Deputies and the others in the Senate. . 208

CHAPTER VII.—THE SOCIETY OF THE STATES AND INTERNATIONAL LAW.

What the individual is in the State, that the State is in relation to Humanity. The State has its own personality, which asserts itself in contraposition to that of individuals . . . . . 211

The attributes of the personality of States are Liberty, which is translated into independence; Equality, which is manifested in the diplomatic and maritime ceremonialism; and Sociability, which is explicated by legations and treaties . . . . . 212

As regards the difference between internal and external public right, there is in the first direct coercion by means of armed force and of tribunals, while in the second the coercion is only indirect by means of reprisals and war . . 213

The States being in relations with each other, it is incumbent to examine the nature of these relations. States are born, grow, and die like individuals; and they have similarly, primitive, original, and absolute rights, and relative or derivative rights . . . . . 214

Personality or sovereignty is acquired by the foundation of a State or by the withdrawal of it from extraneous dominion. It is not requisite that the existence of a State be recognised and guaranteed by the Foreign Powers, but only that its possession be not defective or faulty . . . . . 214

The sovereignty ceases with the destruction of the territory of a State, or by dissolution of the social bond in it, or by its incorporation, reunion, or submission, total or partial, to another State. When a State depends on another in the exercise of one or several rights inherent in the sovereignty, but is free in other matters, it is called dependent or semi-sovereign . . . . . 214

Several sovereign States may associate themselves with each other so as to form a Confederation or a Federative State. In the Confederation every State preserves its sovereignty entire, and it is bound to the other Confederated States only by the obligations resulting from the federal compact. The other States recognise both the individual sovereignty of the confederated peoples and the federal sovereignty constituted by them . . 215

These characteristics are the absolute rights referred to, because they constitute the personality of the States. There are also relative rights, such as those which war confers on the belligerent States, and which cease with the ceasing of the extraordinary circumstances which have given rise to them . . . . . 215

A State and a Nation are identical as to their nature, but not as to their history. Wars and emigrations have blended the peoples, and hence the political aggregations have often been the effect of chance or of force. In order to form a State it is sufficient that there be certain common interests and a common will, express or presumed, whereas a Nation has mostly a common origin, and therefore the same thoughts and the same sentiments, and a language which serves to express these thoughts and these sentiments. The union of these things forms the naturally perfect state of a Nation, or its ethnicarchy, as the illustrious Mancini called it. . . . . 216

## Section First.

### *The Absolute Rights of the States.*

The State as a free person may exercise any sovereign act whatever, provided it does not injure the rights of others. The State should possess all the means necessary to secure its own preservation. It has therefore the right of legitimate defence, to which no limit can be put, except that arising from the security of other States . . 217

Every State is invested with an exclusive power of legislation in reference to the personal rights of its subjects, even when residing abroad, and to immovable goods dependent on its territory, whether they belong to members of the nation or to foreigners. There are certain rules generally accepted with regard to private international right . . . . . 218

The right of property being the highest manifestation of the human personality, States which are also persons, have a right to the appropriation of external things for the rational ends which they ought to attain. International ownership of property involves the right on the part of a nation to use and dispose of its territory while excluding other nations from it, and to exercise over it all supreme power . . . . . 225

The surface of a territory is composed of land and water. On the land it is easy to mark out confines, by following the chains of mountains, the course of rivers, or other natural signs; but on the sea only an imaginary line can be traced out by the degrees of longitude and latitude . . 226

International right indicates occupation, accession, and cession, as modes of acquiring national dominion. Authors are at variance as to recognising prescription . . 229

States are equal because the essence of juridical personality is the same. Among the first corollaries of equality is the respect which is due to all, both as regards the physical personality and the political and moral personality . 233

This respect is manifested in a negative manner by abstaining from any action contrary to it, and in a positive manner

by observing whatever is prescribed by the diplomatic and maritime ceremonial . . . . . 233

The various political agglomerations which have taken the name of States, have not less need than individuals to exchange their ideas and to conjoin their respective forces in order to attain the goal set up for humanity . 239

Diplomacy has as its mission to watch over the external development of the States, and to guard the rules adopted for the conservation of their rights and their prosperity. It is the prerogative of a supreme sovereign to send and receive ambassadors as a matter of right. This prerogative extends to semi-sovereign States within the limits of their political constitution. To protect commerce, consuls were appointed, who, in order to exercise their functions, require the *exequatur* of the government in whose territory they reside . . . . . 246

The diplomatic agents do not always act isolatedly, for they often meet in ministerial conferences, which are so called to distinguish them from other meetings in which sovereigns often take part, and these ministerial conferences take the name of congresses . . . . . 250

The function of the diplomatic agents is the conclusion and execution of Treaties . . . . . 251

The generic name of Treaty is given to the Conventions which are entered into between different States. It is usual, however, to distinguish Conventions from Treaties. The word Treaty indicates a solemn contract which regulates grave interests of the State; a Convention has less grave interests in view . . . . . 251

Equal treaties are distinguished from unequal treaties. They are all declared perpetual, unless a termination of their duration is stipulated, and this is done in order to avoid the necessity of renewing them . . . . 257

A general war between the parties suspends the treaties which were not stipulated in view of that war . . 259

## Section Second.

### *War.*

Analysing the personality of the State, we have discriminated *absolute* rights, such as Liberty or Independence, Equality and Sociability, and *relative* rights which spring up and terminate with certain given circumstances . . 268

The legitimate consequence of the independence of States is the right to defend themselves and to ask reparation for the wrongs which it is thought they have received. The object of war is to repel an unjust aggression or to obtain a just reparation. It is defensive, if the attack of the enemy is awaited; it is offensive, if the attack is anticipated . . . . . 268

In war the struggle is not now carried on as formerly between nation and nation, but between government and government, so that the respective subjects to whom the office of arms is not entrusted are at peace with each other. Hence war has no longer as its object the destruction of the enemy, but the inflicting of the least possible evil upon him when it is sufficient to bring him to himself and to make him give the reparation that is due . . 270

The desire to render wars less frequent has suggested the system of equilibrium, or the Balance of Power. Klüber considers that the system of equilibrium is not founded on the right of nations, but that it is to be regarded as resulting from special conventions. Wheaton sees no limit to the right to augment the power of a State by all legitimate and innocent means, except in the correlative and equal right of the other States to preserve themselves . . . . . 271

Before proceeding to hostilities parties ought to accept the good offices of some friendly Power, or sign a compromise and select arbitrators to pronounce a sentence according to the rules of right and equity . . . . 273

Retorsion and reprisals are considered as means of avoiding war. Retorsion consists in inflicting on the subjects of the State with which the dispute exists, the same or

anaolgous measures to those which have damaged its own subjects. Reprisals are isolated acts of war . . 274
Both retorsion and reprisals are exercised by government on government, and not by private citizens . . 275
When war has become inevitable it is necessary to give notice of it in some way to the enemy, as well as to the subjects of the State itself, and to the subjects of the other Powers who might sustain damage from it . . 278
A Declaration of War is often preceded by an *ultimatum*, which is a diplomatic note conceived in peremptory terms, laying down a determinate time for a categorical reply, and indicating that a dilatory reply, or failure to reply, shall be regarded as a proof that war is desired. . . . . 278
The effects of war are different in the case of the belligerents and of third parties. As the action of the war has to be restricted to destroying or rather paralysing the forces of the enemy, it is thus necessary to determine carefully what these forces are. By the forces of an enemy are meant the men and things which directly or indirectly serve as means of offence or of defence . . . 279
With regard to the modes of carrying on war, the following are generally disapproved of: the use of poisoned arms, as well as of those which cause useless sufferings or wounds difficult to heal, such as double balls or balls of glass and stone, and exploding projectiles less than 400 grammes, and such as contain fulminating and incendiary materials. Wounded and sick soldiers ought to be tended by whichever of the two parties they belong to . . . 280
The military forces on the land are the regular soldiers, the citizen militia, and the volunteers duly authorised; at sea, they are the ships of war and privateers provided with Letters of Mark by the States who do not adhere to the principles of maritime law formulated by the Treaty of Paris of 1856. As regards the peaceful citizens, it is no longer disputed that their lives and their honour ought to be respected . . . . . 280
As regards property, it is necessary to distinguish the goods which belong to the hostile army, to the State, and to private citizens. The goods of the private citizens ought

as a general rule to be respected. Requisitions of objects and contributions of war have remained as a remnant of the ancient right of pillage, and not a few writers have considered them as the redemption of private property. The devastation of a country is practised in very rare cases, in order to cause the enemy to abandon an important strategical position . . . . . 286

By a strange anomaly, private property, while respected on land, may be seized at sea, but only by ships of war and privateers, and not by private citizens, who should keep apart from the struggle . . . . . 288

Third parties may take part in the war as auxiliaries and allies, or may remain perfectly indifferent and neutral. The obligations of auxiliaries usually consist in furnishing a contingent in men, money, or provisions, and those of the allies usually consist in taking part in the war in a more general manner. In the case of an offensive and defensive alliance, the ally has always a right to examine whether the war undertaken by the other party is a just one . . . . . 297

Neutrality springs in principle from the respective independence of the peoples, and it consists in remaining in peace when other peoples are at war . . . . . 298

The rights of neutrals ought to extend to all that is not formally prohibited by the war . . . . . 300

Their territory ought to be respected, and should not suffer violence under any pretext. Neutrality at sea has been much longer contested. It has definitely triumphed in the Treaty of Paris of 1856 . . . . . 302

War ceases with the absolute submission (*deditio*) of one of the belligerent States, or with the conclusion of a Treaty of Peace. Usually the country conquered is added to the State of the conqueror, and the conquered country will lose some of the powers necessary for the full exercise of sovereignty, and will become a dependent or semi-sovereign State . . . . . 306

Treaties of Peace frequently contain milder conditions, a termination being put to the war by the simple recognition of a right, and by the payment of an indemnity . . . . . 307

Every Treaty of Peace *ipso facto* makes all the consequences natural to the state of war cease; and hence treaties and conventions, and the rights of the invaded State and its inhabitants, revive with the Treaty of Peace. This revival of rights is called by the name of *Jus postliminii*, from a mere historical association . . . . . 308

## Chapter VIII.—Humanity.

The word Humanity has two principal significations—one expressing in intension the quality which best distinguishes man, namely, benignity, reasonableness; and the other indicating in extension the human family. Above the States we can imagine as a subject of right a vaster association comprehending the entire human species. The question then rises: What form will it assume? . . . . . 309

The physical unity of the human species is admitted by the most celebrated naturalists. Its moral unity is proved to a demonstration by Paul Janet. . . . . 310

The centre of creation is usually located in Asia. The traditions of the great races refer to it. . . . . 312

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At several meetings the Institute proposed a system of rules

for arbitration. Reform of the prize tribunals and the adoption of uniform principles regarding the execution of sentences pronounced by foreign tribunals . 332

Count Kamarowsky has drawn attention to the judiciary character attributed to certain mixed commissions as an advance towards the organisation of permanent arbitral tribunals. The schemes of Bluntschli and Lorimer and Fiore . . . . . 335

In order to facilitate the work of these tribunals and to render practice more certain, Bluntschli in 1868 and Dudley Field in 1872 published sketches of an International Code . . . . . 340

The juridical capacity, an attribute inseparable from every human being, and therefore from every regulated aggregation, cannot be limited to the States or nations, but extends to the whole human race . . . . 345

This capacity, however, is in the inverse ratio of the extension of the aggregations. Man integrates himself in the Family, and associates himself in the Commune, the Province, the Nation or State, and in Humanity. The harmonising of these sentiments and relations, the fulfilling at the same time of the manifold duties and exercising the rights inherent in this manifold association, make man a complete juridical personality . . 346

# BIBLIOGRAPHY

OF

## THE PRINCIPAL WORKS ON THE PHILOSOPHY OF RIGHT, PUBLISHED IN ITALY, FROM VICO TO THE PRESENT DAY.

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Vico. *De uno juris universi principio et fine uno.* Napoli, 1721.

——. *De constantia jurisprudentis.* Napoli, 1721.

In these two works the great philosopher contemplates the universal order under the theological form *De origine*, *De circulo*, *De constantia*. He exhibits the course of the struggle of right against private violence from its beginning to its final triumph; and he weds philosophy and philology, and opens the pathway to the New Science (*Scienza Nuova*).

Saverio Duni. *Della giurisprudenza universale di tutte le nazioni, in cui si tratta il vero diritto di natura, e della diversa indole, origine e progressi del diritto delle genti e civile.* Napoli, 1743.

Brother Emanuele, Professor in the University of Wisdom (Sapienza) at Rome, had published *La Scienza del costume, ossia sistema sul diritto universale*, in which he censured the errors of others without opposing to them any system of his own.

Saverio took up the work, proposing to examine the origin, the foundation, and the principles of right, and how far immutable right in general extends. To such right he gave the name of *Jus naturale*, as the true and only right, which is constantly in conformity with the reason and the correct

reasoning of man. He distinguishes it clearly from the *jus gentium* and the *jus civile* which has sprung from the will of legislators accommodated to the corrupt human custom of the peoples, nations, and particular cities, in order to secure the greatest possible peace and support of societies united with each other. He defines the right of nature or Natural Right as the law that has come to us from God through the reason which dwells in Him, and to which He has subjected in various degrees all creatures, according to the use to which He has destined them.

As is evident, he inverts the theory of Vico, but he does not overlook the history of the right of nations and of civil right, although he considers them arbitrary and mutable.

Antonio Genovesi. *Diceosina.* Napoli, 1767.

Appetite impels us towards an end. As there is an order existing in the world, there also exists a law. Right is an essential property of rational beings, and is guaranteed by the law of the world. Besides strict right, there is also a right of reciprocal helpfulness. From the necessity of existence springs co-existence; and from co-existence the right of sovereignty. Honourable labour is always the source of public and private well-being.

J. Lampredi. *Juris publici universalis sive juris naturae et gentium theoremata.* Liburni, 1776–78.

This work was translated into Italian by Defendente Sacchi in 1817, who again revised the translation, and republished it at Milan in 1828 (in the *Biblioteca Silvestri*).

The author describes universal public right as that collection or system of laws inherent in reason and human nature. He touches on natural right to examine the different state of men in civil society and in natural society, and to explain their duties and their rights. This, however, is the office of ethics, which undertakes the analysis of human actions, and specially deals with the origin of morality; and hence Jurisprudence and Ethics have their principles, matter, and object in common. They differ only in this, that natural right expounds the just and unjust taken in the largest sense, and it consists of mere

theories, whereas ethics forms the transition to practice, and teaches virtue and justice conjoined with utility. In the present day it is precisely the contrary view that is taught.

Filippo Briganti. *Esame analitico del sistema civile.* Napoli, 1777.

——. *Esame economico del sistema civile.* Napoli, 1780.

There is discerned in the human mind a progressive movement, a perpetual fermentation of the spirit, which tries to raise itself through successive stages from the positive state of being to the comparative state of well-being. Hence the passions, as instruments at once useful and prejudicial to the equilibrium of the mind, when excited by a general principle of perfectibility, tend to the integral end of nature; and this end, made real by the moral necessity of an intelligent cause, and analysed by the trustworthy testimony of the internal feeling, promises a better existence to the constitution of man. The principle is the predominant reason; the end is the determinate intention of the law; and the ultimate end is God.

From the analysis of facts it is found, as a result, that those peoples are truly prosperous who are able to combine a laborious existence, a plentiful subsistence, and a vigorous co-existence; and hence in his second work the author leads us from the idea of perfectible existence to that of perfect co-existence by means of population and instruction. As regards the population he makes the subtle remark: "A people may be numerous without being happy, for the prosperity of the population does not result so much from an excessive number as from a number proportional to the local circumstances." He had thus a presentiment of the doctrine of Malthus.

Gaetano Filangieri. *Scienza della legislazione.* Napoli, 1783.

In the work of this young author we discern at the first glance the struggle between the doctrines that were predominant in the eighteenth century and those taught by the disciples of Vico.

A good prince, counselled by philosophers, is the best pos-

sible kind of government. Wealth springs from population and agriculture, and the government ought to promote them both. It is only a good education that can regenerate a people. Enamoured of Sparta, the author would like to see the State transformed into a vast agent of public instruction. Starting from sensationalism he rises to Christianity.

He did not understand the English Constitution, which seemed to him a remnant of feudalism. He dwells at length on the principles and history of penal right, and discovers previously unobserved relations between the English jury, which he recommends to his countrymen, and the mode of judging cases among the Romans.

Mario Pagano. *Saggi politici.* Napoli, 1789.

The author is a follower of Vico, whom he calls "a new sun" that should rouse up the dulled intellects of the Italians. The object of these Essays was to present a picture of the origin and formation of societies, and of their progress and decadence.

Before the formation of any city there existed the general society of the human species. Men ought to consider themselves as the parts of a whole which tend always to become more closely bound to each other. Cities are just the approach of these parts which unite themselves to other parts when not able to bind themselves apart into wholes. Men, in forming societies, make their force, will, counsel, and rights common. By degrees right disentangles itself from facts, and regulates them.

Nicola Spedalieri. *I Diritti dell' uomo.* Assisi, 1791.

The author opposes the precepts of the Gospel to the principles of 1789, showing that the Christian religion is the friend of man, of his rights and his liberty, and of all scientific, artistic, industrial, and commercial progress. "It is my intention," he says, "to refer this gravest of causes to the tribunal of human reason. I shall even forget that I am a Christian. I shall put aside the persuasion which I have of the divinity of revelation, and will limit myself to consider Christianity only from the side of politics, in order to see how it operates upon even the temporal affairs of men."

Gian Domenico Romagnosi. *Introduzione allo studio del diritto pubblico.* Parma, 1805.

——. *Assunto primo della scienza del diritto naturale.* Milano, 1820.

Romagnosi may be called the Italian Locke, now that the English philosopher is understood in a spiritual sense. He yields to Locke as a philosopher and publicist, but he excels him as a jurist. In the view of Romagnosi, Right is a system of utility conformable to morality; and it has no other object than to make the reciprocal equality of men, in their aspirations after happiness, reign in society. The goal being thus determined, it remains to be seen by what indispensable means it may and ought to be attained. The means is the happiest conservation of elements by an adapted perfectionment, that is to say, by the social process of civilisation. Romagnosi modifies Kant by combining him with Vico; or, in other words, he unites the rational with the real.

Pietro Baroli. *Diritto naturale privato e pubblico.* 6 Vols. 8°. Cremona, 1837.

According to Baroli, natural right is nothing but the law of justice imposed by nature on man, who comes to know it by means of reason. Man is born the subject of right in consequence of his essential qualities, and he becomes such in the legitimate exercise of his faculties. He is rational by nature. The proximate end of civil society is placed in the justice and security of the right of every one (*securitas publica*). The remote or mediate end of the State consists in the universal or full cultivation of men till they attain to humanity, and therefore to the resulting common happiness or public well-being (*salus publica*). The work betrays the retrograde influence of the writers who arose during the Holy Alliance when it was composed.

Poli. *Della riforma della giurisprudenza come scienza del diritto.* Milano, 1841.

According to this author, morality and right mutually accompany and sustain each other. Justice is the greatest utility; but utility is the effect, and justice the cause.

Rosmini Serbati. *Filosofia del diritto.* Milano, 1841.

The illustrious philosopher of the Tyrol applies his system of *possible Being* to jurisprudence. The science of right stands in the middle between eudaemonology and ethics, and in such a way that by the one extreme it touches the former, and by the other the latter. It is a science which properly turns on the relation of that which is moral. The notion of right involves that of duty, which is a simple idea, whereas the idea of right is complex. Right is, therefore, a capacity for performing what gives pleasure, protected by the moral law, which enjoins the respect of it on others. Rosmini finds the highest juridical principle in liberty; and the principle of the derivation of right in the conception of property.

The work is divided into two parts: *individual right* and *social right.* In the first part the connatural and acquired rights are examined, together with their transference and their lesion. In the second part he speaks of society in general, and then of its three principal forms: the theocracy, domestic society, and civil society, which serves as their shield. The work abounds in fine analyses and judicious observations, but it does not satisfy the want of the age.

Luigi Taparelli. *Saggio teoretico di diritto naturale.* Torino, 1844.

Taparelli absorbs right in morality, hardly distinguishing the *honestum* and *licitum* from the necessary. He perceives in the universe a principle of motion tending to fulfil the designs of the Creator. Man endowed with very different faculties from the inferior beings, tends deliberately to this goal, by conforming his activity to the harmonious laws of the universe. As the universal order includes the good of every one, there is imposed on the others a moral necessity not to depart from it, since to offend against this order is to offend against nature, human and divine. Man, just because he tends to an end, is naturally sociable. The nature of society demands a harmony in willing and acting, and therefore implies a power of binding men together. Now, a power according to reason, is what is called right; and this right is designated authority. Society has in view the common external good, and it is adapted to

the internal individual good of all the associates, and subordinated to their ultimate end.

Society has a duty of guardianship and of co-operation, which it exercises by means of a constituted power. The duty of guardianship is somewhat exaggerated by Caparelli, by its being extended in an absolute manner to protecting the members of society from the public assaults of error and scandal, from which he concludes to the superiority of the spiritual power over the temporal, and of the pope over the princes.

Mamiani e Mancini. *Lettere intorno alla filosofia del diritto e singolarmente sull' origine del diritto di punire.* Napoli, 1845.

This work appeared at Naples in 1841, but was republished in 1845, with the addition of other five letters.

According to Mamiani, morality absorbs right and rules it in its principles and in its consequences.

Mancini, without severing the very close bond that conjoins right with morality, which also constitutes its chief element, admits a real distinction between the two sciences. Along with the absolute good, the human good aims at conciliating politics with morals.

The last edition of these letters bears the title: *I fondamenti della filosofia della diritto.* Livorno, 1875.

Carlo Buoncompagni. *Introduzione allo studio del diritto.* Lugano, 1848.

Buoncompagni makes right depend on morality, which determines our relations by putting the intellect into relation with the conscience. The moral law may be considered under three principal aspects: in relation with the principle from which it proceeds, *i.e.*, with God; in relation with the intellect and the human conscience which recognise it; and in relation with the external and visible effects in which it is manifested, and hence arises right.

Gianpaolo Tolomei. *Corso elementare di diritto naturale e razionale.* Padova, 1849.

Natural right in general is, according to Tolomei, the science

of the rights deduced by reason from the nature of the beings who are capable of rights, commencing from God the Supreme Being. In particular it is the science of the rights of man, deduced by reason from the nature of man, in his different conditions and relations with those like himself; or, more briefly, it is the science of human rights as determined by the light of human reason.

Notwithstanding this programme, Tolomei's work is not very philosophical, as it contains hardly anything but the generalities of positive law.

Alessandro de Giorgio. *Saggio sul diritto filosofico.* Milano, 1852.

A disciple of Romagnosi, De Giorgio defends his system against the excessive rationalism of Kant, and the absolute utilitarianism of Bentham.

In a later production he enters on a confutation of the pantheistic theory of Krause as modified by Ahrens.

Guglielmo Audisio. *Juris naturae et gentium privati et publici fundamenta.* Romae, 1852.

This work is divided into three books. In the first book, Audisio discusses the relations of man to moral beings, and deals with the origin of right and religion; in the second book, he speaks of the relations of man to sensible things, and, therefore, he deals with property; and in the third book, he finally expounds the relations of man to society, here dealing with public right. He confounds right with morality, and is very subservient to the Church.

Luigi Pietro Albini. *Principii di filosofia del diritto.* Torino, 1856.

Albini deduces from the supreme principle of morality the practical recognition of beings according to their dignity and excellences. He makes juridical duty spring from ethical duty, and co-ordinates them in the various forms of social association. In the logical order he holds that duty precedes right, but in the real order right manifests itself before duty.

He agrees with Rosmini in maintaining that the State is a mere means in order that the individual may attain his end.

Benedetto D'Acquisto. *Corso di diritto naturale.* Palermo, 1856.

Man feels, understands, and wills; and he has an end to attain, to which he incessantly tends. The direct and immediate relation of the activity of human nature to the end which has to be attained constitutes natural right. D'Acquisto defines natural right as the individual personal virtue of man, which folding itself back upon the nature from which it originates, furnishes, arranges, prepares, and adapts those conditions which are the means necessary for the realisation of the total purpose or end of human nature.

The distinguished prelate, the predecessor of Gioberti, never loses sight of the typical ideal of human nature. Personality in the species and in the individual lays down the authority and the law, and on the other hand, constitutes property and its legitimacy in the individual, in the community, and in the State.

Emerico Amari. *Critica d' una scienza delle legislazioni comparate.* Genova, 1857.

Amari develops largely the doctrine of Vico, adapting it to the present conditions of comparative jurisprudence, which, according to this author, is the science which collects and compares methodically the laws of the peoples, in order to draw from them the juridical doctrine of universal civilisation, and provide by means of comparative studies for the political, economical, and historical wants of the nations. It has also to provide for the initiation of the laws that are to be made, and for the interpretation of those already introduced; it has to supplement the experience of legislators with knowledge of the changes of the fortune of the laws; and it has to furnish the demonstration of a universal right of reason and the providential progress of the human race under the idea of a nature common to the nations, and by means of the pre-ordained transmission of civilisation. All this Amari reasons out according to an ideal of civil perfection

which serves as a standard for the choice, arrangement, and comparison of the laws, and as a criterion for the whole of civil philosophy; and he concludes with a history, a philosophy, and a universal theodicy founded on the laws of the human race, or a doctrine of the archetype and progress of human society.

The work is rich in information and in sagacious observations.

FELICE TOSCANO. *Filosofia del diritto.* Napoli, 1860.

The author applies strictly the formula of Gioberti: *Being creates the existent.* Every human operation, says Toscano, has as its first element and causal principle the inborn tendency to the good which is the impulse by which God draws His creature to Himself. The ctisological principle rules the moral and juridical world, as it does the real and ideal world. As the free action of man cannot be developed without material means, so from liberty itself there springs property, the principle of the derivation of rights.

Here Toscano abandons Gioberti for Rosmini, whom he follows in the department of social right, viewing the State as a means for the triumph of theocratic and domestic society.

CATARA-LETTIERI. *Introduzione alla filosofia morale ed al diritto razionale.* Messina, 1862.

Examining the human relations, this author seeks a nexus between ideas and facts, maintaining that the true wisdom lies in their dialectic mediation.

Right is distinguished from morality; the two differ as to their object, end, extent, conditions, and means. Morality is the science of the end; right is the science of the means. Coercion is not competent to morality, but it is the characteristic mark of right.

VINCENZO PAGANO. *Nuovi elementi di diritto razionale o universale.* Napoli, 1863.

Pagano perfects the moral-juridical system of Buoncompagni. The first relation established by him forms the supra-intelligible, the second constitutes the intelligible, and the third gives place to the sensible. There is a difference in

favour of the Neapolitan thinker, who recognises in the supra-intelligible right only; in the intelligible in relation with other men, duty and right; and in the sensible, a right of a secondary order.

This work deserved a better fate than it has had; it was owing to the unjust malevolence of which the author was the object that it has not been sufficiently valued.

Antonio Cavagnari. *Odierno indirizzo della filosofia del diritto.* Padova, 1870.

Cavagnari presents nature, history, and reason as the three integral elements of the philosophy of right, which he defines as the science which establishes the ideal foundations of right, and which traces out the laws that govern the life of humanity. Instead of stopping at the first term as the positivists do, he advances to the second, and follows the gradual development of the human personality in order to find a rule of reason which is always provisory.

Giuseppe Prisco. *Filosofia del diritto.* Napoli, 1872.

This author adapts the Thomist system to the modern conditions of right, keeping nearer the letter than Taparelli. In fact Thomas Aquinas wrote: "Lex naturalis nihil aliud est quam participatio legis aeternae in natura rationali. . . . Ius sive iustum est aliquod opus adaequatum alteri secundum aliquem aequalitatis modum." Prisco translates thus: "Right in the objective order is the imperative authority of God, who commands the observing of proportion in the relations essential to men when living together."

In his applications Prisco does not show himself at all animated by that Guelfian democracy which made men's hearts beat in the Middle Ages.

Luigi Mattirolo. *Filosofia del diritto.* Torino, 1874.

Right is distinguished, according to Mattirolo, from morality, by its end, by its object, and by the conditions of its existence and sanction. The supreme principle of right externally recognises the human individual and society in their true being, and operates in the relations of the social life in conformity

with this recognition. The principle of the derivation of right is found in liberty according to equality.

Society in general is the union of several persons under a common authority in order to attain, by their mutual co-operation, a good that is known and wished by all.

Raffaele Schiattarella. *I presupposti del diritto scientifico e quistioni affini di filosofia contemporanea.* Palermo, 1875.

According to Schiattarella, right springs from the morality that is common to the whole fauna. The chimpanzees, the anthropoid apes, the cynocephali, bury their dead in caves, cover them with sand, and bewail them. Men in the flint age recognised their mother, the father being unknown on account of the reigning promiscuity. In the alluvial epoch, or that of polished stone, the hordes began to aggregate themselves into tribes, the races became fused, the cultivation of fruit-bearing plants succeeded the chase, languages were developed, and the worship of ancestors assumed a heroic form. The family was grouped around the father in cabins constructed on piles, and the moral and juridical sentiment was developed. The struggle for existence became a struggle for right; and individualistic sentiments were transformed into individuo-social sentiments which changed the direction of juridical facts.

This system runs in accordance with the celebrated definition of Ulpian: "Jus naturale est quod natura omnia animalia docuit."

Giuseppe Carle. *La vita del diritto ne' suoi rapporti con la vita sociale.* Torino, 1880.

This work is divided into two parts. The first part contains the psychological genesis and the historical development of the idea of right in society; and the second part presents the idea of right as it is contained in the juridical and social doctrines of the modern epoch.

The author proposes to reconcile idealism and positivism, civil psychology and social physiology, the spiritual life and the organic life, Hegel and Spencer.

With this intention he takes wide surveys of history; and he finds in the East the germ of right, in the classical antiquity the various elements which begin to differentiate and specialise themselves, and in the modern period their co-ordination.

Right being thus studied, if on the one hand it does not result as an immutable mathematic of relations in time and space, neither on the other hand can it be regarded as a mere product, the fruit of the evolution of nature, or an aspect of that struggle for existence which takes place in the physical and natural world. Right appears, on the contrary, as an organic element in the life of society, which has developed along with it by continuous action and reaction between reason and facts, from the certain to the true. It is established by authority, and is able to make itself an interpreter of reason, the idea of the just appearing as an aspect of the great idea of the Infinite, or of the Hegelian Indefinite.

The work is very useful from its abounding in historical notices.

Giovanni Bovio. *Filosofia del diritto.* Napoli, 1885.
——. *Sommario della storia del diritto.* Ivi, 1885.

The numbers of Pythagoras became the ideas of Plato and the pure *actus* of Aristotle. Under the name of mathematical naturalism, Bovio resuscitates the Italic School. No rational connection nor historical equilibrium would be possible, if sense did not seize the first and original co-existence of contraries (the equal and the unequal), by which sense is developed into intellect and will, and nature into thought and history. The author modifies the proposition, *omnia comunia inter amicos*, in the sense of the balance between claim and obligation, and between labour and profit. Morality contains right as the cause contains the effect; and the causal principle of morality becomes proportional in right. The juridical evolution passes through three stages—the response founded on equity; the sentence inspired by the social convenience, or by policy; and the "degnità" which reconciles policy with equity.

The second work serves as a counterproof to the first, showing us the alternating views of the jurists, of the politicians, and of the political jurists.

Giovanni Abate Longo. *La filosofia del diritto odierno.* Catania, 1885.

Liberty is not selection, or the elective process of a nature which makes itself, but it is a choice which man carries out with full knowledge of a cause, although under the influence of motives efficacious and determinant to action. Nevertheless in man the notion of the good assumes the ethical character, and the objective necessity of it is moral necessity.

Right is the attribution to every one of what belongs to him by reason of autonomy, order, and organisation. The author distinguishes attribution as a truly human act, from assimilation as a natural and individual act. The State rather than Order is the organisation of right; unfortunately, however, it becomes usurpation and monopoly if it does not subordinate the activity of every one and the autonomy of every citizen to the existence of the social organism. The contents of right are the conditional goods of human life. Reason is its autonomy as the power of acting within the limits of one's own nature, with which every single or social individual is endowed.

Luigi Miraglia. *Filosofia del diritto.* Napoli, 1885.

Miraglia follows Rosmini in psychology, and he seeks in ethics the supreme principles of willing and acting. Morality and right are parts of ethics; for the good is able to develop itself inwardly in the innerness of the relations of the conscience, and on the other hand it can unfold itself by preference in the external relations between man and man and between man and thing. Following Vico, the author says that, in the first case, the mind, in order to preserve and increase its dominion, ought to turn itself against cupidity, and to constitute ethical virtue or the sphere of morality. In the second case, the mind becomes the measure aud proportion by which it is necessary to equate the things that are useful among men. The material of right is utility; its form or measure springs from the depths of the mind itself.

Want of space does not allow us to follow the author when he goes on to establish the *suum necessarium* and the *suum non*

*necessarium* of the person. In the rest of the volume he expounds the general principles of private right.

Scillio Vanni. *Prime linee di un programma critico di sociologia.* Perugia, 1888.

In 140 pages octavo, the author endeavours to determine the outlines of the new science of sociology which is still in formation.

The study of the various forms of social activity, he says, belongs to distinct and autonomous sciences; while the general co-ordination, and the supreme synthesis of the results obtained in each of them, with the unitarian explanation of the structure and functions of the social organism, and the determination of the laws of its equilibrium, movement, and development, belong to sociology. This new science ought to embrace the natural history of society from its lowest and most rudimentary forms to its most elevated and complex forms; ascending from the group which contains any association of elementary unities, organic, human, or animal, whether individually distinct or indistinct, composing a collective whole or an individual organism. In fine, sociology ought to be a science truly descriptive, and also comparative of the data furnished by anthropology, ethnography, prehistoric archæology, and the history of civilisation. In order to give colouring to his sketch, the author avails himself largely of the works of Herbert Spencer, Schäffle, and more recent writers, thus departing from the scientific traditions of the Italian School.

In this rapid review we have endeavoured to include the views of the representatives of the various schools in the different parts of Italy, without desiring in the least to derogate from the merit of the authors who are not mentioned in it.

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