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THE
STATE AND THE NATION

THE STATE AND THE NATION

BY

EDWARD JENKS, M.A., D.C.L.

AUTHOR OF
"LAW AND POLITICS IN THE MIDDLE AGES,"
"A SHORT HISTORY OF POLITICS," ETC.

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PREFACE

THIS book is an expansion of a little work contributed nearly twenty years ago to the *Temple Primer* series, under the title *A Short History of Politics*, which has for some time been out of print. Of its imperfections no one can be more painfully conscious than the writer. But he ventures to think that the unexpected welcome given to the *Primer* volume shows that there is a real demand for a popular statement, in simple terms, of the main lines of social and political evolution, and that even the dangers necessarily attendant upon broad and general statements ought not to prohibit an honest attempt to satisfy this reasonable demand.

The study of social and political problems (which are now seen to be inseparably intermingled) is no longer a matter exclusively for experts; though the work of the expert is now more important than ever before. And it is one of the most hopeful signs of the times, that many thousands of earnest men and women, now endowed with political power, are taking a deep and serious interest in such problems. Many of these students have little leisure for large books, and little familiarity with technical language. But they have a keen desire to know something of the way in which society assumed its present complex character; for in that knowledge they believe to lie the key to the solution of many problems of urgent practical importance.

It is the hope of the writer that this book may be

useful to such students, and that they may be led by it to pursue their studies into works of authority and research, without failing to realise how closely interwoven are the various interests of mankind, and how a successful civilisation depends upon the hearty co-operation of men and women in all walks of life in furthering the common good.

E. J.

LONDON.

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THE STATE AND THE NATION

CHAPTER I

THE SUBJECT AND ITS TERMS

THE history of politics is a branch of the greater history of civilisation. And the history of civilisation is the history of human efforts to supply human needs, and, especially and primarily, the history of efforts made *conjointly*, *i.e.* in CO-OPERATION, by human beings, to achieve a satisfaction of their mutual needs. For, while it is possible to imagine a civilisation built up by the unaided efforts of isolated individuals, such a civilisation would be a thing very different from the civilisation which we know, and, probably, very inferior to it. The fact of COMMUNITY, *i.e.* the fact that human beings can, and do, combine to further common ends, is the cardinal fact in the history of civilisation, and pre-eminently in the history of politics.

It is interesting, and not unprofitable, to speculate about the origin of this vitally important fact. When we think of the immense difficulty, even at the present day, of getting people, even educated people, to work harmoniously for an end which, in theory, they all admit to be desirable, we stand amazed at the difficulties which must have faced the primitive co-operator. Remember, that he was dealing with a group of individuals without any consciousness of a common history, without foresight, perhaps without any articulate speech, liable to sudden impulses of fear and anger, incapable of perseverance, with only the feeblest and roughest mechanical equipment, whether of

weapons or tools. Happily, he was powerfully aided by the circumstances of the case. Man is born into a universe which he is powerless to alter, governed (though he does not know it) by laws which he does not understand; and yet he is dependent on this unalterable, mysterious universe—what we call his environment—for his very existence. It is a grim problem; and its alternatives are very simple. Man must solve it or perish miserably.

Now it is possible to imagine that, in certain parts of the world, the problem of existence was, at any rate in the earliest days, comparatively easy. Where the climate and soil were good, and, consequently, ready food abundant, men would learn to help themselves spontaneously, as a chicken, hatched in an incubator, will pick up groats on the second day of its independent existence. But, even in these favoured regions, the existence of such ideal conditions would, of itself, tend to stiffen the problem; for it would lead to the rapid increase of numbers, and, therewith, to that "pressure of population on the means of subsistence" with which text-books of political economy are painfully familiar—to say nothing of the probability that such prolific conditions would produce powerful enemies, like the tiger of India and the crocodile of the African creeks. Thus, even in such places, that "struggle for existence" (not, as a travesty puts it, with or against his fellow-man, but against the pressure and dangers of his environment), which is the dominating fact of the history of Man, would in time cast its shadow even over these favoured lands, and the Golden Age would become the Age of Iron.

It is impossible to doubt that it was the pressure of this struggle for existence which was the most powerful factor in developing the capacity for co-operation among men. In its most rudimentary form—that, for example, displayed by a pack of wolves in hunting its prey—the faculty of co-operation is almost always found in connection with the quest of food or the defence against attack by hostile force. And we can hardly doubt, that it was

this constant pressure which gradually converted the casual group of human beings, related only by physical ties which they but faintly understood, into a SOCIETY, or body of persons engaged, consciously or unconsciously, in uniting their efforts to pursue similar, and, ultimately, even common objects, by that adaptation of means to ends which is the work of intelligence. We need not suppose that any definite "public spirit," or desire to benefit the members of the group as a whole, animated the earliest societies of men, and kept primitive savagery, with its outbursts of self-assertive fierceness, in check. It was sufficient that each member should feel that, by working with his fellow-members, instead of against them, he was furthering his own ends. By so doing, he was learning the priceless lesson, so hard to master in its fulness, that "no man liveth to himself"—that no individual can, as it were, act in a vacuum—that individual freedom and social action, liberty and discipline, are only different aspects of the same truth.

But this capacity for co-operation manifests itself in very different degrees, and in many directions; and one necessary, though, perhaps, rather dull part of our task, is to define our part of its activities, and clear up a few of the difficulties to which a lax use of technical terms has given rise. There are, for example, careless speakers and writers who use the words "State," "Nation," "Society," "Community," "Race," and so forth, as convertible terms, or, what is even worse, as meaning different things at different times in the same speech or book. A cynical speaker might defend himself by claiming that, in addressing a popular audience, it is necessary to use a certain amount of inaccuracy in order to be listened to. The writer of these pages may, perhaps, be forgiven, if he regards this excuse with scepticism, and prefers to treat inaccuracy and shiftiness of language as blemishes of which most writers (including himself) are at times guilty, and which do much to lessen the value of the majority of books on this and kindred subjects.

Professor MacIver, whose very valuable work, *Community: A Sociological Study*, deserves the attention of every student of institutions, defines "society" as a state of willed relationships between human beings.[1] To the writer, this definition appears to be too wide; for it would include merely hostile relationships, which would seem to be inconsistent with the very idea of that mutual help which is at the basis of all social action. In these pages, therefore, the term "society" and its equivalents will be confined to harmonious, or, at least, peaceful relationships —a practice which will not exclude the relationship between competitors, which, as Professor MacIver well points out,[2] is distinguished from mere hostility, by the fact that it recognises and submits to a community of interests, more important and more powerful than rivalries of competition. Thus, for example, two merchants, or two professional men, however keen their rivalry, will draw the line at murder, robbery, and, in most cases, what is called "unfair competition"; and this, not merely because they fear the consequences for themselves, but because they realise that both of them belong to a society whose very existence would be imperilled by such practices. In war, on the other hand, the rival forces are, alas! bound by no such consideration—a truth which is admitted by the general recognition of the fact that to go to war to "set the world right" is not merely a Quixotic act, but an act of doubtful morality.[3]

But if we may not accept Professor MacIver's definition of society, we may gladly follow him in his admirable analysis and explanation of the different kinds of societies. The widest of all is that vague and almost indefinable association which he calls COMMUNITY, whose area often

[1] Macmillan & Co. 1917, p. 5. [2] *Community*, p. 334.

[3] This view does not in the least conflict with the argument that, before deciding that danger to its own interests justifies it in entering a war, a State may well consider also the probable effect on the world at large of a refusal to do so. There is nothing necessarily hypocritical in such an attitude.

overlaps the boundaries of political and even geographical units, and which is found wherever the existence of common interests in fact leads to harmonious, though, possibly, unconscious co-operation. Thus, at least until the splitting asunder caused by the Great War, the peoples of Western Europe and the United States of America, as well as of the great self-governing Dominions of the British Empire, were a true community;[1] and the fact that harmonious relationships extended even beyond this large circle, though in gradually lessening intensity, is not inconsistent with the usefulness of the classification. Such a community, though it may comprise many independent and self-governing units, may even develope its own institutions (p. 9); though these will, naturally, be less complete, and more liable to interruption, than those of more highly organised societies. Examples of such institutions are copyright and postal conventions, peace conferences, and scientific congresses, and wide organisations such as that of the Roman Catholic Church.

Different in nature from these vague and but slightly organised societies, are those more definite bodies which we call NATIONS. These societies are distinguished from mere communities by the fact that they claim exclusive control over a clearly defined area, or territory, and owe allegiance to a common government, which concerns itself with the general, as contrasted with specific or particular, interests of their members. Whatever may be the limits, ideal or actual, of the powers of each government over its own "nationals," as to which something will have to be said later (p. 11), it is clear that, according to present practice, no question as to these limits can be raised by any other government. Again, it is clear that, as between themselves, the more powerful of these governments recognise no binding authority; in fact, they approach, in theory, as nearly as possible to the view,

[1] The term "civilisation" may be preferred as an alternative to "community" in this sense. But, to the writer, it suggests a kind or way of living rather than the society which practises it.

fundamentally false, expressed in the cynical phrase: *homo homini lupus*. This unhappy theory of SOVEREIGNTY, propounded with regret by some of the great thinkers of the sixteenth and seventeenth centuries, as an alternative of worse evils, was believed, until lately, to be mitigated in practice by the somewhat vague recognition of a so-called " Law of Nature," or scheme of morality, to which even sovereign governments professed allegiance. Recent events have, however, shown the weakness of moral ties, that is, ties which make for the permanent and general interests of communities, when confronted with considerations of expediency, based on the immediate interests of nations. Of the grave issues raised by this conflict, something will be said later on (Ch. XVIII). Meanwhile, attention must be drawn to a term which is often used as an equivalent of " nation," but which, if it have any definite meaning at all, should be carefully distinguished from it.

This is the term RACE, *i.e.* a society welded together by the physical tie of generation, or blood-relationship.

The causes of the confusion between " nation " and " race " are abundant and obvious. We shall see, as we proceed with our story, how a certain well-marked stage of development in progressive societies naturally tends to emphasise the importance of physical relationship, and leads to what may fairly be called a revolution in many aspects of life. From this stage many active and prosperous societies have not yet emerged; and it is not surprising that their members continue to set great store on real or supposed blood-relationship. Among more advanced peoples, recent discoveries and speculations in physiology have tended to emphasise the importance of inherited characteristics. The influence of such discoveries and speculations has been emphasised by the charms of more doubtful sciences or pseudo-sciences—such as craniology (study of skull-types), somatology (study of physical characteristics generally), philology (study of the structure of languages), folk-lore (study of popular legends), and the like. But it is more than doubtful, whether such

theories of "race" are not dangerous will-o'-the-wisps haunting the path of knowledge. Claims to purity of physical descent seem somewhat fantastic to the student acquainted with modern conditions of migration and intercourse. It is unquestionable, that similarity of language, religion, literature, ways of living, and the like, are powerful stimulants of social intercourse; though there are obvious cases in which some of them are not found necessary to the existence of a nation. Yet it is probable that we can hardly, as was once remarked to the writer by a learned historian, define a "race" more exactly than as "a body of people who wish to be one"; and to regard "race" and "nation" as equivalent terms is to court disaster, both in the region of theory and the arena of practice. All that we can say is, that physical relationship, real or imaginary, has, in the past, played a large part in causing groups of men to coalesce into a society of such cohesion, that they have succeeded in the difficult task of evolving a common government, and thus becoming a nation.

Below the Nation, again, comes another very large class of societies—so large and so comprehensive, indeed, that it may be subdivided into many smaller classes. But the whole of these societies are distinguished from communities and nations by certain well-marked characteristics, which it is therefore useful to mention.

First, these societies are, as a rule, much less comprehensive than the nations within which they exist. Some of them, such as colleges, ordinary commercial partnerships and companies, scientific and social societies, societies for sport and amusement, are quite small, comparatively speaking, in numbers. Others, such as Trade Unions and some religious bodies like the Wesleyan Methodists, are large; but still, far smaller than the nation in which they are found. Occasionally, however, these societies exceed in numbers many nations, and extend their activities over the territories of many nations. A notable example is, as we have said, the Roman Catholic Church. But the difficulties inevitably encountered by such societies in dealing

with different, and (possibly) conflicting systems of national law, render their existence somewhat suspect in influential quarters; and they not infrequently come into conflict with that very powerful institution of national life, the State, of which something must soon be said (pp. 10-12).

In the second place, these more limited societies are, as a rule, both consciously and voluntarily formed, as contrasted with the community and the nation, which are often, perhaps usually, formed unconsciously, by the general progress of events, and which (in the case of the nation, at any rate) frequently include many members who have never voluntarily joined them. In fact, anything like a claim to " compulsory recruiting " by these societies is regarded with instant hostility by the Nation, which sees in such a claim a distinct menace to its own position.

Thirdly, the more limited societies of which we are now speaking, are distinguished by the quality of specialism; that is, their objects are, usually, restricted and defined by their charters, rules, or other constitutional documents. Even where these are undefined or secret, their nature and scope are fairly well understood; for example, in the widely spread organisation of Freemasonry. Any claim of universal scope would, just as much as a claim of compulsory jurisdiction, at once arouse the jealousy of the larger society of the Nation.

It is not easy to find a name sufficiently comprehensive to include all these various societies, and yet distinguish them from others; but, perhaps, the term ASSOCIATION best fits the want. For if it be objected that " association " is only " society " writ large, it may be replied that the term " association " does, to most people, suggest the deliberate formation of a society for a specific purpose; which is exactly what we want in this connection.

We have now distinguished between the three great classes of societies with which the history of politics is concerned. We have next to deal with the instruments by which these societies accomplish, more or less perfectly, their objects.

These instruments we call INSTITUTIONS; and, difficult as may be the task, we must, if we are to keep our heads clear, try to understand the nature of an " institution."

One way of attacking the difficulty is, to consider a very favourite metaphor which writers and thinkers on social sciences have for centuries employed in dealing with institutions. This is the metaphor which speaks of political institutions as " organs of the body politic," ecclesiastical institutions as " organs of a religious body," and so on. The writer to whom reference has previously been made, Professor MacIver, protests [1] strongly against this practice, and shows, with much force, that there is a danger lest the metaphor should cease to be regarded as a metaphor, and be accepted as a scientific truth. In other words, a society is not an " organism "; because its members have each a distinct individuality, which the parts of a true organism have not, and because it has no consciousness, as distinct from the respective consciousness of its members. But, if this limitation be conceded, we shall still find it useful to speak of the " organisation " of a society, and of its institutions as its " limbs " or " organs." For by " institutions " we mean permanent arrangements which enable a society to get its work done quickly and efficiently—usually by deputing certain of its members or employees to do certain tasks and fill certain positions whenever occasion arises, or by recognising certain events as giving rise to rights and duties which it will enforce, or by practising certain fixed customs or ceremonies which will (it is believed) further the objects of the society. Thus, doubtless, a company or a college might, conceivably, select special individuals to write each letter which it has occasion to despatch, or to receive each cheque due to it, or to admonish each student entrusted to its care; just as a man might walk, now on his hands, now on his feet, now on his knees. But the waste of time and energy involved

[1] *Community*, pp. 70-4. One false deduction from the use of the metaphor is that societies must inevitably grow old and die (*ibid.* pp. 202-5).

in such a procedure would be appalling. And so a society appoints certain persons to legislate for it, others to judge for it, others to receive and expend its money; and it arranges for a succession to their duties when they die or move on. Likewise it may prescribe a certain method of procedure or ritual to be observed at its meetings, or, instead of laboriously deciding how the advantages of each valuable article within its orbit shall be enjoyed, it may lay down general rules for the acquisition of rights of ownership, and so on. Thus kings, magistrates, forms of worship and debate, property, contract, and other INSTITUTIONS accomplish the work of societies, as the limbs of the human body achieve the purposes of the individual.

One of the most important, if not the most important, of these institutions is the STATE. As we shall have occasion to see, many communities, and especially the great community previously described (p. 5), have never developed it; and it may possibly be that, in the future, its importance will diminish, and that progress will ultimately discard it. But at present it is so prominent in the most powerful societies in the world, that it is doubtful whether any society could claim rank as a nation which had not produced it, its forms are so varied and so interesting, its claims are the subject of such keen debate, that an investigation of its history and nature will be a substantial part of our task. At this point, it is only necessary to utter one or two cautions with regard to the meaning of the term, and its use in these pages.

In the first place, then, we mean by the STATE the institutions by which government is carried on. In some cases (though these are becoming rarer each decade) it is correct to speak of the State as a single institution, with subordinate institutions under its control. This is the condition of things, for example, in England, where King, Lords, and Commons, in Parliament assembled, exercise supreme authority. In other cases, notably in the British Empire as a whole, and in the United States of America, the powers

of government are shared among various co-ordinate authorities—President, Congress and Supreme Court, and again between federal and "State" authorities (in the American use of the word). Here it would be more correct to describe the Federal State as a group of institutions than as a single institution.

Again, some States claim complete independence, or "sovereignty," as regards all external authority; others do not. Among the latter, again, some claim unlimited authority over their citizens, *i.e.* the members of the nations of which they are the organs; others again, as in the case of the cantonal governments of Switzerland and the governments of the Provinces of Canada, do not. All, however, in greater or less degree, claim the right to use force to secure obedience to their decrees. We shall see how this claim arose historically (Ch. XVII), and shall consider the justification for it. Here we need only point out how the existence and general recognition of this claim to the use of force distinguish the State from all other institutions of society, and place it in a class apart and unique, and how natural it is that an institution with such claims should jealously watch, and deeply resent, any rival which appears to threaten its monopoly. The perennial conflict between Church and State is a striking example of this truth. Rival forces operating in the same field speedily lead to conflict.

But there is a real danger in speaking of the State as a conscious being, animated by such human passions as jealousy and suspicion. What we really mean in using such language is, that the men who, for the time being, control the State machinery, having a certain conception of the purposes of that machinery and a belief in its power and utility, feel bound to oppose any tendency which seems likely to diminish that power and utility. They believe, or, at least, the honest and upright among them believe, that the safety and welfare of the Nation depend upon the maintenance of the authority of the State. Some go further, and seek to identify the Nation and the State,

which is mere confusion of thought, as though one should fail to distinguish between the mill-owner and his machinery. Some, again, go further still, and, in their worship of power and authority, set up the State as a deity, whom to serve is the highest duty of the citizen, and whose greatness and power should be increased by all means, even by the sacrifice of the lives and happiness of those in whose interests the State nominally exists. This monstrous perversion of elementary truths would appear incredible, were it not, unhappily, too obvious, as well as its consequences. A clear thinker can only regard such a lapse from sanity as an unhappy "reversion to type," a "throw-back" to primitive Fetishism, which makes of its ghastly Ju-Ju an instrument of torture and terrorism. That such an obsession should have seized the minds, not of Oriental mystics, but of presumably cool-blooded European thinkers, in this twentieth century, is one of the saddest facts in the world's history.

Apart from these excesses, however, the activities of the State play such a dominant part in modern politics, that any attempt to penetrate behind it, to show how it came into existence, or to describe the history of society before its appearance, is apt to be derided as "mere antiquarianism." It may be well, therefore, at this stage, to say a very few words in justification of the earlier chapters of this work, which will deal with the history of society before the appearance of the State.

In the first place, then, examination of the earlier stages of society is justified by the light which they throw upon the nature of the STATE itself. If we regard the State, as do those writers to whom we have alluded, as an institution which *must* have made its appearance, or which is so essential to the very existence of human society that such society cannot be conceived of as existing without it, we not only ignore a vast and deeply interesting field of enquiry, but we necessarily approach the study of the State from a preconceived or *a priori* standpoint. Two evils result from this attitude.

The first is, that we fail utterly to understand the general outlook on life of those vast numbers of the human race who are still living in the pre-political age, and thus, in our dealings with them, are apt, with the very best intentions, to make the most disastrous blunders, which may involve bloodshed and waste. History is full of such blunders; and that of the British Empire is by no means free from them. One conspicuous example occurs in the dealings between the Colonial Office and the Maoris of New Zealand in the middle of the nineteenth century. The Maoris, a brave and chivalrous people, were, and still for the most part are, in the patriarchal stage, one of the fundamental principles of which is, as we shall hereafter see, the communal and inalienable character of land-ownership. The British settlers and officials, accustomed to regard land as individual property, bargained with individual Maoris or tribal chiefs for the acquisition of land, oblivious of the fact that, according to Maori ideas, no alienation of land, as we understand it, least of all by any private occupant, was possible. Consequently, the white settler, who had acquired his land by purchase, sometimes with the approval of his Government, found himself continually harassed by the claims of the tribesmen on whose land he had settled, which claims he, naturally, resented fiercely, as an attempt to levy blackmail. Accusations of treachery, greed, and unscrupulousness, equally naturally, were made on both sides; revenge and violence inevitably followed; and, time and again, the country was desolated by cruel wars between two peoples who had many affinities of character, and who, after ignorant misunderstandings had been cleared up, became good friends. An even more glaring injustice was perpetrated when, after the final submission of the Scottish Highlands which followed upon the Jacobite rising of 1745, the lands of the Scottish clans were disposed of by a "settlement" which treated the clan chiefs as absolute owners of their clan districts; and much of the terrible tragedy of Anglo-Irish relationship has been due to a failure by English statesmen to

grasp the fundamental attitude of the Irishman towards land-ownership.

A second evil resulting from ignorance of early social conditions is, an almost necessarily prejudiced view of the true functions of the State. The writer of this book is well aware of the danger of confusing the historical origin of an institution with the justification for its existence, or the true scope of its functions. But, in a very real sense, " the roots of the present lie deep in the past "—or, as it might almost be put, the present *is* the past, revealed by the progress of time. Consequently, unless the attitude of the student of political institutions be one merely of detached curiosity, he will be enormously helped in his estimate of the value and limitations of them by a knowledge of what preceded them. For although it may, in a sense, be true, that " institutions are not made, but grow," yet they are the work of human beings, who, consciously or unconsciously, were attempting to satisfy human needs, and who, therefore, worked, wisely or unwisely, towards certain ends. It may at once be admitted, that this book does not pretend to deal with final VALUES—that is the province of ethics, not of politics. But every student of politics is, or should be, a critic, in the best sense of the term, *i.e.* a person who considers how far any given political institution is really suited to perform the functions for which it exists. The old view, for example, that the British Constitution was a Heaven-sent and final revelation of the highest good on matters political, though this doctrine may once have served a useful purpose, has now been definitely rejected, as a belated survival of Ancestor-worship in a society which had builded better than it knew.

Once more, a knowledge, however slight, of pre-political institutions is essential, if we wish to understand the great variations which have taken place in the development of political institutions issuing from the same source. Broadly speaking, the political institutions of Western Europe, North America, Australasia, and, to a large extent, of South Africa—that is to say, if we except Japan, of the

leading nations of the world—are derived from those immigrations from the East which, in the fifth and sixth centuries after Christ, broke up the Roman Empire. We might even go further, and say that they are derived from one particular group of those immigrations—that which we call, for want of a better name, "Teutonic"; for the more brilliant, but less enduring conquests of the Arabs, which, at one time, extended from Persia to the Atlantic, and even passed over and challenged their Teutonic rivals in Spain, have left but little impression on the political institutions of the world, while their allies, the Turkish tribes, though they succeeded in founding the two European States of Hungary and Bulgaria, for the most part achieved nothing beyond the political barrenness of the Ottoman Empire.

How, then, are we to account for the infinite variety of political institutions which cover the civilised world at the present day? Ultimate causes are to be found, doubtless, in climate, character, religious and scientific ideals, contests with enemies, and even, it may be, in the somewhat speculative influence of "race." But these are the causes of the appearance of institutions, rather than institutions themselves. And, if we ask ourselves why institutions issuing from the same source assume such infinite variety of form, we shall probably find, that the secret lies in the extent to which, and the manner in which, they are related to, and connected with, the pre-political institutions which they have followed. It is true that no mistake could be greater than that which regards successive stages of progress as separated from one another by sharp lines. That is a travesty of the doctrine of evolution, which pictures progress emphatically as a slow and unconscious *development* of the present out of the past. But, inasmuch as a bold generalisation, even if only partially true, is useful as a guide through a maze, the writer will venture to suggest, as one of the great laws which the study of history has seemed to reveal to him, that *those political communities or nations have been most successful, which have most completely absorbed into their political institutions the social*

institutions of their earlier history. Here we have at least a glimpse of the meaning of that brilliant historian who wrote, " All history is a seamless web," and of that mystic but profound dogma, the " unity of history." We may now begin our study of the history of society before the appearance of the State.

PART I

PRIMITIVE INSTITUTIONS

CHAPTER II

PRIMITIVE INSTITUTIONS

THIS book is avowedly written on evolutionary lines, that is, in the belief that the universe is governed by law. It may be well, therefore, to begin with a few words of explanation as to its methods. It makes no extravagant claims to be a complete explanation of all difficulties, or to lay down an absolutely rigid scheme of development. The laws of progress, naturally, apply only to progressive communities; and progressive communities cover but a comparatively small part of the earth's surface. Even amongst them, there are different degrees and rates of progress; and stages which appear to be normal may, owing to dominating physical and other causes, be omitted. A conspicuous example is the case of the communities which have, from time immemorial, inhabited the delta of the Nile and the plains between the Tigris and the Euphrates rivers, where, owing to the lack of great forests, the well-marked stage of timber buildings is absent from the development of architecture, and the use of bricks early made its appearance. In other cases, notably in the Indian peninsula, progress, after making considerable way, seems, for a time, to have been arrested. All that is claimed is, that, where social development is found, it naturally proceeds on certain recognisable lines; that is to say, that, where the latent capacities of mankind have won their way to fullest expression, they have done so by steps which we can trace. Of the great ethical question: What is the end and aim of progress? it is not proposed to treat. That is for other hands. In these pages, "progress" implies neither praise nor blame; and institutions will only be criticised in so far

as they appear to succeed or fail in achieving their avowed purposes. The optimist may, if he chooses, assume, that each step in progress indicates a real advance in the happiness of mankind, the acquisition of ethical values, or the purposes of a Divine ruler. Such a belief is implied, for example, in the notion of blame or contempt which so often attaches to the use of the terms "savage," "barbaric," and other names used to indicate communities in a comparatively undeveloped condition. On the other hand, the pessimist and the doubter may rest assured, that no such censorship is implied in the use of these terms by the writer, who is far from attempting to dogmatise on fundamental truths, and who desires simply to show the relationship to one another of admitted facts. Only the reader (if such there be) who regards the universe and its inhabitants as the sport of chance or arbitrary caprice, and its records not as HISTORY, but merely as chronicles or annals, need regard himself as out of sympathy with the book.

Thus, to avoid misconception, the author will, in sketching his plan, begin by abandoning a term employed in the smaller work on which the present is based, and speak not of the "savage" but of the PRIMITIVE stage in the history of institutions. This stage may be regarded as the discovery of the last half-century; and the discovery marks a solid achievement in the study of mankind. It is true that geologists had, long ere that date, made us familiar with the existence of the man of the ice-cave and the river-drift. But of this kind of man, long since extinct, so little can, obviously, be known, that he and his doings form no part of history—in fact we usually call him "prehistoric."

On the other hand, the type of man who has been revealed to us during the last half-century, is far more rudimentary than the type treated as primitive by Sir Henry Maine and his band of brilliant contemporaries, who regarded the Homeric heroes and the Romans of the early Republic as the founders of modern institutions. And, fortunately, we are not confined to speculation upon the ways of life of this primitive type of man; though we may

well confess ourselves to be in the dark with regard to many of his motives and beliefs. For he still exists in considerable numbers in the remoter parts of the earth; and he has lately been made the subject of sympathetic and skilful study by such observers as Messrs. Spencer and Gillen, who have spent long periods in studying the aboriginals of Central Australia,[1] by Miss Mary Kingsley, whose unprejudiced yet enthusiastic researches into the life of the West African native are a noble monument of a great career too early closed,[2] and Sir Alfred Lyall, in his sympathetic studies of the beliefs and practices of the hill-men of India.[3] References to these first-hand sources of information may be supplemented by the more comprehensive work of the late Professor E. B. Tylor on *Primitive Culture*,[4] and by visits to the stores of what may be called "circumstantial evidence," in such institutions as the Pitt Rivers Museum at Oxford.

The picture which these observers and evidences present to us is at first sight confusing; and we must be careful to remember in connection with it, and also with other stages of development, two important facts, which are really one. The first is, that all these stages comprise communities which differ slightly, though not fundamentally, one from another, in their attainments. Thus, for example, Miss Kingsley's West African natives are, in some respects (probably owing to their contact with European traders), more advanced than the aboriginals of Australia, who live practically in a state of isolation. It is only in fundamentals that they agree. The second fact is a consequence of the first, namely, that it is quite impossible to say exactly when stages marked by such movements as the Renaissance and the Protestant Reformation, or a period such as the "Middle Ages," began or ended. All that can

[1] *The Native Tribes of Central Australia*, Macmillan, 1899.

[2] *Travels in West Africa*, Macmillan, 1897; *West African Studies*, Macmillan, 1899.

[3] *Asiatic Studies*, Murray, 1882, I. ch. iv.

[4] (4th edition) Murray, 1893.

be done is, to point out certain important facts or institutions which appear to indicate the character of an epoch or phase of development, and to attempt to explain their origin, significance, and disappearance. Subject to the limitations imposed by these facts, the picture we have now to study may fairly be described as representing a stage of social development; for it is marked by a connection between its principal features which embraces the life of its human material as a whole.

The life of Primitive Man seems, at first sight, to be best described by a series of negatives. His food supply is, practically, limited to the products of the earth—the fruits of the wild tree or bush, the beasts and birds of the forest, and the fish of the river and the creek. It is an achievement when he learns to know something about the recurrence of the seasons, and to lay up against winter a store of the summer produce. His clothing, save where, as in Lapland or Greenland, the rigours of the climate early compel him to wear the skins of wild animals, is even more limited in scope. It is doubtful what motive or combination of motives led him to make developments in his wardrobe. The Australian evidence suggests, that religion and vanity had at least as much to do with it as modesty or hygiene; for, though their ceremonial costumes are elaborate and impressive, in ordinary life the aboriginals go about stark naked. Primitive Man has few domesticated animals; the ox, sheep, horse, ass, and cat are accompaniments of a more advanced stage. The dog, the companion of the chase, is the first of such acquisitions; but, perhaps, until he is used to draw sledges or guard sheep, he can hardly be called " domesticated." It is a singular and suggestive fact that, in the view of the English common law, as it stood not many years ago, the dog ranked midway between wild animals, which are no man's property, and domestic animals, which are capable of being stolen, and for whose vagaries their owner is responsible. Needless to say, the dwelling-places of Primitive Man are rudimentary in the extreme. A ready-made cave, or a rude

bark hut, marks the limit of his achievements in that direction. There is, however, little real evidence that he ever roosted in trees; though the readiness with which even civilised children follow the pursuit of tree-climbing suggests a survival of primitive instincts. More probably, Primitive Man used trees as refuges, or as lurking-places from which to watch for his prey, rather than as his habitual abode.

Of what may be called the technical arts, Primitive Man was equally ignorant. The legends and institutions of Greece and Rome point clearly to a time when the art of fire-making was a rare and new achievement. The figure of Prometheus, the Fire-Bringer, is one of the most tragic in the world's literature. The Vestal Virgins of Rome, who guarded the sacred flame which, at peril of their lives, they were bound to keep alive, day and night, are an eloquent testimony to the fear of losing a priceless but ill-understood art; and many less picturesque, but equally significant, survivals point to a similar experience among other communities. The tools of Primitive Man are of the rudest character. Wood, especially bark, is early used, both for weapons and tools. It is hardly possible to find communities to which the bow and the spear (the former strung with the intestines of animals) are totally unknown; and the " pitchi " of the Australians, the primitive spade or digging-basket, is widely spread among primitive peoples. But the limitations of wood, its lack of durability and sharpness, are obvious; and the use of stone for weapons and tools is early adopted, except in countries where stone is rare. But that it is later than the discovery of fire, seems to be suggested by the Australian legends, which describe the use of a charred stick as having preceded, for certain primitive surgical operations, the application of stone.

It is interesting to discover, that what we should regard as æsthetic, rather than practical, arts, appear to be almost, if not quite, as primitive as practical equipment. Miss Kingsley's testimony to the musical accomplishments

of the West Coast natives, and the extent of their orchestra, is borne out by the evidence from other primitive communities, including the splendid collections of primitive musical instruments in various museums. The world was startled but a few years ago by the discovery of an undeniable fossil picture, of which the famous White Horse of the Berkshire Downs may be a relative. But it is well known, that one of the chief objects of primitive music is to drive away those evil spirits, which, as we shall shortly note, play so large a part in the life of Primitive Man;[1] and it may well be, that the art of drawing or painting had an equally practical object in the days in which writing was unknown. If so, the facts point to the interesting conclusion, that, in claiming that there could be no beauty without utility, at least in human art, Ruskin was expressing a truth supported by the history of progress. Even the most primitive survival of the decorative arts, viz. tattooing or painting of the human body, had, in all probability, the very practical objects of frightening enemies and giving information to friends.

When we come to the positive side of primitive institutions, we may look first at the attempts to convert the loose miscellany of the " pack " or hunting group, probably determined by mere circumstances of neighbourhood, into an orderly social system. Here the Australian evidence is of the first importance; and the debt which we owe in this respect to Australian observers is incalculable.[2]

Quite naturally, it turns upon one of the primordial facts of human society, viz. sexual intercourse. Incredible as it may seem to us, there are reasons for believing that Primitive Man does not at first realise the apparently obvious cause of reproduction of the species; though of

[1] The ringing of church bells is a survival of this practice.

[2] In addition to the works previously alluded to, may be mentioned an earlier book of great value, viz. *Kamilaroi and Kurnai*, by Rev. Lorimer Fison and A. W. Howitt (Melbourne), 1880. Also, as a study of Red Indian institutions, L. H. Morgan's *Ancient Society*, Macmillan, 1877.

course he is familiar with the facts of childbirth.[1] In other words, he seems to have practised for ages the act of generation, without realising its physical consequences. Doubtless, as in the case of animals, his sexual relationships had some trifling degree of permanence, instigated by the primitive feeling of jealousy, or desire to secure pleasurable emotions for himself. But of the existence of what may fairly be called " sexual promiscuity " in primitive societies there seems to be no reasonable doubt. One of the strongest evidences is the well-known practices of Pacific communities which, under the influence of certain awe-inspiring natural phenomena (*e.g.* the " Aurora Borealis "), relapse into it, believing the Powers of Nature to be offended by its disuse.

But a still more indisputable fact is the discovery, even by primitive communities, of the evils of intermarriage between near relations; and the steps taken to combat them appear to give rise to the earliest efforts towards social organisation. These steps result in what is technically known as the " classificatory system " (or systems) of relationship, which are in full working order among the Australian aboriginals at the present day, and of which there are clear traces in Red Indian society. Broadly speaking, they consist in grouping the community into smaller units, sexual relationships within which are strictly forbidden, under the severest penalties. For purposes of easy recognition, these units are distinguished by the name of some familiar natural object, or *totem*; and it is impossible to avoid connecting this practice with the primitive belief (for which there is considerable evidence) that the proximity of such objects at the time of a child's birth has a powerful influence on its destiny, or may even be the

[1] After all, this apparently incredible state of ignorance is only a survival of a strictly " prehistoric " state of things, when there was no differentiation of sex. Sexual relationship is not essential to reproduction, but only to improved or more rapid reproduction. Prehistoric memory may be responsible for the widely spread legends of " virgin-births."

cause of its birth. Thus we can see how the fact that individuals belonged to the same totem would begin to build up the idea of kinship, or relationship by blood. But the primary object of the totem group is, apparently, to prevent intermarriage between near relatives. "Snake must not marry snake" is one of the few moral precepts of the Australian aboriginal.

But the converse of this and similar maxims is, to our minds, really startling. Apparently (for we must still speak with some reserve of the evidence) the negative precept, "Snake must not marry snake," is balanced by the rule, that every male of a class in one totem group is the husband, actual or potential, of every woman of the corresponding class in another totem, and *vice versa*. Thus, if the Snake totem has the Emu totem as its marriage group, every male Snake of a given class may, in theory, have marital relations with every Emu woman of the corresponding class, and every female of that class with every Snake man of the corresponding class. We say "class" advisedly; for, though it can hardly be doubted that the object of this restriction is again to prevent the marriage of direct relatives, yet, in fact, it is almost impossible, in such a system, to be at all sure of paternity, and the grouping into classes within the totem appears to be done, in a somewhat arbitrary way, by the periodical gatherings for religious rites which are such a striking and picturesque feature of aboriginal life in Australia.

Even with this limitation, however, the marital possibilities open to the Australian aboriginal are extensive; for, as members of the same totem group are often scattered over vast distances, and are also, in the more powerful totems, very numerous, an Australian woman may, as one observer puts it, be (potentially)" married to several hundred miles of husbands." On the other hand, there is, in theory at least, no freedom of choice; so that, as the same observer also says, marriage is, among the Australian aboriginals, "a natural state into which both parties are born." And the corresponding relationships are equally

limited in range and extensive in number. For if a man is the potential husband of all the women of the corresponding class in his totem of marriage, all their children are his children, all the members of his mother's totem in the classes senior to hers are his ancestors, all those in her class his uncles and aunts, all those in the classes below her his brothers and sisters, and so on. For it is needless to say that, in such a state of things as we have described, descent is traced through the mother, not through the father; the rule of "mother-right" being universal in primitive communities. As another writer pointedly puts it: motherhood is, in such circumstances, a fact, paternity only an opinion. It is a pity, however, to describe this condition by such a term as "matriarchate"; for that suggests a state of society in which women, as such, exercise authority, which is certainly not the case among the Australian aboriginals, or, indeed, in most primitive communities, though, occasionally, instances are to be found of individual women exercising great power.[1]

On the hotly debated question, whether primitive society is more "communistic" than modern, it is necessary to speak with great caution. As usual, in these great controversies, it is essential, if the truth is to be reached, to be clear as to terms. And so, if we are asked whether primitive men are "communistic," we must ask: "Communistic in what?" We have seen that, at least to an extent which seems to us to be startling, they are communistic in sexual relationships. But if we use the term in its more common application to property, in the ordinary sense of the word, *i.e.* objects of value, we are at once met by the counter-question: "In what property?" Some writers and speakers appear to assume the existence, in the primitive jungle or desert, of the contents of a Bond Street or Rue de la Paix, and to speculate at length upon their ownership. But we

[1] This is not to deny that, under "mother-right" institutions, women may have more independence than in the succeeding or patriarchal stage. Miss Kingsley, in fact, suggests that this is so among the West African natives.

must remember that, as we have already seen, the material possessions of Primitive Man are few. He has neither cattle nor sheep, corn, wine, or oil, house or furniture, nothing made of metal. (Think what a gap that makes in the picture.) Land he can have for the asking; but, of what use is it to him? He leads, literally, a " hand-to-mouth " existence. It is highly probable, that such game as is captured by an organised hunt is shared in some way among the hunting group; for it would be difficult, if not impossible, to get such a group together except on terms of sharing out. But there is little, if any, evidence to show the identity of the hunting group with the social or totem unit; though it may well be, that the individual members of such a unit recognise a certain obligation on them to allot a share of their individual booty to the weaker members of the unit, the old people, child-rearing women, and children. The other really valuable possessions of Primitive Man, his weapons and scanty adornments, could hardly, in the nature of things, be shared with others. They were probably acquired by one or other of the two oldest titles in the world: production and capture.

Nevertheless, where circumstances are favourable to the early appearance of objects of value in primitive communities, as, for instance, amongst the natives of the West African coast, who have been visited for centuries by European traders, there is some ground for saying that arrangements which may, in a modified sense, be described as " communistic," are adopted. Thus, Miss Kingsley relates that certain groups, or " Houses," are regarded as owning certain objects of value in common; though the control and disposal of them belong (within limits) to the Head or Chief of the House.[1] Unfortunately, Miss Kingsley's works do not enter at any length upon the nature or composition of these " House " groups; and we are left to conjecture with regard to their origin. But it does seem to be

[1] The fact that the office of this person is described as the " Stool " suggests the origin of the group. The stool, in the practice of West Africa, is the primitive child-bed or obstetrical apparatus.

clear, that most of them have what may fairly be termed "capital," *i.e.* wealth used for purposes of traffic and gain, usually in dealings with European traders. But the same account shows, that the House Chief and his slaves (another anachronism introduced into primitive society by the alien trader element) regard gains acquired with House capital, beyond a certain limit, as their private perquisites, and grow rich thereby.[1] The evidence must, therefore, be regarded as adding but little weight to the belief in primitive communism.

Before we conclude this sketch of primitive institutions, a few words, and those somewhat hesitating, must be said concerning that powerful, but mysterious influence, Primitive Religion.

The most obvious and dominant fact in this connection is, that Primitive Man, whatever else he may be, is not a materialist.* On the contrary, his universe is peopled by unseen spirits, whose influence upon his fortunes he believes to be direct and powerful. Most of them are, unhappily, evil spirits, whose influence is malevolent. Needless to say, he attributes to them motives and intentions with which he is familiar in his intercourse with his fellowmen; but, if that fact should cause us to form a somewhat gloomy picture of primitive society, we must remember that gratitude is a somewhat late development in human feelings. The absence of gratitude among primitive peoples has, in fact, often been remarked; and the probable explanation is, that, like very young children, they have no conception of altruistic motives, and assume, if they consider the matter at all, that their benefactor is prompted merely by caprice, or some self-interested design.

Another prominent fact in primitive religion is, that Primitive Man is apt to locate the numerous spirits which, as he believes, are everywhere around him, in certain material objects, such as stones, trees, and animals. The

[1] See the account, in *West African Studies*, pp. 428-9, where students of Roman Law will find a curious anticipation (in order of development) of the well-known Roman doctrine of *peculium*.

reason of this, at least, is not very difficult to guess. It is due to that overmastering tendency in the working of the mind which we call the "association of ideas." This tendency, which is to be found equally, if not even more highly, developed in animals than in men, has its value, as a warning and a safeguard. Thus, a man who has seen his fellow drowned, as the result of an attempt to walk along a floating log, may well be chary of attempting to use floating logs himself; though he may not understand the reason for his companion's fate. But, of course, floating logs are, in themselves, harmless, and, indeed, useful, if properly used. And so the failure to distinguish between good and bad uses, *i.e.* to perform that mental process which we call "analysis," may deprive him of great advantages. Miss Kingsley [1] boldly attributes this tendency, which is highly developed in her West African natives, to the logical qualities of the African mind; and the claim, though apparently bold, is not so improbable as it sounds. Starting from certain accepted premises, the mind of the West African arrives at fairly reasonable conclusions.

Be the cause what it may, this tendency to embody unseen spirits in concrete objects, or, as it is generally called, FETISHISM, is apt to give to primitive religion, or ANIMISM, a materialistic appearance which, as previously urged, it does not really deserve. It is, to all seeming, the earliest form of that most beautiful and poetic of more modern religions, Pantheism, or the belief in the immanence of a Divine Power in the works of Nature.

Apparently, the primitive mind is (as might have been expected) much like the animal mind. It causes its owner to go about "smelling to" objects, and deciding whether or not they are to be avoided; much as a kitten, newly introduced into a roomful of furniture, will occupy itself for the first few days in sniffing over each article, and, apparently, deciding its character. From the practical point of view, this rudimentary system of experiment is unsatisfactory; because the ideas of the experimenter are

[1] *West African Studies*, p. 124.

limited, and determined by what would appear to us to be irrelevant circumstances. Thus, the fact that a man is killed by the casual fall of a tree when walking on a certain path, will lead to the conclusion that the Tree Spirit is annoyed by the use of the path. And so the path becomes "taboo," *i.e.* forbidden; and any one who uses it is "taboo," or outcast. Thus arises the most primitive form of LAW, with its most primitive "sanction" or penalty. Certain rules thus arbitrarily laid down, nearly all negative in character ("Thou shalt not"), form the code of primitive law; and it is interesting to note, that its chief sanction, or penalty, instead of becoming antiquated and unsuitable with social development, remains, in spite of modern substitutes, at once the most effective and the least revolting of punishments. In fact, the more intensely the strands of human co-operation are interwoven, and the more widely they are spread, the more helpless the community or the individual excluded from their protecting shield. Perhaps it is more to the present point to note that, even in primitive life, the idea that the offender against the code is a danger to the community, is developed by the notion of the CURSE, *i.e.* the belief that the wrath of the offended spirit will visit, not only the actual offender (who is, possibly, in hiding), but his community also, unless he is found and given up; for this leads to the appearance of one of the earliest, if not quite the earliest, of legal proceedings, viz. the expulsion and, if necessary, destruction of the offender. The story of Achan, as related in the Hebrew Scriptures,[1] is a vivid illustration of this process, and should be carefully studied for the light which it throws upon primitive jurisprudence.

One other result of the primitive attitude of mind which we have been trying to describe, must be noted. Quite naturally, human nature being what it is, Primitive Man does not spare efforts to avert the dangers by which he believes himself threatened by the powerful spirits who surround him. Apart from the well-known practice of

[1] Joshua, ch. vii.

observing OMENS, *i.e.* the appearance of objects believed to be pregnant with danger, or (later) with prosperity,[1] and guiding his conduct accordingly, the primitive believer has a profound conviction of the value of a judicious bribe offered to a powerful spirit, usually in the shape of a victim on whom he (the spirit) may satisfy his desire for vengeance. This deep-seated conviction is the source of that dark page in the history of mankind, the record of vicarious suffering, the notion of the SACRIFICE. It is, alas! to be feared, that observation of his fellow-men, only too correct, is at the root of this belief of Primitive Man. Primitive Man, out for blood, is not particular as to the identity of his victim. If he cannot get the individual he wants, some one else will do—if possible, related to the victim sought. It is a modification when the blood of animals is substituted for that of human beings; and, in its later stages, offerings of fruit and flowers develope into a really beautiful symbolism, in which primitive religion is seen at its best.[2]

But this gradually unfolding system of belief naturally produces a class of skilled practitioners who thrive upon it. These are the soothsayers, magicians, medicine-men (*biraark*, as the Australians call them), who profess to deal with the unseen spirits. These persons are not, necessarily, either conscious hypocrites, or dealers in iniquity. Much of their action is intended to be benevolent. In the more advanced stages of primitive life, they tend to separate into various classes. Miss Kingsley, for example, regards the village apothecary, who lives openly among his patients, and treats their various minor diseases with simple herbal

[1] The later form of this practice, viz. the examination of the entrails of birds and animals, shows a considerable scientific advance; for it is believed to have originated in the practice of communities trekking into new country, and testing the qualities of new flora by causing their animals to eat them. ("Try it on the dog.")

[2] It is, perhaps, irrelevant, but interesting, to note, that the Imperial crown may have originated in the basket of fruits ceremonially carried at the patriarchal harvest. (See the figures in the Cluny Museum at Paris.)

remedies, as a harmless, if not actually useful person; though, in a humorous passage,[1] she suggests the more dangerous possibilities which attend his art. But the higher practitioner, who combines the functions of priest, lawyer, and physician, and surrounds himself with mystery, is also by no means always a mischief-maker; and Sir Alfred Lyall[2] clearly distinguishes between "black" and "white" magic. The practitioner of the former art is the later wizard or witch; and the intense and long-surviving hatred with which he and she were regarded, even in Western Europe but a century ago, has, probably, a dark background of history to excuse it. As an instance of that interlocking of institutions which justifies us in treating progress as a series of stages, we may refer to another humorous passage in Miss Kingsley's great work,[3] which describes how goods left for sale in the primitive markets of the Guinea Coast are each protected by the Ju-Ju, or special idol, of the proprietor, which thus serves to fortify the growth and sanctity of property. The market itself is a deeply interesting institution, which shows us the early stages of that widening intercourse between different and highly suspicious communities, which does so much to foster progress. But its development at this stage is rudimentary and exceptional; and a fuller account of it must be reserved to a future chapter.

[1] *West African Studies*, pp. 181-2. Invitations to dinner, amongst native practitioners, are, it appears, rarely accepted.

[2] *Asiatic Studies*, Murray, 1882, I. ch. iv.

[3] *West African Studies*, pp. 248-9.

PART II

PATRIARCHAL INSTITUTIONS

CHAPTER III

KINSHIP THROUGH MALES

WE now come to that well-marked stage in the development of society which to Sir Henry Maine and his contemporaries appeared to be the oldest stage, but which, as we have seen, was preceded by at least one stage of a far more rudimentary type. The striking feature of this later stage, from the standpoint of social organisation, is the dominance of the House Father, that is, of the oldest living male ancestor of a group of individuals related through males. Such a group, much more a society based on such groups, was impossible under a system of sexual relationships such as that described in the last preceding chapter. Such bonds of social cohesion as then existed were based either on the apparently arbitrary allotment into totems and sub-totems or classes, and the physical fact, probably of much slighter importance then than now, of descent from the same mother or female ancestor. This latter fact, as we have said, apparently gave to the female ancestor no social power. On the other hand, the note of patriarchal society is the dominance of the male. What was the cause of the transition?

It is as certain as any assertion not absolutely verified by observation can be, that it was the domestication of wild animals by Man which led to the change. We know, for a fact, that all domestic animals—the horse, ox, sheep, goat, ass, pig, camel—have their "opposite numbers" in the desert and the jungle. In some few instances, it is possible that these wild animals may be the offspring of those which have escaped from domestic captivity; this view has been maintained, for example, with some plausibility,

in the case of the Mexican wild horse, or mustang, which is said to be descended from the Spanish breed imported at the time of the conquest. But it seems quite impossible to argue, that the jungle and the desert were originally peopled by "escapees"; for such a suggestion would raise more difficulties than it would solve. Where then did Man get the domestic animals which escaped? He could not make them. The theory of a special creation of wild and domestic animals is opposed to all that is known of unconscious Nature. The inference is irresistible: that, circumstances favouring, some communities discovered the art which was to revolutionise society, viz. the art of taming wild animals. This is, of course, not to say that all communities learnt that art by what is ordinarily called "discovery," *i.e.* without conscious imitation of human example. Doubtless many communities acquired it by transmission. But there must have been a beginning.

Unfortunately, in this as in so many other matters of profound importance in history, the evidence is slight and inferential. We know that the great discovery was made; but as to who made it, or how, we know very little. Nevertheless, we can gather hints from certain observations of travellers among pastoral peoples, which, combined with our knowledge of more rudimentary stages, will at least suggest probabilities.

We begin, therefore, with the unquestionable fact, that, in spite of the immense increase in the knowledge of what used to be called "Natural History," during the last hundred years, an infinitesimal addition to the list of domesticated animals has been the result. Nearly all, if not quite all, of the world's domesticated animals were known, as such, ages before modern scientific investigation began. In other words, domestication of wild animals was the work, not of civilised, but of primitive men; and, so thoroughly did they do it, that they seem to have left little for their civilised successors to do.

Again, there is no evidence for the view, that the origin of the achievement was the mental superiority of special

communities or individuals. Legends to that effect, no doubt, prevailed after the event, due to a cause to which we shall hereafter refer. But there is no reason to assume, for example, that the Eskimo, who have no oxen or horses, are inferior in mental aptitude to the Tartars, with whom they are abundant. The more obvious reason is, that the climatic conditions of the Eskimo country offer but a scanty supply of raw materials upon which the Eskimo can draw for his experiments in domestication. Such theories of " racial superiority " are as baseless as they are dangerous.

In fact, the evidence appears to show that, as might have been expected, nearly all domesticated animals originated in those parts of the tropical world in which abundant vegetation produced food for a very large number of animals capable of domestication. Broadly speaking, no carnivorous animals have been domesticated; for the cat and the dog are hardly exceptions, the latter being, as we have said, more a companion hunter than a domestic servant,[1] while the former is more of a plaything than a utility. But the very existence of the cat as part of the intimate life of man, though it may be regarded as a " sport," or exception, does point a suggestion as to the origin of domestication, which, as it happens, is confirmed by actual evidence.

One of the strongest characteristics of Primitive Man is his want of foresight. Hardly, as we have said, does he realise the possibility of storing up an occasional superfluity to meet the needs of the future " rainy day." A lucky round-up of game is followed by an orgy of feasting and extravagance. Nevertheless, there have, probably, always been limits to the capacity of the human stomach; and there came, therefore, on occasions of unusual plenty, a time when the most rapacious appetite had, regretfully, to call a halt. If the superfluous game had been killed, as would most likely have been the case with all fierce carnivorous

[1] The writer does not, of course, forget the sledge-dogs of the Eskimo, or the cart-dogs of the Belgians, or the sheep-dogs of many lands. But these are, comparatively speaking, of minor importance.

animals, there would, of course, be nothing for it but waste, or, at best, some primitive method of storage, such as "biltong" or "pemmican." But if the game had been captured alive, and were of a peaceful or timid disposition, it would simply be retained in captivity, being allowed to browse in a rough compound, till required for the next meal.

Now there is nothing far-fetched in the hypothesis that, in such circumstances, a feeling of affection would grow up between the captives and their captors. The basis would already be there, in the association of the captives, in the minds of the captors, with the pleasurable sensation of the gratification of hunger. An affection of that kind is, doubtless, in its primitive shape, incompatible with the survival of the affection, otherwise than in the form of regret. But assume that a steady maintenance of the food supply permitted the continued survival of the captive until the primitive form of the affection had modified itself into something less grossly material. Would there not grow up between captor and captive a relationship most favourable to the establishment of domestic relations? It is precisely this stage in domestication, when the captive has become the "pet," or plaything, of his captor, that the late Sir Francis Galton shows us in his *Narrative of an Explorer in Tropical South Africa*;[1] and there is nothing in the least improbable in it. It is the social nature of Primitive Man extending its influence to beings which are, after all, not so very different from him in intelligence, whose habits he has studied for the most practical of reasons, and with whom he therefore feels himself in sympathy. The numerous Beast-Legends of the more contemplative peoples are another suggestive contribution to the problem. And a third is the

[1] Murray, 1853, p. 138. Sir Francis suggests further, that the choice of the more beautiful of the superfluous captives would lead, by a process of natural selection, to the improvement of the breed. This view appears to the writer to be premature. The hungry hunter would naturally slay his finest captives at once for food. Artistic considerations would come at a later stage of development.

well-known tendency of children, who exhibit many of the instincts of primitive mankind, to make companions, or "pets," of all kinds of animals.

Suppose another highly probable event, viz. the dropping of young by captive animals of the female persuasion. Is it conceivable that the lesson of such importance and obviousness would always be overlooked? A group of a dozen captive buffalo or wild sheep might be doubled in a single night, without a stroke of labour by their captors. The notion of PROFIT, *i.e.* the gain to be derived from the preservation, as contrasted with the consumption, of acquired objects, with all the immense possibilities involved in such a notion, would gradually begin to dawn on the consciousness of Primitive Man. It is remarkable, that the two familiar words which, in our language, embody this conception—viz. "capital" and "profit"—should be seemingly derived from the practice of stock-breeding.[1] The inference we have suggested is almost irresistible.

But now arises another consideration. Increased wealth means increased cupidity—an instinct intensified by the feeling of affection to which we have previously alluded. In some way or another, we do not know how, the promiscuous ownership of the capturing group becomes converted into the family ownership of the pastoralist. Of course there must have been always a good deal of individual trapping, as distinct from the "drives" conducted by hunting groups; and it may be, that the stock of the primitive pastoralist came from these individual captures. In time to come, anthropology may tell us more of this important step in the evolution of property. All that we can at present say is, that the typical patriarch, as we know him in the Hebrew Scriptures and elsewhere, is an individualist to the backbone, leading his flocks and herds in search of pasture and sweet water, as his skill or fancy urges him.

This practice would of itself lead to the segregation of

[1] "Capital" = "heads" (*capita*) of oxen and sheep—"cattle," as we say. "Profits" = "offspring" (*proficiscor*).

the primitive totem group or hunting pack (p. 24) into smaller units, each tending to become, as pastoral knowledge increased, larger and larger, by the accumulation of flocks and herds. For, as the numbers of these grew, their proprietor would, naturally, require the assistance of subordinates, to perform the duties of herdsmen, watchers, shepherds, spinners of wool, milkers, and the like. The latter classes of duties could easily be performed by women; and it is to this fact, almost without doubt, that we owe the accumulation of wives by the pastoralist. And by " wives " we mean women exclusively devoted to the interests of their husbands, not, as in the earlier stage, women having merely occasional or temporary sexual relations with a class of males in a totem group. Thus we approach a step towards the modern conception of marriage as a permanent relationship between man and woman; but not, be it observed, between one man and one woman. For the typical marriage of the Patriarchal Age is not " monogamous " but " polygamous "—*i.e.* the man is the husband of several wives, whose children are emphatically *his* offspring, and who remain under his control, being absorbed into the patriarchal group as his servants.

Leaving, for the present, the subject of the influence of patriarchal conditions on the development of the family group, which was deep and lasting, we may note that the pursuit of pastoral industry also led to the appearance of the institution of SLAVERY. The desire to exploit human labour soon made it evident to the ruler of flocks and herds, that it was more profitable to preserve the lives of his human captives than to dispose of them by the primitive methods of cannibalism, of the widespread existence of which, in earlier days, there is, unfortunately, only too good evidence. We need not suppose that it was a universal practice; but, where the food supply was scanty, it was undoubtedly resorted to, and, revolting as it seems to modern ideas, there is nothing inherently improbable in it. Even so intelligent and progressive a people as the Maoris of New Zealand were, in comparatively recent times,

unable to resist, on certain occasions, a revival of the taste for "long pig," which, as an habitual indulgence, they had abandoned; and the accounts from other and more primitive communities, all over the world, point to the conclusion that it was once quite a popular practice to dispose of captives by eating them. In other cases, captives were, in all probability, either killed at sight, or reserved as sacrificial offerings to those powerful spirits which, as we have seen, play so large a part in the religion of Primitive Man. But one excuse may fairly be quoted for what appears to us to be the revolting practice of cannibalism, viz. the widely spread belief that the spirit and powers of the victim pass into the keeping of the consumer—a belief which thus made of the doughty but unfortunate warrior a particularly savoury meal.

But we naturally ask, if, as we are entitled to assume, even the loose association of the primitive totem group implied the existence of friendly relations between its members: Whence came the materials for the earlier institution of cannibalism, or the later slavery which took its place? This question naturally suggests the wider and long-disputed question: Is the condition of primitive mankind one of peace or one of war? To this question there is, in the writer's belief, no simple answer. There seems to be, on the one hand, evidence of primitive communities which lead a normally peaceful existence; either in complete isolation from other communities, or maintaining friendly relations with them. On the other hand, the existence of warlike conditions, spasmodic or continual, between other primitive communities, is undeniable. There is evidence of it even among the scattered Australian communities, to say nothing of the more closely packed negroes of West Africa, and the warlike groups of South Africa. A common source of quarrel among such communities, often degenerating into a perpetual feud, is a dispute about the boundaries of a hunting area; and such quarrels play their part in generating the later institutions of territorial area, and even of private property in land. But, for our

present purpose, we may note that they afford an obvious opportunity for the acquisition of captives, who, being "preserved" from slaughter, became the *servi*, or slaves, of their captors. This was the deliberate opinion of the great Roman jurist, Gaius, who certainly knew a good deal about slavery, even if he did not know very much about primitive institutions.

But there was another widely spread source, if not of slavery, at least of something like it, in early stages of civilisation. This was the existence of DEBTS, for which the debtor "paid with his body." We must not rashly assume that the primitive debtor was the victim of unfortunate mercantile speculations, or even of the failure of crops. That would be an anachronism. Failure to pay the composition, or, as our English ancestors called it, the *wergild*, for the unintentional or excusable shedding of blood, was a very common source of debt in early times. Strange as it may sound, the practice of GAMBLING, which goes back a long way in history, was another source. From these two sources, one outside the community, the other within it, came the stream of ancient slavery. But it is worth noting, as an evidence of primitive social feeling, that the native BONDSMAN, the debtor, was usually treated as being on a slightly superior footing to the captive, or mere chattel SLAVE. He was, to a limited extent, protected by the law. He had a chance of regaining his freedom in a comparatively short time. Above all, his offspring did not inherit his servile position, but were, unlike the offspring of chattel slaves, born free. These distinctions are clear in Roman Law from an early period.

It is not proposed, in this chapter, to do more than indicate one or two of the other more obvious consequences which would follow the adoption of pastoral pursuits. One of the most obvious is the increase of accumulated wealth. In addition to the natural increase by the propagation of animals, great in tropical countries, there would be the increase from the current produce of the flocks—the milk of the kine and goats, the wool of the camel and sheep.

These at an early stage gave rise to by-industries, which have held their own to the present day, and are hardly likely to be superseded. The butter and cheese of the pastoralist play a leading part in all stories of patriarchal life. The spinning and weaving of wool are very ancient industries, which gradually replaced the rude skin garments of an earlier age. Probably there was a transition stage, in which the raw sheepskin, with the fleece worn inwards for warmth and comfort, preceded the more wholesome refinement of the woven garment; and this transition stage may well have been reached by the lonely herdsman watching his flocks in the chill of the night. The term "industry" [1] itself suggests the origin of craftsmanship in the making of clothes; and, indeed, the term "manufacture" is far more suitable for the processes of the hand-loom and the spinning-wheel than the products of the factory and the mill. Another well-established, but probably later, industry of pastoralism is the tent, or movable house, at first, probably, made of skins, later of woven cloth. For, in the pastoral age, we are still far from the days of fixed dwellings, which would have been quite unsuitable for the roving life of the herdsman. It is a remarkable fact that, in ancient Teutonic Law, the house is classed, strangely to our ideas, as a movable.

Naturally, this great increase of material wealth and comfort led to a manifest softening of the crudities of existence. The life of Primitive Man is generally hard, even in tropical countries. But, under favourable conditions, the life of the pastoralist is far from being unenviable. Existence is no longer a series of violent alternations between hunger and gluttony. As experience increases, the food-supply becomes assured; and the wholesome variety of diet, resulting from the use of milk in its various forms, tends to improve the physique of the community.

But the change must have had even more profound effects on the development of human character. Absence

[1] Possibly from *induere* (to "put on," "clothe with"). But the derivation is doubtful.

of foresight is, as has been said, one of the most striking features of Primitive Man. But the occupations of the pastoralist are impossible without foresight; and the rewards which they bring to foresight are so palpable as to foster its growth. The choice of suitable pastures, the provision of water supply, the protection of calves and lambs from the tempest and the fierce beasts of the jungle, the careful mating of selected stocks, the long periods of meditation in the nightly watch over the flocks—all these must have tended to bring out latent powers of the mind, and to elevate the character. A very significant tradition attributes the beginnings of astronomy to the observations of the Chaldean shepherds. Nor did Art fail to accompany Science in her progress. If the latter gives the quaint story of the peeled wands of Jacob,[1] the former is revealed to us in the shepherd's pipe and harp, whose strains replace the savage music of the tom-tom and the kitty-katty.[2] The beginnings of poetry date back to the pastoral age. Vergil, civilised and polished as he was, had a true instinct for the fundamentals of poetry; and his pastoral idylls are by many preferred to his more ambitious heroics.

Finally, it cannot be doubted, that the effect of the transition to pastoral life was to bring out more strongly those differences in capacity between man and man, which, in all probability, have always existed, but for which the uniformity of primitive life hardly allowed much scope. It is true that there might have been, here and there, a "mighty hunter before the Lord"; but the "classificatory" system described in the last chapter (pp. 25–27) is a pathetic, because all unconscious, confession of inability to differentiate between man and man. In a sense it may, no doubt, be regarded as a recognition of the fundamental equality of mankind. In a deeper sense, it is based upon a poverty of opportunities, and a consequent uniformity and poverty of needs. Primitive law consists, as we have seen (p. 31), mainly of a series of negations. The conception of legal rights is absent from it; because legal rights are based

[1] Genesis, ch. xxx. [2] *West African Studies*, p. 64.

upon interests, and interests imply a striving after specific objects. In the undifferentiated community, there is no striving after individual or specific interests; because there is no division of labour, no specialisation of functions.

Very different is the scene opened up by the advent of pastoralism. Here the skill required for the taming, breeding, guarding, and exploiting of the flocks and herds, tends rapidly to a division of labour between the various members of the community; and the herdsman, the shepherd, the milker, the shearer, and the weaver, make their appearance, all acting under the authority of the patriarchal chief. For long the interests created by this process remained concealed under this overmastering authority. But, as we shall see in our enquiry into the nature of patriarchal religion and law, they were truly, if silently, laying the foundations of modern society, upon which the complex structure of modern life is built.

But if, reverting to a former question, we ask whether this change indicates a transition from primitive "communism" to modern "individualism," we are met by a doubt similar to that which rendered so difficult the answer to that earlier question. Is there, in truth, any such sharp contrast as is implied by either question? That the change from primitive to pastoral conditions produced a vast improvement in the comfort and security, as well as the skill, of the individual, even of the slave, there seems little room to doubt. But did it not also produce, equally, a greater security and cohesion in the social group itself? Above all, did it not produce an immense development of that faculty of co-operation which is the secret of social progress? To these questions we must now attempt to give some answer.

CHAPTER IV

THE ORGANISATION OF PATRIARCHAL SOCIETY

As we have pointed out in the preceding chapter, the key-note of the new type of society produced by the adoption of pastoral pursuits is the ascendancy of the patriarch, or House Father, which naturally leads to the organisation of the social group on the basis of kinship through males.

It is not altogether easy to see how this change came about, though the fact of the change is indisputable. According to modern ideas, it is natural to assume, that the superiority of men over women as hunters would give to the former the greater opportunities for the practice of the art of taming captive animals, and reducing them to domestic uses. But this assumption is not altogether easy to reconcile with the fact that, the further back we go in the history of civilisation, the more closely do the sexes approach to equality of physical strength and cunning. It is natural, also, to assume, that the handicap upon women produced by the circumstances of childbirth would give a definite superiority to men in the arts of the chase. But, again, we are very apt to exaggerate this handicap, by importing into ancient society the practices of modern. To the primitive woman, the birth of a child was, probably, a somewhat unimportant event, so far as any disturbance of her physical activity was concerned. Even at the present day, the children of gypsies, and other primitive folk, are introduced into the world with a minimum of ceremony. The woman turns aside from the path, drops her burden, shoulders it, and rejoins her companions, as though nothing particular had happened. Doubtless such practices are bad from the physiological standpoint; and they may

have led to that general weakening of feminine physique, as compared with the male, which is so obvious a feature of later society, and which may, even in its earlier stages, have seriously impaired woman's skill as a hunter.

Much more probable is it, however, that, not the mere handicap of childbirth, but the subsequent devotion of the woman to her offspring, really brought about the change to male ascendancy. Speculators on the origin of the different human instincts and emotions find in the woman's devotion to the care of her children the beginning of the " altruistic " or unselfish element in human character; and they explain it by the unconscious feeling of the woman that the child, which has for so long been part of herself, still retains a close connection with her. Be this as it may, it is evident that, as the care devoted to children increased, with the improvement in the conditions of existence, later stimulated by the perception of their value as potential sources of labour, the burden of this great social duty fell, almost entirely, on women, leaving them less and less time for the excitements of the chase, or the experiments which lead to the increase of material wealth.

On the other hand, as we have seen, the direct rewards produced by the successful taming of wild animals would tend quickly to the development of that intellectual curiosity which is, perhaps, one of the few distinguishing marks of the masculine mind, and certainly to that aggressive and acquisitive attitude which is so patent an accompaniment of the pursuit of material wealth. We have seen, already (p. 42), how this attitude led the pastoralist to gather round him a group of subordinates, devoted to the purpose of increasing his possessions.

It is probable enough that, in the earliest stages of patriarchal life, the head of the pastoralist group drew little distinction between his wives, his children, his slaves and bondsmen, and his flocks and herds. They were all, as the ancient Roman Law put it, in his *manus*, or hand. But, in the parcelling out of their duties, he would naturally allot the most important and essential to his human

subordinates of his own sex; for it is hardly to be denied, however much it may be regretted, that men have, so far back as records go, believed implicitly in the superiority of their own sex, at any rate in "practical," *i.e.* in wealth-producing occupations. Thus the herdsman, the shepherd, the horse-tamer, or the swineherd, and, later, the hedge-builder (so essential as a defender against theft), or the ploughman, is, almost invariably, a man; while the less essential tasks of weaving, dairying, and, later, brewing, are left to women. Also it may well be, that the undoubted superiority in strength and size of the male over the female of most domestic animals, impressed their lords with an undue sense of the superiority in other respects of the masculine sex. Be this as it may, the note of the pastoral age is, as we have said, beyond all question, the predominance of the male.

Nowhere does this fact come out more clearly, or, for our present purpose, more fundamentally, than in the rules of INHERITANCE recognised by patriarchal law. As we have previously noted (p. 27), kinship is, in primitive society, in so far as it is recognised at all, kinship through females; and the persistency of "mother-right" is marked by the well-known survival, as obvious anachronisms, of the Hebrew Levirate,[1] and the rule of succession by the son of the sister by the mother's side, which Miss Kingsley found at work in West Africa,[2] and which is to be traced also in the otherwise strikingly masculine institutions of the old Teutonic codes. We call these rules "anachronisms"; because they are obviously inconsistent with the general scheme of things of which they form a part, just as a sword-belt would be in a civilian costume, while they are not mere freaks, but at one time formed a natural part of a system based on other principles. We have now to show how this is so.

The evidence is clear, that patriarchal society inherited from its predecessor a firm conviction of the evils of inter-

[1] See the story of Ruth, especially ch. iv.

[2] *West African Studies*, p. 437.

marriage between near kindred. Probably this conviction was strengthened by observation of the effects of in-breeding among animals; but, be this as it may, patriarchal society was *exogamic, i.e.* governed by the rule that wives must be sought among the members of an outside group. Owing to later modifications of the earlier plan, which we shall hereafter notice, the rule itself became modified; and, as a famous writer puts it, took the form of *endogamy* for the tribe, and *exogamy* for the clan.[1] But the simpler character of the older rule comes out most distinctly in the earliest forms assumed by the marriage rite, after marriage has become the permanent relationship required by pastoral pursuits. In the primitive or "classificatory" stage, there would be no question of appropriation of the woman by the man; consequently, little likelihood of opposition to the union by the lady's social group, even if we suppose its members to have regarded her as a valuable asset. But in the patriarchal stage, the wooer, or at least his House Ruler, required, not merely a temporary mate, but a servant for life; and, naturally, her former proprietors would not be inclined to part with one of their valued possessions. This assumption is clearly reflected in the two early forms of marriage, viz. capture and sale. The former was, probably, the older. It is embalmed, for example, in the well-known legend of the *Rape of the Sabine Women*, as well as in the many symbolic survivals, to be found all over the world, which indicate the real or fictitious reluctance of the bride to leave her father's protection and become a member of a new household. Conspicuous among these is the wedding ring, the last survival of the chain by which the husband tethered his bride to her new abode; whilst the tightly-swathed feet of the Chinese lady are said to be derived from a similar origin.

Most interesting, perhaps, among the signs of this change, is the evidence from Arabic sources collected by

[1] This rule may be seen at work in the instructive story of Isaac's advice to his son Jacob on the subject of marriage (Genesis, ch. xxviii.).

Dr. Robertson Smith;[1] and none the less that, in the writer's view, the learned collector of that evidence attributed the change which it indicates to a wrong cause. The Arabs are, of course, a typically patriarchal people; and the evidence collected by Dr. Robertson Smith shows us that, at a certain stage in their history, society was divided between the merits of *beena* and *baal* marriages. The *beena* marriage is the older type, in which the woman forms temporary connections with different men, without quitting her ancestral group, or forfeiting its protection. The *baal* marriage is the later form, in which the woman is permanently attached to the household of her husband or lord (*baal*). Evidently there was a lively conflict of ideas, in which the rival attractions of the two forms strove for the mastery. Ultimately, however, the *baal* type prevailed; and the permanently married wife succeeded, by the force of public opinion, in depressing her more conservative sister into that condition of social inferiority which has long been the portion, in progressive communities, of the sexually independent woman. It is a pathetic, but deeply interesting, picture of one of the earliest internecine struggles of progressive society, in which the future ruthlessly stamps out the relics of the past. Nor can it be doubted that, in her ultimate willingness to accept a lot in many ways less attractive than her former freedom, woman was again, perhaps unconsciously, manifesting that capacity for self-sacrifice, in the interests of her offspring, which is so marked and admirable a feature in her history. For it is obvious that, in the conditions of the pastoral age, the children of a *baal* marriage, born heirs of an organised group, would start with fairer prospects in life than those of a woman who, as we shall see, could not admit them, at least as of primary right, to the heirship of her father's household, but merely as slaves or bondsmen.

But it is equally clear that marriage by capture, by its very nature an anti-social institution, was ultimately

[1] *Kinship and Marriage in Early Arabia*, Cambridge University Press, 1885.

superseded, as a normal practice, by the more prosaic but peaceful institution of marriage by purchase. This practice implies, of course, a recognition of the institution of sale, or, at least, of barter; and we are, perhaps, somewhat anticipating, in assuming the existence of this new development of economic progress, which was but faintly recognised in primitive society. Leaving this development in general for future treatment, we may here accept it as an institution naturally resulting from the great increase of material wealth which followed upon the success of pastoral pursuits, and note how widely spread is the notion of the "bride-price," *i.e.* the payment of cattle or sheep which the bridegroom makes to the head of the bride's household. Where, as in the case of Jacob, the bridegroom has no "capital," he transfers his services for a time to the household of his prospective father-in-law, and so wins his wife by his labour.• The subject is, no doubt, complicated by the existence of the right which the lady had, as we shall see, to an "outfit," or portion, from her ancestral household; but it is probable that this somewhat later development followed upon a modification in the nature of the marriage tie which we shall later notice (p. 58).[1] But the well-known form of Roman marriage, the *co-emptio*, in which the form of sale and purchase was solemnly conducted by the archaic machinery of the bronze and scales, is, though, doubtless, only a picturesque survival even in the days of the Republic, yet an eloquent testimony to the tenacity of the practice on which it was based. Nor does the contemporaneous existence in Roman Law of the patrician marriage, with its imposing religious rites, in the least disprove the former existence, even in aristocratic circles, of the root ideas which accompany the marriage by capture and sale. For, as is well known, the *confarreatio*, like the *co-emptio* (perhaps even more

[1] Tacitus (*Germania*, c. 18), in a well-known passage, contrasts the then Roman and the German practices. The wife does not give dower to the husband, but the husband to the wife. The *manus* marriage was almost extinct in Rome by the time of Tacitus.

completely), conferred upon the husband the *manus*, or complete lordship, of the wife's person, property, services, and, above all, her children.

For it is almost needless to say that, in this respect, the offspring of the marriage were in no better position than their mother. The complete authority of the House Father over the lives and persons of his descendants in the male line, is one of the most completely established features of patriarchal organisation. In Roman Law, it is embodied in the terrible phrase *jus vitæ necisque* (" right of life and death "), and the complete inability of the *filius familias*, down to the end of the Republic, to own any individual property. If we know less in detail of the *mund* among the barbarian invaders of Western Europe, it is only because it disappeared at an earlier stage than among the Romans,[1] whose intensely conservative system of law retained it until it had become an anachronism. The stories of Abraham and Isaac,[2] and of Jephthah's rash vow,[3] reveal incidentally the absolute power of the patriarch over his children of both sexes. And this power did not cease with the first generation, in the case of sons. It was, of course, only a natural consequence of the power of the House Father, that he should control the marriages of his daughters; for by such marriages he lost their services. But, even in comparatively late times, the Roman *pater-familias* could dispose of his sons also in marriage; and their offspring came under his power. Nay, he could, in theory at least, dissolve their marriages against their will; though, by the time of the classical jurists of the early Empire, such an exercise of his authority, without good reason, had come to be looked on as scandalous.

But, in the case of male descendants, this apparently rightless position was modified by one great fact. It lasted only till the death of the immediate parent. Then

[1] Even where the barbarians, *e.g.* in the south of what is now France, adopted the Roman Law (*pays de droit écrit*) they modified it by the maxim: *puissance de père n'a lieu.*

[2] Genesis, ch. xxii. [3] Judges, ch. xi.

the son found himself a free man, entitled to a share of the family possessions, and himself endowed, as regards his own descendants in the male line, with that power to which he had himself been subject. Apparently there was a stage during which this altered position did not give him the right to demand an actual division of the paternal inheritance, but merely entitled him to carry it on with his brothers, in a sort of federal group, known to historians as the "joint undivided family." But such an arrangement must have been singularly inconvenient; and we are not surprised to find, early in legal history, a special process for putting an end to it. Probably the great difficulty in the way was the sharing of the debts owing to and by the deceased patriarch, to which the whole inheritance was entitled, and for which it remained liable. It is well known, that such rights and liabilities remain legally inalienable, long after the legal transfer of concrete ownership is definitely recognised by law; and European merchants are, for example, often startled by the devotion with which an Oriental will work to pay off the debts of a deceased ancestor, for which, according to modern ideas, he is in no way responsible. Still, in course of time, the step is taken. We can, for example, detect it as one of the reforms brought about by the famous Twelve Tables of the Roman Law.[1] But the solidarity of the patriarchal household long survived in the rule, so strange to modern ideas, that the heir's liability for the portion of his ancestor's debts allotted to him was not restricted to the property which he had inherited. The modern rule, that the debtor's death wipes out the personal liability, and leaves the creditor with recourse only to the dead man's property, was only established by gradual stages in Roman Law, at first by giving the heir the right to refuse the inheritance altogether, only later by giving him the right of "inventory," *i.e.* the power to separate the inheritance from property acquired by his own labour. In English law, the complete liability of the heir for his ancestor's debts

[1] *Nomina hereditaria ips*

survived at least until the twelfth century A.D., and was only abolished, apparently, as the unforeseen result of indirect causes.

One other very striking evidence, alike of the power of the patriarch, and of the importance attached by pastoral society to the continuance of the male line, is to be found in the widely spread practice of ADOPTION. To a modern Englishman or American, with his firm belief in the right of a parent to distribute his inheritance as he pleases, the process of adoption has small legal significance. In England, at any rate, its effects are now purely moral. But, in patriarchal society, adopted children ranked as full members of the household, and were entitled, equally with natural offspring, to share in the inheritance in the first rank of heirs. In other words, the fiction that adoption is natural reproduction, so clearly evidenced by the ceremonies attendant on the process,[1] is carried to its logical conclusion.

It is generally assumed, and there is, doubtless, much to be said in favour of the view, that adoption was, originally, only resorted to in default of natural offspring. But it is quite clear that, even if this view is correct, the advantages of the process as a means of increasing the patriarchal household were soon understood; and *fosterage* or *adoption* plays a very large part in the life of the pastoral community. It is true that there is strong evidence in Roman Law that *posthumous adoption, i.e.* the appointment, by will or testament, of heirs outside the pastoral group, was originally subject to severe restrictions in the interest of natural-born or previously adopted heirs. But that was because, as we shall hereafter see, the practice of testamentary disposition was itself an innovation on the original ideas of inheritance. Meanwhile, it is sufficient to observe, that the adopted child ranked as a full member of the household, subject only to the rule, that a son might not

[1] See the striking expression of Rachel in deciding to give her maid Bilhah to her husband: "She shall bear upon my knees" (Genesis, xxx. 3).

have an heir foisted upon *him*, against his will, by the adoption of an outsider as a grandchild by the House Father. Thus, to refer once more to the instructive story of the family of Jacob, the sons of the handmaids Bilhah and Zilpah ranked, along with the sons of Jacob by his legitimate wives, Leah and Rachel, as full heirs of the patriarch, and founders of the later branches of the stock of Israel. Needless to say, no woman could adopt.

To sum up the influence upon social organisation of the rules discussed in the present chapter, we may say that their effect was gradually to substitute, for the primitive totem group, the patriarchal community, based on real or fictitious relationship through male descent. But the names used by writers who deal with this subject are arbitrary and confusing. The word "tribe," which is, perhaps, the most common employed to signify the whole of the group descended, or believed to be descended, from a common male ancestor, seems to be an accidental borrowing from the practice of Roman historians; while the terms, *gens*, "kin," *mægth*, *sippe*, and so on, are used without any precise or definite meaning. This is an almost inevitable result of the fact that, by the nature of things, the patriarchal group was always tending to resolve itself into smaller units. As each House Father died, his sons, perhaps after a period of "joint undivided" industry (p. 55), split up into independent households, which reproduced the conditions of the ancestral group. For a long time, helped by that careful preservation of pedigree records, or genealogies, which is so marked a feature of patriarchal life,[1] these subordinate groups maintained a sense of unity which drew a line between them and strangers in blood. Thus, between all the descendants of Abraham and the stranger peoples—the Canaanites, Moabites, and Amalekites—a great gulf was fixed, which is indicated in the story, more than once previously quoted, of the

[1] See the long lists in the Hebrew Scriptures (*e.g.* 1 Chron. chs. i.-ix.), and the Welsh and Irish *Synnachy*, or pedigree-keeper.

marriage quest of Jacob.[1] Sometimes, as in the case of the Welsh Laws, there is an attempt to impose a definite limit on the number of the generations which are regarded as still remaining a unit for practical purposes. There the tribal chief is described as "the oldest efficient man in the kindred *to the ninth descent*, and a chief of household"; and we may, perhaps, assume that, beyond these limits, the legendary founder of the tribe would be a mere *eponym*, or traditional and sentimental influence. Thus patriarchal society was what is technically called *fissiparous*, *i.e.* tending to break up continuously into fresh groups, with the process of generation, though always based on the ultimate unit of the pastoral household, actually living together as a single family, under the dominion (*domûs unio*) of a male ascendant. The practice of adopting *patronymics*, *i.e.* names indicative of descent, such as the prefixes "Mac" among the Kelts and "Ben" among the Syrians ("Mac Intosh," "Ben-Hadad"), and the suffixes "ing" among the English and "off" among the Russians ("Basing," "Romanoff"), served to bind together the wider groups, and to keep alive the sentiment of race or kinship.

In conclusion, two of the practical consequences of this "fissiparous" tendency of patriarchal society may, perhaps, be noticed.

One was the gradual re-establishment of peaceful marital relations which, while preserving the root principle of *exogamy* (p. 51), rendered unnecessary the resort for wives to wholly alien communities, which would, naturally, only be inclined to yield them as the result of force, or the fruits of barter. For, while the wholly alien group would, inevitably, regard as pure loss the departure of one of its women to a stranger household, a kindred group would look upon such a step as a much smaller loss, or, it may be, as an actual gain in the strengthening of friendly relations. Thus the way was prepared for the marriage by free consent, or CONTRACTUAL MARRIAGE, in the place of the older marriages by capture and purchase. In this new type of

[1] Genesis, ch. xxviii.

marriage, the wife does not pass into the *manus* or power of her husband; though the offspring of the marriage do. She retains her rights as a member of her ancestral household, and brings into the marriage abode her *dos* or portion of her family wealth. It is true that, according to Roman Law, the administration and control of this fund remained with the husband during the marriage. But if the marriage was childless, or if it was arbitrarily dissolved by the husband, the capital returned on its termination to the wife's ancestral group; and later Roman Law is full of provisions for safeguarding it during the husband's administration. This state of things is, probably, what is meant by the writer previously alluded to (p. 51) as "endogamy within the tribe, and exogamy within the clan"; and its adoption opened up an entirely new chapter in marital and family relations.

The other consequence of the "fissiparous" tendency of patriarchal society to be noted is the appearance of the council of ELDERS, the *rachimburgi* of the Barbaric Laws, the *Henadwr* of the Welsh, the *Senate* of Rome, the *Panchayat* of India. So long as the gentile group held together, it recognised the authority of the paramount chief. But, after the revered founder of the tribe, the *eponym*, had passed away, it is not to be supposed that men who, in their own households, exercised arbitrary power over the various ranks of their dependents, would tamely submit to the despotic control of one who had been, within living memory, but one of themselves, probably even a humble *filius familias* in his House Father's "hand"—or, as the Welsh Laws put it, "at his father's platter, and his father lord over him, and he is to receive no punishment but that of his father, and he is not to possess a penny of his property during that time, only in common with his father." By whatever rules the Chief was chosen, whether by primogeniture or by free selection from a limited circle, it would be only natural that his former compeers should claim a share in his decisions, and a right to guard the tribal traditions. For, as we shall see when we come soon to speak of

patriarchal religion and patriarchal law, the very existence of patriarchal society is believed to depend upon the reverent maintenance of the ancestral rites and customs, which have been handed down by tradition from remote ages. The tribal Chief, unlike the House Father, was no despot; he was but the mouthpiece of his tribe, the person in whom its common life was embodied—the *cyning*, the kin-child or "king," as the English called him. When we find, among patriarchal peoples, a ruler exercising despotic powers, we may be sure that he belongs to a new order of ideas, which circumstances are beginning to produce, and which will ultimately sweep away, or, at least, profoundly modify, the old gentile system. Of whom, exactly, the Council of Elders consisted, it is not possible to say definitely; the custom, doubtless, varied with the tribe. But its existence as part of the normal structure of developed patriarchalism is undeniable, as is also its importance in the future of institutions.

CHAPTER V

PATRIARCHAL RELIGION

AN interesting, though, perhaps, somewhat speculative attempt to generalise on the history of religion, lays it down, that Man begins by worshipping some object external to himself, a stone or tree, or rather, perhaps, the spirit which is believed to operate through such object. He then passes to a stage at which he worships a being like himself, usually a deceased ancestor, or one whom he believes to have been such. Finally, he rises to the conception of a divine being who combines in himself the qualities of the internal and the external world—the Me and the Not Me—and rules both. We have seen, to some extent (pp. 29–30), in what way this generalisation is supported by the Animism of primitive mankind, with its Fetishism, or superstitious belief in the effectiveness of material objects. We have now to apply the formula to the test of patriarchal religion. Only we must remember that, of all human institutions, religious beliefs and practices are the most tenacious; so that we must not be surprised to find survivals of earlier stages lingering on into stages in which they have lost all real meaning.

It is clear that the formula which we have described finds great support from the scheme of patriarchal religion, which is, almost universally, ANCESTOR-WORSHIP, *i.e.* the cult of deceased ancestors. Even at the present day, this type of religion is practised by immense multitudes, possibly by a majority, of the human race; in times past, it has played an enormous part in human history. If it has its dark side, for example, in the cruel sacrifices of the ancient Britons and the Scandinavian peoples, it is capable of

beautiful and dignified manifestations, as in the Shintoism of China and Japan, and the piety of patrician Rome.

With regard to its origin, many suggestions have been made, of which, perhaps, the two most important may be described as the Ghost Theory and the Inventions Theory. The former assumes that the imposing form of the deceased patriarch continues to haunt the scenes of his earthly life, appearing to his descendants at moments of crisis—storm, plague, or battle—or in dreams. We have seen already that the belief in a spirit world is one of the earliest attributes of Man; it would not, therefore, need any supreme exercise of the imagination to figure the venerated form of the House Father passing into that world, but continuing still to take an interest in the household in which, during his earthly life, he was so profoundly concerned. The mystery of dreams is still unsolved, and still of deep interest to humanity. If M. Bergson's famous theory is at all near the truth, it would be highly probable that, during sleep, when all the activities of the mind are at rest, and it becomes the mere reflecting surface for impressions which have become part of the unconscious self, the figure of that House Father, who, in the most impressionable years of childhood, had loomed so largely on the mental horizon of the sleeper, should reappear to him again and again. In the view of Patriarchal Man, these apparitions could have but one meaning. The distinction between fact and imagination would, of course, be wholly beyond his capacity. He would believe in the continued existence of his ancestor, because he continued to see him. Doubtless he would be puzzled by the change in the conditions of his ancestor's appearance, from the daily intercourse, not (probably) without constant occasions of physical contact, to the intermittent appearances during sleep, unaccompanied by corporal touch. But, as we know from experience, a dream may include, not merely apparition, but action and speech; and, as we have already seen, Patriarchal Man had inherited from his predecessor a ready disposition to believe in the existence of spirit beings.

Can we doubt that such a state of things would produce important results in the conduct of Patriarchal Man? Would not his natural instinct be to attempt to please, by every means in his power, this being of whom, during his earthly life, he had stood in such awe, and whose power, he might well feel, would be even more terrible when directed from that spirit world of which his descendant knew so little and dreaded so much? Would he not be scrupulously careful to obey those injunctions of his, which, in earlier days, had been so sternly imposed upon his household? Would his descendant not order his life, with scrupulous care, upon the model which his ancestor had set before him? Would he not observe the ancestral times and seasons for driving the flocks to the hill pastures, and, again, bringing them back to the winter folds, the days for mating the bulls and the cows, the rams and the ewes? Would he not innately follow the methods of killing, skinning, dismembering, and apportioning the animals needed for food, of making the butter and the cheese, of spinning and weaving the wool? We know, for a fact, that, in all patriarchal society, this rigid adherence to ancestral precedent is the most conspicuous feature of life; and, if we make all allowance for that deep-seated dislike of change (due partly to fear, partly to dislike of mental exertion) which is so characteristic a feature of all mankind with few exceptions, we shall not fail to realise how intensely this primordial instinct would be fostered by the belief that, in yielding to it, Patriarchal Man was but following the dictates of piety and common prudence.

But another and more positive result would follow from the apparitions of the ancestral ghost, and the consequent belief in the continued existence of the ancestor. Doubtless, during his earthly life, this ancestor was fairly insistent upon the satisfaction of his bodily needs, and not a little inclined to visit with his wrath those of his subordinates who failed to supply those needs. The descendant, now become a House Father himself, was familiar with his own feelings and tendencies in that direction. The obvious

lesson would not be lost upon him. And so we get that widespread practice of OFFERINGS TO THE DEAD, which is so marked a feature of patriarchal life. Once more, we realise that this practice had its forerunner in the sacrifices offered by Primitive Man (p. 32) to propitiate the spirits whom he dreaded; and it may well be, that this feeling carried over into Ancestor-Worship, and gave rise to those grosser forms of human sacrifice which disgrace an otherwise humaner creed. Especially would this be the case where the ancestor had died, or was supposed to have died, as the result of foul play, and the desire to gratify his supposed feelings of revenge prompted the sacrifice. But, in the main, the motive of the ancestral sacrifice is to satisfy the more peaceful desires of the dead ancestor, his hunger and thirst; and the offerings chosen—the oxen and sheep, the wild fruits, and, later, the corn, wine, and oil—are chosen with this end in view.

It cannot well be doubted, that from these offerings are derived some of the most refined practices of later civilisation. Take, for example, the modern economy of food. The primitive meal was either a hasty and surreptitious gulping down of prey captured by the individual hunter, or a disgusting common orgy by the pack which had been successful in rounding up a herd of captives. The patriarchal meal, at least at ordered times and seasons, became gradually a religious ceremony, marked by deliberation and restraint, by pauses for the change of offerings, by the presidency of the House Father, who dispensed the sacrificial victims in graduated portions to the members of his assembled household in their various ranks. The practice of " grace before meat " is one of the most striking survivals of this original character of the domestic meal; another is the practice of pledging healths, *i.e.* of calling the deceased ancestor to witness the friendly intentions of the host. Doubtless, the primitive animal long survived in Patriarchal Man; for long the orderly domestic meal was only an occasional matter, while the common everyday needs of hunger were still satisfied in primitive fashion. But the

more refined custom gradually spread, to the immense gain in all that we understand by "good manners"; and it is a distinct loss, at least from that point of view, that the exigencies, or assumed exigencies, of modern economic life, should have resulted in the exclusion of servants from a share in the family meal, and the doubtful boon of the "quick lunch." The latter may be a necessity; but it is a distinct "reversion to type."

Compared with the consistent logic of the Ghost Theory, the evidence for which is abundant in patriarchal literature (nowhere more than in the Old Testament Scriptures), the somewhat doubtful arguments for the Inventions Theory seem to the writer thin and far-fetched. The view seems to be, that Patriarchal Man, impressed by the undoubted conveniences of his life, as contrasted with the rude existence of the more primitive communities with which he is supposed to be familiar, and believing, doubtless with truth, these conveniences to be the results of the intelligence of his forefathers, was filled with gratitude for these discoveries in the arts of life which had produced his superior lot, and expressed that gratitude in worship of those to whom he owed them. There is, doubtless, some evidence for this theory, in the legends of antiquity, such, for example, as the story of Prometheus, the Fire-Bringer. But, as we have before urged, gratitude is not a characteristic of Primitive Man; whilst fear and imitation are deep-seated and primal characteristics. It is, indeed, not unlikely, that a long course of such practices as are the well-known features of Ancestor-Worship would tend to beget feelings of gratitude; as the growth of reason, and the beginnings of philosophical speculation, led mankind to consider the purpose and meaning of these practices. It is, likewise, not improbable, that a gradual perception of the value and usefulness of the various processes of domestic life would beget gratitude for the inventors of them. Nor, finally, is it unlikely, that any proposed departure from these traditional practices by those advocates of reform who are usually regarded with fierce hostility as the enemies of society, until they are

gradually recognised as its benefactors, would drive the supporters of the existing state of things into alleging the ingratitude of those who proposed to depart from the practices of deceased ancestors. For if there is one feature of Ancestor-Worship, in all its forms, more striking than another, it is its intense and rock-like resistance to change. Nevertheless, all these arguments appear to suffer from the fatal objection, that they transpose cause and effect; in other words, they allege an attitude of mind which is produced by Ancestor-Worship, as the origin of Ancestor-Worship itself.

If we now turn from the origin of Ancestor-Worship to consider its place in the scheme of social development, we shall best achieve our object by contrasting it briefly with the type of religion which preceded it and that which has followed it.

We have suggested already, that one prominent difference between Ancestor-Worship and the more primitive Animism is the change in the object of worship or reverence. Primitive Man fears and worships unseen spirits as concentrated in, or manifested through, external objects. Patriarchal Man cultivates the spirits of those who were once, like himself, human beings. It would, doubtless, be far-fetched to argue, that he thereby approaches the great belief implied in modern physical science, viz. that Man is, at least potentially, the master of the universe, and not the universe of Man. But it is not unreasonable to suggest, that this new attitude helped, albeit unconsciously, to build up in mankind, or, at least, such communities as adopted Ancestor-Worship, that social capacity which was the necessary groundwork and machinery of subsequent social advance. We have already seen (p. 32), that even Primitive Man could be brought to believe, that certain exceptional persons—magicians, medicine-men, and the like—had power to affect, or deflect, the action of those spirits whose terrible powers he feared. But the mysterious and uncertain practices of sorcery and witchcraft, occasionally exercised, despite the fascinations which they undoubtedly

enjoyed, could not, in the long run, fail to dwindle in importance before the open, regular, and sure operation of those beneficent processes which gave to Man his daily food and drink, his shelter and clothes. And as these, by daily habit and practice, became associated in his mind with the comfort and beauty [1] of the ancestral hearth, with its rites and ceremonies, he would inevitably learn to assume a greater confidence in himself and his fellows. No longer a terrified creature, stumbling about in an universe of unknown terrors, he would gradually acquire a dignity and serenity of mind which would mark a distinct advance in social progress.

Again, as we have seen, primitive religion and primitive law (which is inextricably mixed up with it) are mainly, if not entirely, negative in essence as well as in form. Patriarchal religion, on the other hand, is POSITIVE, that is, it inculcates on its followers the daily and hourly doing of certain acts. The cattle are to be fed in a certain way, at a certain time. The sheep are to be shorn at such a season, and in such a manner. The kine are to be milked at certain hours. The cheese and butter are to be made by certain processes. Man is no longer a child subject to a continual stream of "Don'ts." The commandment is no longer: "Thou shalt not," but: "Thou shalt." It is, perhaps, fanciful to note the fact that the only positive commandment in the Hebrew Decalogue is, in effect, the central commandment of patriarchal religion: "Honour thy father and thy mother." But the coincidence is striking.

Incidentally, it may be noticed, that the appearance of patriarchal religion does not always mean, perhaps rarely means, a total abandonment of the primitive type. Most patriarchal communities maintain, alongside their new Ancestor-Worship, which may be described as their working religion, a survival of the older Animism, enshrined in Nature-Worship. The most striking example is, perhaps,

[1] The attractiveness of a bright light is not realised by a world accustomed to it in abundance. But let any one watch an infant's eyes fixed upon an electric bulb.

the beautiful MYTHOLOGY of the Greeks, with its cult of the glade and stream, and its gods and goddesses who haunt them—the Fauns and Dryads of classical poetry. Other peoples hold by a religion of beast and bird, which may be connected with the totemism (p. 25) of primitive times. The beautiful fairy lore of medieval Europe is another example. If there is anything in theories of RACE, it is in folk and fairy lore that it is to be found; not in political or even economic institutions. For these are the product of adult minds, which put practical considerations before the ties of blood; while folk and fairy stories are handed on from mother to child around the family hearth.

Turning now to the features which distinguish patriarchal from modern religion, we find an equal sharpness of contrast.

In the first place, every modern religion claims to be UNIVERSAL. "Go ye into all the world, and preach the gospel to every creature," is the keynote, not only of Christianity, but of Mahometanism, Confucianism, and even of Buddhism; though the method of each is different. No new religion could, at the present day, hope for success, if it did not offer salvation to all mankind, even though it did not preach a panacea for all evils. That is why the terrible Calvinistic doctrine of "predestination" was bound to perish; because it was a belated survival of an era which was passing away. How can you hope to persuade a man to accept your religion, if you have to tell him that, for all you know, he may be foredoomed to perdition? Such a religion cannot *proselytise;* and all modern religions are proselytising religions.

Not so Ancestor-Worship. The notion that his religion was for all mankind, would have horrified Patriarchal Man. It would have seemed to him rank sacrilege, that an outsider should take part in his ancestral rites, or "offer strange fire" upon his family altar. What pleasure could it be to his ancestor to receive worship from men of alien blood, who owed no allegiance to his ways, who had never seen his ghost? Only when, by marriage or adoption, the

stranger had been absorbed into the family circle, could he or she be permitted to share in its mysteries. When Ruth's husband's people had become " her people," then, and not till then, would " their God become her God." [1]

It followed, as a natural consequence from this conception of Ancestor-Worship as the private affair of each tribe or clan, that its rules and rites were guarded with the utmost SECRECY by their proper custodians. These would, in the first instance, naturally be the House Fathers themselves, each in his separate household; while the Chief of the tribe or clan would be its natural High Priest. The Priest-King is, in effect, a recognised feature in patriarchal society; he is the type of which Melchizedek of Salem, and Moses and Aaron among the Hebrews, are examples. But, in course of time, the inevitable tendency towards specialisation, which, as we have seen, was already at work in patriarchal society, led to the appearance of a class of PRIESTS, charged with the special care of the sacred rites. We see the beginnings of such a movement in the consecration of the sons of Aaron to the priestly office; [2] and we know of the existence of colleges of priests in ancient Rome. Naturally, the growth of corporate enthusiasm produced by such a step tended to make the rites of a tribe or clan more mysterious than ever; in their own interests, and to magnify their own importance, these priestly colleges guarded, with intense jealousy, the secrets of their profession. Some of the deadliest feuds of patriarchal society were caused by an attempt, on the part of an outsider, to penetrate the sacred privacy of religious ceremonies. Contrast this attitude with the offer of " free salvation " by the exponents of modern religions, and the earnest, in some cases pathetic, efforts of the Churches to increase the numbers of their adherents.

Finally, patriarchal religion differed from modern in the fact that it concerned itself little with THEOLOGY, *i.e.* with any attempt to explain the origin and purpose of the universe, and the scheme of human salvation. It was,

[1] Ruth, i. 16. [2] Exodus, ch. xxviii.

simply, a practical guide to a course of conduct, enforced by picturesque and impressive ceremonies. Again we may refer to the Hebrew Scriptures, one of the best possible records of patriarchal history. The first few chapters of Genesis are, indeed, taken up with an attempt at *cosmogony*, not of a very high order; but the author or authors seem to turn with relief to the more congenial task of relating the pedigrees of their ancestors, their wanderings and adventures, and the details of the rites and ceremonies which they had prescribed for their descendants. In all this they were, so to speak, at home; and the interest which they put into this part of their work at once raises its quality to a high level. If the higher forms of Animism or Nature-Worship give rise to imaginative literature, the cult of deceased ancestors may fairly be claimed as the origin of that hardly less important branch of Art, the writing of History. But it is no part of the business of Ancestor-Worship to explain the position of Man in the Universe, the destinies of the human race, the purposes of a Divine Creator of the World, the reconciliation of Divine Justice with Divine Pity, the conflict between Free Will and Necessity, or any of the deep problems which it is the task of theology, or religious philosophy, to explain. A Christian writer would, naturally, shrink from the accusation of irreverence which might be levelled against him if he were to speculate openly on the feelings likely to have been aroused in the mind of a Hebrew Prophet, had he been able to foresee the exposition of the Christian revelation by its Founder. But one may, at least, be permitted to surmise the expression on the face of Moses or Joshua, if he could have read the elaborate philosophical arguments of the Epistles of St. Paul.

CHAPTER VI

PATRIARCHAL LAW

In an advanced stage of society, every educated person realises, or thinks he realises, the difference between religion and law. Both prescribe rules of conduct; but, while the rules of religion are attributed to a divine source, and are left to be enforced by spiritual sanctions, the rules of law are believed to emanate from human authority, and to be enforced by human, that is by physical, penalties. Occasionally we read of protests by unlettered persons in police courts, or elsewhere, followed by an instructive little discourse on the difference between religion and law by the magistrate; and we are inclined to smile at the simplicity of the protest which has called it forth. But such protests are, in truth, deeply instructive; for they are but survivals of a state of mind which was once universal. And they show how difficult it still is for many people to perform that mental process to which we have before alluded, to wit, the *analysis* which distinguishes between the different elements in a compound substance or idea.

Nor is the difficulty confined to simple-minded persons. Even the educated man, who happens to be neither a theologian nor a trained jurist, is often puzzled by what he conceives to be a confusion of boundaries between religion and law. He is faced by the obvious fact, that a very large number of important rules are common to both; and he is inclined to doubt, with much justice, whether the term "law" can rightly be claimed as the exclusive property of secular tribunals, such as police and county courts. He realises, for example, that the precepts: "Thou shalt do no murder," "Thou shalt not steal," "Thou shalt not

bear false witness," are common both to religious and secular systems; even if there are others, such as: "Thou shalt not covet," which are peculiar to religion, and: "Thou shalt not omit to register the birth of thy child," which are peculiar to secular law.[1]

The truth is, that there is much excuse for this state of bewilderment; and it is by no means easy to find a test which will disperse it in all cases. The origin of the difficulty is obvious. It lies in the fact that, as we have seen, in primitive communities, religion and law are the same thing. When once Primitive Man has come to the conclusion that an act is WRONG, he has reached the end of his short chain of reasoning. To ask him whether it was forbidden by religious or by secular authority, or how he knew it to be wrong, or why it should be wrong, or how the offender was to be punished, or to what extent, would be to beat the air. These are questions which much more highly developed minds have been long struggling to solve, by no means with complete success. For they really involve an understanding of that complex, mysterious, and yet all-important thing, human society. Wherefore a brief attempt to answer these questions is part of our duty in this book.

Now if the essence of religion be the attempt to guide one's life by conforming to a standard set up, or believed to be set up, by a Power Not Ourselves, it is unquestionable that religious are older than secular laws. It may well be that, in primitive communities, individual authority is occasionally exerted, by a man stronger and more cunning than his fellows, over one, or even a few, of his companions. But, in absolutely primitive communities, such as those of the Australian aboriginals, there is little or no evidence of such a state of things; and the failure to comprehend this fact was responsible for a good many amusing incidents in

[1] There is, indeed, a school of theology which inculcates as a religious duty the performance of all obligations of the secular law. But such theology is illogical and dangerous. The true precept is: "Render unto Cæsar the things *which are Cæsar's*," *i.e.* not religious but secular obedience.

the early intercourse between the aboriginals and the white settlers, in which the former showed a considerable astuteness in taking advantage of the preconceived ideas of the latter.[1] In any case, there is no *organised* or systematic human authority which can claim to prescribe rules of conduct.

But, when we come to the next stage of progress, the patriarchal, there is, obviously, a great change. For while, as we have seen, the tribe or clan believes itself to be bound by rules laid down by its deceased ancestors, who have already passed into the spirit world, there is a good deal more "humanity" (in the strict sense of the word) about these rules, than there is about the arbitrary and mysterious prohibitions of Animism. Moreover, and this is still more important, the discipline of the patriarchal household, enforced, without appeal, by the House Father, must have tended powerfully to establish the reign of human authority. Here we have the germ of the future distinction between religious and secular law. Let us look a little closer at this important fact.

The admitted ideal of Patriarchal Man was conformity to the will of his deceased ancestors. This ideal may truly be termed religious; and by it, of course, the House Father, no less than his subordinates, was bound. Doubtless, in the beginnings of the system, when the tradition of deceased ancestors was short and feeble, the restraints on the arbitrary power of the House Father were slight; in fact, he probably acted, within his domestic circle, pretty much as a despot. But as the tradition grew and strengthened, his power would become less arbitrary, more regular, more calculable—in other words, more like law and less like caprice. Moreover, as the single pastoral unit expanded, by the process previously described (p. 57), into federated groups bound together by the reverence to a common

[1] For example, when it was realised that tobacco, blankets, and other desirable objects, could be obtained by any "chief" who would sign a treaty—*i.e.* put little black marks on paper—"chiefs" sprang up like mushrooms.

" eponymous " ancestor, or actual tribal chief, the pressure of the common tradition upon the individual House Father would become stronger; because it would be enforced by the opinion of neighbouring units, and, possibly, by the common action of his kindred patriarchs. There are significant hints in Roman Law, for example, of a mysterious process known as " branding with infamy " (*notatio infamiâ*), not open to the ordinary citizen, but performed by a religious or tribal official, as a public duty. It was emphatically a matter of *fas* (*i.e.* speech, especially religious speech), as opposed to *jus*, or secular law; and the word *infamia* (" unspeakableness ") suggests that it took the form of exclusion from the sacred tribal rites.

To the outside world, and even to those subordinate members of the household not admitted to the sacred mysteries of the family rites, the only evidence of this ancestral tradition was CUSTOM, *i.e.* the long continued course of similar conduct in similar circumstances. The actual origin of custom is to be found rather in psychology than in religion or law. It is probably the result, partly of imitativeness, partly of laziness, partly of intelligence, partly of caprice. Men will take a particular path because it is the easiest, because others have taken it, because it is really the most convenient, because, by some chance, it is attractive at the moment. But the men who *make* the custom, not merely originate it, are the imitative men, the men who conform to a standard already laid down, the men of law, that is, the " law-abiding men."

Thus we see Patriarchal Law starting on its way, sanctioned by religion, and evidenced or interpreted by custom. It is, as has been said, far more comprehensive than the old primitive code, in that it is not merely negative, but includes the doing of acts, or, as we should say, the performance of positive duties, regularly and in the proper way. It is possible that some of the old negative rules of the primitive period survived, being really founded on reason. But most of them were discarded, except by

the more conservative or timid members of the community, as, in the strictest sense, SUPERSTITIONS.

But we have now to ask an important question, or, rather, two questions. By whom, and how, was this body of custom enforced? And, if we succeed in getting the right answers to these questions, we shall arrive at least at some idea of the nature of Patriarchal Law.

The answer to the first of these questions is simple. The House Father was always the judge and executioner within the limits of his own household. No outside interference was tolerated by him, at least on the appeal of one of his own subordinates. One of the greatest dangers of modern statesmen in dealing with less advanced races is an ignorance of this fact, and the passionate depth of the feeling behind it. It may well be, that the Romans owed much of the success and permanence of their Empire to the sympathy with which they regarded it. At any rate, their Oriental and barbarian subjects recognised and respected the Roman doctrine of *patria potestas*. At least on one occasion, British authority in India has been gravely threatened by a real or apprehended neglect of it. Without it, the *jus vitæ necisque* (p. 54) would have been merely organised caprice, a principle wholly foreign to the intense legality of the Roman character. Without it, the responsibility of the House Father for the conduct of his subordinates towards members of another group would have been impossible. In later days, as we shall see, this principle came into sharp conflict with another of even greater authority and force; and that conflict is one of the real turning points in the world's history. But that time marked the death, not the life, of patriarchalism.

If we turn now to the second branch of the question, and ask how the decrees of this domestic judge were enforced, we are also not in any great difficulty. For minor offences, the ordinary punishments of domestic discipline—whipping, deprivation of food, restriction of liberty, exclusion from the hearth—many of which survive to the present day, would be sufficient. For graver offences, the punish-

ment of death was, undoubtedly, inflicted; but a common alternative, more merciful in appearance, hardly so in reality, was that of BANISHMENT, or "emancipation" as the Romans called it, which expelled the offender from his paternal household, deprived him of his rights of heirship, and set him adrift upon the world a broken, or, in the expressive language of the Welsh Laws, a "kin-shattered," man. Originally this process (which may have been remotely connected with the "taboo" [p. 31] of the primitive era) must have usually meant death by slow starvation or the attacks of foes. Later on, as adult sons began to revolt against the restraints of the paternal authority, it did, undoubtedly, come to be looked upon as a boon. The Twelve Tables, in a famous passage,[1] offer it as a consolation to the son who had been three times sold as a bondsman by his unfeeling House Father. But the indelible mark of its original disgrace survived in the rule of Roman Law that *emancipatio*, with whatever object performed, involved *capitis deminutio*, or loss of status; and the Imperial State ultimately placed restrictions upon it.

Still, however, we should do wrong to assume, that the House Father was subject to no internal restraint in the exercise of his authority, or to underestimate the influence of such restraint as existed, merely because it was, to modern eyes, indefinite. It was the CUSTOM itself, which, with ever-tightening grip, held both judge and accused in its bond. Where the offence was against the authority of the House Father himself, the chances of a successful appeal to the custom would, we should think, be small; though, possibly, the attitude of his kindred potentates, or the tribal Chief, may have acted as a kind of primitive Court of Appeal. But there is a very forcible warning against such a belief in the well-established fact, that the manorial court of the later Middle Ages, at any rate in England, though presided over by the lord or his steward, with whose decisions there could be no outside interfer-

[1] *Si pater filium ter venum duit, liber esto.*

ence,[1] did in substance succeed in upholding the customary rights of the copyhold tenants for centuries against their lords, without the aid of such interference. The history of the English manorial courts, with their "homage" or body of tenants which "declared the custom," gives us an instructive hint as to how this success was achieved; and we shall, probably, not be far wrong in assuming, that the domestic tribunal of patriarchal days comprised not merely the patriarch, but a panel of adult sons, who, in the language of slightly later days, "deemed the dooms," *i.e.* expressed the rules of that custom by which even the House Father was bound.

Where the offence alleged was not against the authority of the House Father, but against the interest of another subordinate member of the household, the difficulty would be far less. In deciding such a dispute, the authority of the House Father would not be involved; unless, of course, which is unlikely, one of the parties to it refused to be bound by his decision. That would be a case of "contempt of court," which, as we shall later see, is a contingency which all tribunals have to meet. But, in the ordinary way, the overwhelming authority of the House Father would prevail; and he would merely be concerned to see which of the parties was in the right, or, as the older phrase ran, "had right." He would then make an award, adjusting the dispute; and the matter would be at an end.

In the distinction between these two classes of offences, we can see the germ of a distinction which is afterwards to become famous—the distinction between CRIMINAL and CIVIL justice. The former aims at repressing a defiance of authority; the latter at adjusting rival claims between two parties, which may not involve any moral guilt at all. The method of the tribunal in the former case is PUNISHMENT,[2] in the latter, COMPENSATION. The party in the

[1] Until the fifteenth century, at least, the copyholder, or serf tenant, could not claim the protection of the King's courts for his holding.

[2] The *object* (or purpose) of punishment is another and deeper question, which we cannot discuss here.

wrong is, in the latter case, merely ordered to make good the loss caused to the other by his wrongful act. It is true, that such a wrongful act *may* have also involved moral guilt; and, as we shall see later, developed systems of law make further subdivisions between civil cases which are merely honest differences of opinion about proprietary and contractual rights, and those which are based on such wrongs as defamation, cheating, and so on. Again, it is true that, just as the same act may be at the same time an offence against religion and an offence against law, so it may also be a crime and a civil wrong. But this fact does not prevent the distinction being of importance in the development of institutions.

If we turn now to ask, on what principle the House Father would adjust the disputes which arose between his subordinates, we find, again, that the test is, at least in many cases, CUSTOM. The individual who has suffered by the breach of a custom claims redress against the breaker. Thus, the man who has been accustomed to ride a particular horse from the common stable, will resent the use of that horse by another member of the household. The woman who has been in the habit of wearing a particular garment, will resent its appropriation by another. In each case, though the horse or the garment may be, in theory, the goods of the House Father, in the sense that he can dispose of them, at any rate within the household, as he pleases, yet the fact that the person who has used them has acquired an *interest* in them, gives him a RIGHT to complain if that interest is interfered with. He is "in his right" in complaining; and the community will approve his complaint. This is, undoubtedly, one of the avenues which lead to the later conception of PROPERTY. Other cases are not quite so clear. On what ground does a man complain of an assault, or a slanderous utterance, or a wrongful restraint of physical liberty? No question of interest may seem to be involved, no custom violated. In a sense, one may, of course, say that a man has an "interest" in the security of his body, or the goodness of

his reputation, or the freedom of his person; and, in later days, such a use of the word does, undoubtedly, become common, and such offences as assault, defamation, and false imprisonment are made the basis of civil proceedings. But this is a refinement hardly arrived at in patriarchal times. Again, one can hardly describe such offences as breaches of custom. All the evidence goes to show that, in early days, assaults and vituperation were extremely common.

As a matter of fact, Patriarchal Law treats such offences with considerable indifference. Its attitude appears rather to be, in the case of a blow: "Give him another" ("An eye for an eye," "A tooth for a tooth"); in the case of a slander: "Call him the same"; in the case of "false imprisonment": "Get out the best way you can." Only when the assault is so serious, or the abuse so gross, or the incarceration so prolonged, as to threaten the peace of the community, does the law step in; and then it is as a prosecutor or a magistrate, rather than as an arbitrator between disputants—in other words, it treats the offence as a crime, rather than a civil injury. The offence so familiarly known to modern tribunals as "breach of contract," is a quite late development of legal ideas; and, when it comes, it comes by way of a rather curious extension of the idea of property.

It is, probably, not until the later period of the patriarchal stage has been reached, and the adoption of agriculture (Ch. VII.) and the growth of industry (Ch. VIII.) have changed the simpler conditions of pastoral life, that we get anything like an ordered PROCEDURE for the punishment of crimes or the enforcement of rights. If we put aside the curious Oriental process known as "sitting *dharna*," in which the complainant plants himself at the door of the offender's tent or hut, and threatens to starve himself if the latter will not come before the tribunal,[1] we

[1] The implied threat is, that the ghost of the dead complainant will haunt the offender. The unimaginative Western mind seems to have invented nothing to correspond with this curious process. See,

see only, as regular proceedings, the "distress," or *nam* (as the Teutonic Laws call it), and the blood feud.

The DISTRESS, as its name implies, is a method of putting pressure upon the offender; and the method consists in seizing his goods, not by way of compensation, but to make the offender come before the judgment seat, and hear the "doom." The idea is childlike in its simplicity. "You have taken my rabbit. I shall seize all your toys till you give it up." Counter-recrimination naturally follows; a disturbance arises, and authority must intervene. If, however, the person whose goods have been "distrained" remains obstinate, and prefers to put up with the inconvenience rather than face the tribunal, apparently there is no other remedy; and it was to this defect, more than anything else, that, as we shall later see, patriarchal justice owed its supersession by a more rigorous authority, armed with sheriffs and other executive officers.

The process known as the BLOOD FEUD, widely spread all over the world, marks, probably, a much later period in the patriarchal stage, when the unity of the tribe had been destroyed by the settlement of sub-groups in more or less isolated villages or kraals, whose inhabitants raided the cattle of neighbouring villages, or murdered the casual farmer or herdsman who strayed beyond his protecting stockade. The kinsmen of the victim, or the owners of the cattle, would "follow the trail" of the murderer or the stolen beasts, until it led to the offender's hut. At first, no doubt, a general fight ensued; but, as the consequences of indiscriminate bloodshed became apparent, this disorderly scrimmage was superseded by an intervention on the part of the elders of the invaded village, who "stayed the feud," [1] and offered compensation if guilt could be

however, the horrible West African practice known as "throwing a face" on a victim of sorcery, described by Miss Kingsley (*West African Studies*, pp. 165-6), which may be in the same line of ideas.

[1] One of the most persistent survivals of this step is the practice of urging two quarrelsome persons to "shake hands"; for if the right hands are clasped, neither party can well use his weapon.

proved. Thus we get the system of blood and theft fines—the *wergild* of the Teutons, the *cro* of the Scots, the *eric* of the Irish, the *galanas* of the Welsh—of which the patriarchal codes are full. Quite possibly it is to this change, as much as to anything else, that we owe the drawing up of those precious monuments of Patriarchal Law; at any rate, some of the very earliest of them read almost like a tariff of fines.[1] Almost all of them permit the killing in hot blood of the murderer or thief caught red-handed—the murderer seized with the bloody knife in his possession, the thief overtaken with the ox in his halter or the sheep on his back. But if the trail merely leads to a hut or stable, then, search (with due precautions against trickery) must be permitted; and, if the stolen article is found, the claimant lays his hand solemnly upon it, and claims it in solemn speech.

Now comes the chance of the cool-headed elders of the invaded village. Inviting the parties to come before them at the moot-stow, the ancient assembling-place of the township, they then hear the accusation of the invaders, which the accused must deny word for word, or, as the old English Laws put it, with a *twert-ut-nay*. Thereupon the elders "deem a doom"; that is, they name the proper fine for the alleged offence, the party on whom the burden of proof rests, and the nature of the evidence required by the facts. And they also "set a day" for the trial, unless, indeed, they dismiss the accusation as frivolous, or as disclosing no offence, whereupon the accused "goes without day."

It is, perhaps, needless to say, that patriarchal tribunals have what would appear to us to be very primitive notions about the nature of EVIDENCE or proof. Doubtless, as

[1] Thus the oldest monument of English law, the Laws of Æthelbert of Kent, opens with the words: "God's cattle and the Church's, twelve-fold fine. Bishop's cattle, eleven-fold fine. Priest's cattle, nine-fold fine. Deacon's cattle, six-fold fine. Clerk's cattle, three-fold fine. Church peace, two-fold fine. Court peace, two-fold fine." And so on.

things develope a little, and especially as the introduction of barter and sale renders it no longer safe to assume that a man found with an ox known to have once belonged to another man is necessarily a thief, we get something like modern evidence, in the transaction-witnesses of the market-place—men whose very existence, however, shows the jealousy with which alleged transfers of ownership are regarded. But the older rules of Patriarchal Law on the subject of evidence are simple and uniform in principle, though varying in detail from tribe to tribe. If the accused is of fair fame, he "wages his law" (as the English codes put it), *i.e.* he brings a number of his kinsmen or neighbours to swear that he is innocent. This they do in solemn unison, with uplifted hands and voices, in a solemn formula. If the accused is of evil repute, he "goes to the ordeal," *i.e.* by some rude test he appeals to the Unseen Powers to slay him if he is not speaking the truth. "May this choke me if I lie," recalls the ancient ordeal of the *corsned* or test by swallowing, so widely spread;[1] "going through fire and water" dates from the familiar ordeals of walking blindfold over ground strewn with red-hot ploughshares, and plunging the arm into boiling water.[2] If the accused fails at the ordeal, he is abandoned to the vengeance of his accusers, or pays the fine.

The system has, however, one weak spot. It is clear from all the records that, in spite of its manifest advantages over violent self-help, there appears to be no authority which can enforce it against unwilling disputants, or compel the offender to pay, or the accusers to accept, the fine, if the former cannot or will not, or the latter will

[1] The *corsned* is Teutonic. But the idea was reproduced among the Jews (Numbers, v. 11-31); and "swallowing the bean" is the recognised way of repelling a charge of witchcraft in West Africa (*West African Studies*, p. 160).

[2] The well-known practice of flinging a woman accused of witchcraft into a pond is another form of the water ordeal. If she floated, she was supposed to be supported by her familiar spirit, and condemned. If she sank, it was a proof of innocence. Anyway, she was got rid of.

not, obey the doom. In either of these cases, the feud goes on; and the efforts of the peacemakers are directed to modifying its bitterness, by appointing SANCTUARIES, or cities of refuge,[1] by fixing certain days as "peace" or "truce" days, by requiring warning of an attack to be given, above all, by strictly limiting the degrees of kindred entitling relatives to take part in the feud. But all this leads us to suppose that the feud was rather a procedure for settling disputes between rival, though, possibly, connected groups, than between individuals within a single group, and under the unquestioned control of a single authority. It was, in fact, a species of limited warfare; and the inability to stamp it out was the great failure of patriarchal justice, which led, as we shall later see, to the supersession of patriarchal by more effective tribunals.

We return, in ending this chapter, to the point from which it started, viz. the close connection between Patriarchal Religion and Patriarchal Law. One of the most striking proofs of this intimacy is the fact that, in patriarchal times, law, like religion, is not a question of locality, but of birth. The fact that a man had become separated from his tribe or clan, did not, necessarily, deprive him of his right to be judged by its law, any more than it necessarily deprived him of the right to share in its religion.[2] In the break-up of tribal communities which followed the irruptions of the barbarian hosts into Western Europe at the fall of the Roman Empire, this rule was long preserved. A Burgundian could claim to be judged by Burgundian Law, a Visigoth by Visigothic Law, and so on. So also was it in England before the Norman Conquest; though fusion

[1] Joshua, ch. xxi. Observe (1) that these cities were originally among those allotted to the priestly tribe of Levi (Numbers, xx. 6), and (2) that, even in a later stage, they were only for the man who had slain another by inadvertence (Joshua, xx. 3).

[2] Of course this rule did not apply to the banished or "outlawed" man (p. 76); and there was, among the Romans, a well-known ceremony by which intending colonists, on the eve of their emigration, renounced their tribal gods (*detestatio sacrorum*).

had begun there. So it is, to a large extent, in India at the present day. Even though, in Western Europe, the rich heritage of Roman Law offered an asylum for the men of different systems, it was long before it became a " common " or universal law. Even in England, small as it is, and well governed, the " common law " dates, at the earliest, from the thirteenth century. In early days there is no universal, or even territorial, law; any more than there is any universal or territorial religion.

It is, however, just these facts which seem to give us a hint towards the solution of the difficult problem: How or why does Law finally separate itself from Religion? The answer is, in brief, *because it ultimately becomes necessary to find a common standard of justice among men who belong to different religions.* For long the priestly colleges at Rome held the secrets of law in their hands; and the Jewish Rabbi is still the Jewish judge. For long even a universal religion like Christianity maintained a hold over law by its conduct of the system of ordeals and oaths; and, even at the present day, in Mahometan countries, the functions of priest and judge are combined in the same person. But there comes a time, in most communities, when the widening intercourse of peoples brings into close relationship men of different faiths, and renders it necessary to frame rules of conduct to which all shall conform, in matters not directly affecting their religious beliefs. As to where exactly the line of demarcation in such matters shall be drawn, there will, naturally, be fierce disputes; because, after all, religion affects all conduct, and men will dispute fiercely as to which authority shall prevail, the religious or the secular, on certain matters. This is the secret of the long-drawn-out struggle between Church and State. But, just as the influx of the provincials into Rome forced the hands of the priestly colleges, and produced the *jus gentium* or secular law, with its own tribunals, its own rules, and its own methods; just as the welding of the English tribes into a single nation produced the " common law," and its corresponding apparatus—so, everywhere in

progressive communities, the line between Religion and Law becomes clearer and clearer, though not without many struggles, many disputed fields of conduct, and much overlapping of claims, of which the "conscientious objector" is a living symbol. But the mention of the STATE, a conception of which we have, as yet, seen no sign in our account of the development of institutions, warns us that a thorough analysis of the problem must await a later stage of our enquiry.

CHAPTER VII

THE INTRODUCTION OF AGRICULTURE

HITHERTO we have assumed, save in special cases, that the normal character of patriarchal life is PASTORAL, *i.e.* dependent on the process of cattle- and sheep-breeding, and its allied industries. This practice is justified by the fact, that the discovery and adoption of this process marks (as we have tried to show) a distinct advance in social organisation, and stamps upon that organisation a character which it retains, in most cases, for long ages. Thus, we have deemed it convenient to analyse this organisation with some care, before proceeding to describe later economic developments which were afterwards fitted into it. For these later economic developments, though they modified the application of the pastoral system, did not, for a long time, destroy it entirely, or root out the principles on which it was organised. Thus we seem to be justified in treating of these later developments under the head of Patriarchal Society; though, in fact, they contained within themselves the germs of forces which were destined ultimately to supersede patriarchal principles. The two later developments with which we have now to deal are AGRICULTURE and CRAFTSMANSHIP. And first of agriculture, *i.e.* the process which seeks to satisfy the economic needs of society by tilling, planting, and reaping the soil.

Even if we did not know it for a fact, we might have conjectured that agriculture comes later than pastoralism in the normal scheme of progress.[1] Agriculture, even in its

[1] A vivid example, from quite modern times, is to be found in the economic history of white Australia. When the little Government settlements at Port Jackson and Sydney burst their bonds, and

earlier and ruder phases, demands so much more patience, foresight, self-denial, and, above all, hard physical toil—qualities by no means characteristic of early Man—that we might have been pretty sure that it would not have been adopted except under pressure. What was the nature of that pressure?

Surely nothing else but the primeval cravings of man—hunger and thirst. Pastoral pursuits suffer still (and in their early stages suffered still more) from three great drawbacks. In the first place, they are liable to sudden visitations of MURRAIN or RINDERPEST, and DROUGHT, which sweep away vast flocks and herds,[1] leaving the communities which have depended upon them face to face with starvation. In the second, this danger is intensified by the fact, that it is difficult to provide against it by accumulating great stocks of reserves in a form which will enable these communities to defy it. If we turn to the instructive story of Pharaoh's dream,[2] we shall find that the famine predicted by Joseph attacked both the KINE and the CORN. But there was no attempt to guard against it by making a reserve of cattle; the utmost that could be hoped for, obviously, was to keep alive the existing stocks out of the reserves of corn stored up by Joseph's plan. And the natural result of the contrast was the desperate resort to Egypt of the purely pastoral communities which surrounded her.[3]

In the third place, the very success of pastoral pursuits, whilst it lasts, tends to produce ultimate catastrophe, by stimulating the growth of population, and thus threatening

became free communities, the first spontaneous economic development was the great "squatting" industry of the interior plains. Then came the "selector," demanding land for the plough; finally, the craftsman of the towns.

[1] The history of Australia again illustrates vividly this danger. In a good season a "squatter's" stock may be worth £100,000. After a single season of drought, it may be worth next to nothing.

[2] Exodus, ch. xli.

[3] "Thy servants are shepherds, both we, and also our fathers" (Exodus, xlvii. 3).

the appearance of that familiar spectre which haunts the imagination of all economists, the "pressure of population on the means of subsistence." We can easily see how this would be so, even if we were not familiar with the stories of large patriarchal families, and patriarchal longevity. The improvement caused by it in the conditions of life would gradually increase the rate of reproduction (very slow in really primitive communities), and lengthen the average duration of human life; while the desire to accumulate labour, would, as we have seen, result in the sparing of captives and deliberate breeding from them. Over against this danger, it is particularly to be noted, that pastoral pursuits are extravagant in their methods. Of course there is no such thing as stall-feeding, much less "soiling," in early times; because the materials for such processes are not forthcoming. The flocks and herds are led about in the summer and winter pastures, cropping the wild grass and eating the land bare till the return of spring brings fresh food. There is no season of "autumn" under pastoral auspices. At the approach of winter, a large part of the cattle and sheep have to be killed and salted for human food; only sufficient numbers for breeding can with difficulty be kept alive, even in favoured countries, on such store of wild edible roots as can be collected, or some scanty provision of bracken or primitive hay. It has been calculated by an eminent economist, who spent a long life in the study of the original conditions of land-settlement in Europe, that an area devoted to agriculture will feed at least four times the number of people who could be maintained on the produce of a sheep- or cattle-run of the same size. It is probable that recent scientific discoveries in agriculture have even heightened this contrast. As a very picturesque phrase of the Irish *Book of the Abbey of Clonmacnoise* puts it, speaking of the seventh century A.D., and the substitution of agriculture for pasturage: "Because of the abundance of the households in their period" (*i.e.* of the sons of Aed Slane), "therefore it is that they introduced boundaries in

Ireland." [1] In these facts we can, with much probability, see the motives which ultimately led, in progressive communities, to the supersession of pastoral pursuits by agriculture.

But if we ask another equally interesting question: How was agriculture discovered? we are, as in the similar problem of the domestication of wild animals (pp. 37-40), thrown back on intelligent conjecture; and, as the problem is not directly in our task, we must not spend much time upon it.

As in the case of the earlier problem, the materials were there; it was only a question whether human intelligence could utilise them. Just as even Primitive Man knew that some wild beasts were good for food, so he knew that some wild fruits, seeds, and roots had a similar quality. What he did not know was, how the slow reproduction of Nature could be stimulated and improved by human effort. One theory suggests, that the offering of seeds and fruits as sacrifices (pp. 32, 64) to fetish-gods or deceased ancestors might have led to the discovery, as the seeds and fruits, left on the ground, sprouted and grew into corn and trees. Another suggestion is, that a store of wild yams or other roots might, in a damp winter, be found to have taken root and multiplied. The lesson would not be lost on the more quick-witted observers; and the prospect of such a welcome addition to the store of food would encourage efforts to repeat it. In all probability, agriculture was practised as a "by-industry" in many cases before a community had ceased to place its main reliance upon cattle- and sheep-breeding; and this may be our starting-point for a brief examination of the early stages of agriculture. For these will be found to throw a good deal of light on the progress of social organisation.

[1] The late Mr. Seebohm, the eminent economic historian, took this passage to refer to the transition from common to individual farming, afterwards to be noticed (p. 98). But, apart from the fact that there is no evidence of individual farming in Ireland at such an early date, it is difficult to see how it would solve the question of over-population.

In the first place, we must remember, that the customs and traditions of the tribal group would be unlikely to favour the breaking up of good pasture land for the uncertain prospects of a future crop. The rival claims of "pasture" and "arable" are very ancient; being, in fact, as we shall see, based on deep-seated class-distinctions. Inasmuch as barren and stony soil would be of little use to him, the tiller of the soil would inevitably turn to the great masses of forest and jungle, which, in fertile countries, precede and hamper the spread of agriculture, and which are useless to the shepherd and herdsman. But clearing the primeval forest by hand was, in the days when metal implements were unknown, an impossible process; and there is widespread evidence to show, that the early agriculturist made use of the extravagant process of burning the forest—an extravagance slightly modified by the fact that the resulting ashes would, though he probably did not know it, add to the fertility of the soil.

But, sooner or later, the primitive agriculturist would find himself up against a rule of Nature, known to scientists as the "Law of Diminishing Returns," by which ground cropped during a long succession of seasons with the same crop, gives each year a smaller and poorer yield. The modern scientific farmer knows, of course, the reason of this rule; for he understands the chemistry of the soil, and realises that it is impossible to go on drawing certain elements from it without producing exhaustion, unless provision is made to restore the lost elements. The primitive agriculturist knew nothing of this; and, if he reasoned about the matter at all, probably thought that the soil had been bewitched by some enemy,[1] or that he had chosen a bad patch of ground. In either case, his

[1] Even such a comparatively enlightened code as the Twelve Tables of Rome made provision against the bewitching of crops (*fruges incantassit*). The picturesque ceremony, still prevalent in conservative countries, *e.g.* Brittany, of blessing the fields, is a survival of the same idea.

natural remedy, though a troublesome one, was to clear another patch, and start again. This is the process known as "extensive cultivation"; and it is, of course, essentially wasteful,[1] because, almost before the ground is clear of stumps and weeds, it has become worthless and is abandoned, while all the labour of clearing begins over again. Nevertheless, it still prevails in backward countries; and it has just this merit to recommend it, that it fits in rather well with the wandering habits of a tribe of herdsmen, whose principal reliance is still on cattle and sheep, but who like to have a little agriculture in the background as a reserve.

It is, however, in time mitigated by the adoption of another improvement which may quite well have been the result of accident—probably was. Having burned off all the available forest, the despairing agriculturist may have resolved to try his luck again with an old clearing, abandoned years before as worthless. To his surprise, the land has recovered its fertility. Again, a modern farmer would readily understand why. During the period of FALLOW, the soil has absorbed from the sun and rain the elements which it had lost in bearing crops. To the primitive tiller, the idea is, that the spell or curse has been removed, and that he may now proceed again to crop the land indefinitely. But, once more, the rule of Nature asserts itself, and, again in despair, he returns to another old clearing, to find, to his delight again, at first, the same improvement, and, later on again, the same failure. Only very slowly would the true remedy dawn upon him. But, ultimately, it would; and thus, by circulating, so to speak, among a series of patches, he would give to each a period of work followed by a period of rest, or fallow, and thus lay the basis of a simple system of sound agriculture. This is, apparently, the precise stage reached by the peoples of Benin and Biafra, in the Hinterland of the Niger Coast,

[1] Miss Kingsley points out (*West African Studies*, pp. 342-3) that this process is not only extravagant in labour, but has, in some places, the very serious result of affecting the essential rainfall.

whose agriculture is vividly described by Miss Kingsley,[1] and who have, seemingly, already adopted, though in primitive form, that "three-field" system which, at a later stage, played such a conspicuous part in European agriculture. This second stage of agriculture is sometimes known as the "field-grass" system; because the abandoned or fallow patches yield, in all probability, a sort of rough pasture for the cattle and sheep of the tribe.

The third stage involves a much greater scientific advance; and, unfortunately, the writer is not aware that any adequate explanation of its origin has been offered. It is based on the great discovery, now, of course, familiar to every one, that, while a continuous series of harvests of the same crop on the same ground rapidly exhausts the soil, a changing of crops exhausts it less rapidly, because different kinds of crops draw different elements from the soil. In the absence of other suggestion, we can only assume that a community fortunate enough to have two or more different kinds of edible seeds to experiment with, gradually learnt the secret by a series of trials. At any rate, by the time that the authentic history of agriculture in Western Europe begins, we find the system of ROTATION OF CROPS fully established, though in a somewhat crude way. Later on, the adoption of scientific systems of manuring renders the wasteful method of fallows almost, if not entirely, unnecessary. But, by that time, the conditions of agriculture have entirely changed, as we shall see.

For long, however, at the stage which we have reached in our enquiry, agricultural society in Western Europe was divided as to the merits of the "two-field" and the "three-field" system of rotation; and, though the dispute is not, perhaps, strictly germane to the object of this book, it is so interesting, that a brief allusion to it may be forgiven.

In the "two-field" system, the land to be exploited is

[1] *West African Studies*, pp. 341-2. The whole passage is so interesting, that it is a matter of regret that limits of space prohibit its reproduction in full.

divided into two equal fields, say of 120 acres each; one to be cropped, the other to lie fallow, each year. The "course of husbandry" for a year would then be as follows. In the autumn and spring, field A would be ploughed, and sown with as many varieties of crops as were desired; during the summer, the fallow field would be ploughed twice (to get rid of the stubble) and left to lie fresh. Result, 360 acres of ploughing and 120 acres of crops for the year's work. Under the "three-field" system, the same area would be divided into three fields of 80 acres each, of which *two* would be under different crops and one lie fallow. If the same rule or "course" were applied as in the former case, the result would obviously be 320 acres of ploughing and 160 acres of crop—*i.e.* one ninth less ploughing and one third more crop. It seems to us difficult to understand how the more costly system could ever have held its own; and we can only regard it as a belated survival of the "field-grass" system (p. 92), and as taking inadequate account of the great principle of rotation of crops. Anyway, at the end of the Middle Ages, the "three-field" system, by which each field gets white crop, green crop, and fallow, once in three successive years, was almost universal in Western Europe; and we may regard it as the climax of patriarchal agriculture, though, as new varieties of seeds became known, it tended to expand into a "four-field," or even a "five-field," system.

This little excursus on the early stages of agriculture will not have been without its uses, if it has caused the reader to ask the natural question: "What has the primitive farmer to do with fields of 120 acres? A field of that size would, at the present day, tax the capacity of even a scientific farmer."

True. But the field of which we have spoken was not tilled by a single farmer. It was the field of a body of farmers working in COMMON; and thereon hangs its importance for our subject. For it is clear, both from direct and indirect evidence, that the typical village of the Middle Ages in Western Europe, and indeed of peoples in a corre-

sponding stage all the world over, was not, like the typical village of modern England or France, merely a *locality*, in which certain neighbours, who carry on their work independently, happen to live, but a COMMUNITY, carrying on its work as a single body of co-partners, governed by customary rules, to which all must conform. It is important, in view of a question to be subsequently discussed, not to put forward extreme views in this matter. There is no direct evidence of a time at which complete *collectivism*, as understood by modern idealists, prevailed; however much we may suspect that such a state of things at one time existed. But there is a good deal of direct, as well as an almost overwhelming amount of indirect, or circumstantial, evidence of the fact, that, at one time, one of the most important of the operations of agriculture, viz. PLOUGHING, was conducted on the co-operative principle; and there are abundant survivals, even in our own day, of the common uses of unploughed land.

The indirect evidence is furnished by what is, perhaps, the most unimpeachable, because the most unconscious, of all sources, viz. the parcelling out of the soil. For if we examine the *Terrier*, or ground-map of the arable fields of any village (and there are thousands of such maps in England alone) drawn up before the process of ENCLOSURE, hereafter to be alluded to (pp. 229-30), had taken place, the merest glance will reveal a state of affairs which, to modern eyes, seems so grotesque as to excite bewilderment or derision. Instead of a plan showing a moderate number of fields of various sizes, of which four or five, usually close together, arable or pasture, belong to each farmer, or "tenant," we find all the arable land of the village lying in three great fields, each divided into an enormous number of narrow strips, usually about half an acre in extent, or, at any rate, as nearly equal as the lie of the ground will permit. These strips are not, like modern fields, divided from one another by hedges or walls; but the whole area is occasionally intersected by terraces, or "baulks," of turf which serve for access to the open or "intermixed" strips,

on one of which baulks may be seen, perhaps, the village mill.[1]

Strange as this picture is to our eyes, it is nothing to the stupefaction which ensues if, as frequently happens, the plan, or "Terrier," is coloured to show the holding of a single farmer. For then we discover, to our amazement, that the farmer of the day on which it was drawn up held, not a compact group of these strips, but a series of perhaps 60, perhaps 120, perhaps even 240, strips, scattered over each of the three great fields, at considerable distances from one another. If, again, we are fortunate enough to get hold of a Terrier on which the holdings of all the farmers are shown side by side, we shall find that these are intermixed in apparently hopeless confusion; so that the whole thing looks like a Chinese puzzle, designed for the bewilderment of the student. And our first impression is, that a system of cultivation based on such arrangements is an elaborate device for wasting time and labour. Such, in fact, when its original purpose had been lost, it ultimately became. But, though we know that savages, and even barbarians, have little notion of the value of time, we know also that they shrink from unnecessary labour; and we cannot help thinking that we are here face to face with one of those SURVIVALS, of which human history is full, and which, if patiently examined, give us the clues to so much of the unrecorded past.

For, if we look a little more closely at the complete scheme of our map, we shall begin to see something of a method in the apparent madness. It is true that the strips of the different farmers are intermixed, "hide-meal and acre-meal"; but we shall notice that there is an order, or succession, of strip-holdings, which is regularly followed throughout the scheme. For example, if we call the different farmers A, B, C, D, E, and so on, we shall find that the order of the strips runs A, B, C, D, E, to the end of the list, and then begins over again with A, B, C, D, E, etc., and goes on, as before, to the end of the list, and then

[1] See Diagram A at end of volume.

begins again, until the field is covered; while a similar process is repeated in each of the three fields. Probably the scheme will not be perfectly regular; for accidental displacements will have happened in the course of centuries. But enough remains to set us thinking.

And then, again, further study will reveal the fact that, though there is not complete equality of holding among the various farmers, there is considerable evidence of a *scale*, in which one group will have holdings amounting in all to 30 acres, another (and smaller) group, of 60 acres, a third (still smaller) group, of 120 acres, and, finally, one much larger holder, known as the "lord," "seigneur," "thane," "Zamindar" and so on, according to the country and language. This is not quite chaos.

Now, as is well known to students, there are two explanations, given by rival schools of thought, of this extremely puzzling state of affairs. The one school regards it as the result of a parcelling out of duties among his dependants by the master of a slave gang, who is exploiting his land by their services. These students find its origin, in fact, in the Roman Empire, with its *latifundia*, or huge estates worked by slave labour, so patriotically deplored by more than one Roman writer; and they point, triumphantly, to the existence of the "lord" or "seigneur," and the undoubted claims which he everywhere had upon the services of the humbler farmers, as proofs of their theory. But, to say nothing of the fact that the system is to be found at work in countries, such as India, whither Roman influence never penetrated, and that the presence of the "lord" or "seigneur" can be accounted for by other well-known causes (p. 100), is it possible to suppose that any absolute proprietor would deliberately set up such a wasteful and absurd system? Moreover, there is another, and almost conclusive disproof of the theory, in the fact that, as we have already noted (pp. 76-77), the existence of the village or "manorial" custom binds the "lord" as well as the villagers, and often in singularly inconvenient ways. For example, it is a general

feature of English manorial customs that, though the timber on the land of the smaller farmers at least, and the minerals beneath it, belong to the "lord," yet he cannot enter on the farmer's land to cut the one or dig for the other, without the farmer's permission. No absolute owner would ever have allowed himself to be bound by such a rule; still less absolute owners generally. The theory of the Roman *dominus* in this connection is unthinkable.

The other school of thought regards the appearance of the Terriers as evidence of an originally co-operative, or, at least, co-ordinated system of cultivation, or even of exploitation, which was gradually being dissolved by a process of individualism, of which the "enclosure movement" (to be hereafter described) was the last stage. They point to the evidence of familiar language—the *commune* of France, the *Gemeinde* of Germany, the "common" of the English countryside—to the rare survivorship of communal officials—the "pindar" (or pound-keeper), the "parker" (or common-keeper), the "beadle," the "verderer," the watchman, and so on—[1] whose services were rendered, not to individuals, but to the village as a whole, and who were maintained by the common husbandry,[2] to the process, still surviving in some countries, of periodical redistribution or *re-allotment* of the strips which, doubtless, gives us the ancient law-term of *alod*,[3] or absolute property (as opposed to the *fief*, or land received from a lord on condition of rendering service), to the existence of the "homage" (pp. 76-77) with its powerful restraint on lord or seigneur, to the immemorial "custom of the country," which no man could break, to

[1] In later times these were nominated in the "vestry," which had taken the place of the old moot.

[2] In a sense, the parson was a village official, taking his tithe "as the plough traverseth the tenth acre."

[3] It is not a little curious, that the popular name for a modern small plot is an "allotment"; though there is no drawing of lots for it in most cases.

the village rights of church-way and "sports on the green," and, above all, to the great eight-oxen ploughs, for which the villagers supplied the cattle in shares proportioned to their holdings, so that, as Domesday Book puts it in one passage, "There is there one half-ox." [1] In the view of this school of thought, then, the original agricultural village is a group of co-operators, working, perhaps, under the direction of a chief, but treating the land as a common stock; ploughing, sowing, reaping, threshing, and storing by common effort, and, it may be, distributing the produce on a common plan. Then, with the growth of capitalist farming, so marked a feature of the twelfth century in Western Europe, the spirit of individualism begins to dissolve the COMMUNITY. The ancient ploughlands—the "common fields"—are divided up with rigorous accuracy into tiny strips; and these are distributed by lot amongst the members of the group in such a way that each gets his due share of good, medium, and poor land, and, further to ensure "equality of opportunity," there is a periodical redistribution by the same primitive methods. Each farmer then ploughs and reaps "his own" strips, *i.e.* those "shifting severalties" which will be his till the next redistribution; for the old heavy eight-oxen plough has been replaced by the more modern and lighter instrument, which the farmer's own two oxen can draw. Gradually, as the farmer begins to understand the increased value put into land by skilful manuring and cropping, he becomes more and more reluctant to give up his land at redistribution, and take over another, and, possibly, inferior holding. So, some day, the process of redistribution ceases; and we get the picture described above, of the holding dispersed with (as it seems to us) preposterous vagrancy over the arable area of the village. But there the individualising process stops; until it is completed by the modern ENCLOSURE MOVEMENT (pp. 229-30).

Moreover, the supporters of this view point to the un-

[1] *Ibi est semi-bos.* The problem would be solved by supplying one ox at alternate ploughings.

questioned fact, that this incomplete process of individualising barely touches the meadow and "waste" land of the village. Until the "enclosures" of quite modern days, the meadow was only parcelled out during hay-growth and hay-harvest. For the rest of the year, it was grazed by the villagers' cattle and sheep, in accordance with a "stint" or fixed allowance, settled by the size of their respective arable holdings. These are the beasts *levants and couchants* on the land, so well known to students of English land law. Over the waste or "common" (in the popular sense), there were no individual rights. It remained open and unenclosed during the whole year; and to it the villagers resorted for their wood and water, the turf for their fires, and their clay and stone, for the feed of their inferior animals—their swine, asses, geese, goats, and the like—and, it is to be shrewdly suspected, for the gratification of their primeval hunting instincts in coney-trapping and fowling. The typical medieval village was, in truth, a compendium of the three stages of economic progress which we have hitherto examined, viz. the hunting, the pastoral, and the agricultural stages.

And, if we regard this elaborate system as an artificial product, no doubt it will deserve all the criticism passed upon it by the vigorous opponents of the community theory. Conscious creation of institutions is hardly to be found among undeveloped peoples. But if we can show that it fits in, as the natural sequence of the older, pastoral, system as it stood at the period of transition, then we are fairly entitled to regard it as a development from patriarchal principles, modified by a change in economic circumstances. Fortunately, we are able to do this with the aid of evidence drawn from the British Islands.

In that fascinating collection of antiquities known as the *Ancient Laws of Ireland*, there is a vivid description of an important person known as a *Flaith*, who is, obviously, the head of a social group of various kinds of men—his *Ciniud*, or kinsmen on the male side, his *Ceile*, or men who have received from him cattle to graze out on the tribal

lands, and his *Fuidhir*, or strangers, whom he has collected round him, as captives or bondsmen. In order to attain this position, the Flaith must have been a rich cattle-lord, a *Bo-aire*, of three generations' standing; and he was evidently then just becoming transformed into a village lord, by the adoption of agriculture. There is a striking resemblance between the arrangements of his group and those of the VILLAGE COMMUNITY which we have lately been describing. The "Flaith" himself is, of course, the "lord" or *seigneur* (senior). His *Ciniud*, or free kinsmen, suggest the big farmers, the "whole-hide men," with a full holding of 120 acres or thereabouts, probably paying only just such trifling dues as are customary everywhere as gifts to a tribal chief. They may be the mysterious "socagers" of the English common law, or the "kindly tenants" of the Scottish *davoch*. His *Ceile*, who have received from him loans of cattle in return for a substantial part of the produce, may be the "half-hide men," the "steel-bow" tenants of Scotland. In later days, they will be substantially rented in money or labour dues. The *Fuidhir*, or strangers, suggest the "farthing-men" or "yardlings" of later times, the servile tenants who "know not in the morning what they must do before the evening," on their lord's "demesne" or "in-land"—who are, in fact, SERFS, though they have little holdings of thirty acres or so, "according to the custom," from which they extract a scanty living. It all looks very much like the *Bally* of the Irish Laws, which is, evidently, a pastoral unit just adopting agriculture "because of the abundance of the households" (p. 88), and, though, primarily, a "run" for 300 cattle, has also 12 *seisrighs*, or ploughlands, each of 120 acres.[1]

Finally, before leaving the influence of agriculture on social organisation, we must notice one important and rather tragic fact connected with it. When the tiller of the

[1] Finntann, *Battle of Magh Lena*. We need not take the poet's statistics literally. But he would hardly be likely to misrepresent obvious facts.

soil has discovered the secret of rotation of crops, and the value of proper treatment of the soil, he has anchored himself to the land, and will cling to it whilst life lasts. He has abandoned his moving tent, and built himself a hut of clay and wattles, or even, it may be, of timber and thatch. His "capital" is now no longer movable beasts, which can be hurried off to a place of safety if danger threatens. It is true, that even the pastoralist needs land for his livelihood. But he does not need *a particular spot of land*, without which he must perish. That is the tragedy of the tiller of the soil. That is it, more even than feudal restraints, which, in time to come, will make him *adscriptus glebæ*, a "villein regardant," as the Anglo-Norman common law puts it—a serf bound to the soil. In a very real sense, he has given hostages to fortune; and much of the great change in the organisation of society which we are shortly about to describe, is due to that central fact. But, before coming to that change, we must describe shortly the efforts made by patriarchal society to assimilate a yet more far-reaching development of human intelligence, viz. craftsmanship and trade or commerce.

CHAPTER VIII

COMMERCE AND CRAFTSMANSHIP

IT is very difficult to discover whether commerce or craftsmanship comes first in the order of social evolution. The root idea of both is EXCHANGE; but whereas, in the case of commerce, exchange, and especially exchange between two more or less separated communities, is the prominent idea, in speaking of craftsmanship, we think rather of the skill which goes to the production, or making, of artificial objects for use or ornament, though we realise that a developed and specialised craft is hardly possible, except upon the basis of a system of exchange. No doubt, as we have seen, craftsmanship may be said to have existed in the purely pastoral stage, in the making of cheese and butter, and the spinning and weaving of wool. But these were not highly specialised industries; rather were they supposed to be simple arts which could be acquired by any one prepared to take ordinary care. They were, as we say, "domestic industries," to be found in each household; and the same may be said of the arts of threshing, winnowing, grinding, and baking the corn, and brewing the malt, in the later agricultural stage. In reality, of course, there was exchange of *services* going on all the time; but no obvious exchange of *goods*. On the other hand, there is some reason to believe, that the exchange of raw materials, to which human labour hardly contributed, was known to some communities long before the pastoral stage had reached its full development, and before the elaborate system of agriculture described at the end of the last previous chapter, had been developed. We may, therefore, deal first with the beginnings of COMMERCE.

It is instructive to notice that, even among the Australian aboriginals (perhaps, on the whole, the most primitive

people whose conditions have been subjected to recent scientific analysis), there is something that may fairly be called commerce. Thus, a group which finds in its wanderings an unusually good supply of a certain green stone, greatly valued for making the heads of axes, will exchange it with another group for a surplus of highly decorative feathers, used in religious rites. There is a good deal of rather formal procedure attendant upon these transactions, which is rendered needful by apprehensions of danger in dealing with strangers. But the most vivid picture of early commercial intercourse known to the writer is that drawn by Miss Mary Kingsley,[1] in her summary of an account given by a Venetian traveller, Ca da Most(r)o, in the fifteenth century, of the salt trade between the Arabs and Moors of Northern Africa and the negroes of a district called by him "Melli," apparently somewhere between Sierra Leone and the Gold Coast.

According to Ca da Most(r)o, the salt was brought by the Arabs on camels from a place called Tagazza, by way of Timbuctoo, to Melli. There it was unloaded, on the banks of a "great water," possibly the Niger Joliba, and straightway arranged in separate heaps, each bearing its owner's mark. The merchants who had brought it then retired half a day's journey; and, when they were well out of sight, the negroes would approach and lay a quantity of gold on each heap, and likewise retire. The salt merchants, returning, would find the gold thus offered, and, if they were satisfied with the amount, take it up, and retire once more, leaving the salt to be fetched away by the negroes. If they were dissatisfied, they would leave both the salt and the gold, and retire once more, leaving the negroes to increase their offer, if willing. If not, after due delay, and possible further repetitions of the process, they would ultimately withdraw the salt, leaving the negroes to fetch away their gold after they (the salt merchants) had finally withdrawn. If this process seems a trifle tedious to the modern business man, he must remember that primitive people have no

[1] *West African Studies*, pp. 241-6.

notion of the value of time—do not, in fact, know what it means as an article of value.

The absurdities of this procedure should not blind us to its significance. Obviously, the feature which distinguishes it from modern commerce is the physical fear which one of the parties, at least, has of the other, and his extreme unwillingness to come into personal contact with his opposite number. This feature is strikingly illustrated by a story, which Ca da Mostro goes on to relate, of an occasion on which the Arab traders were ordered, much against their will, by their "Emperor," to seize some of the negro gold-bringers at all costs. They succeeded in carrying out their instructions; but, though they retained only one captive, and treated him (according to the account) with every kindness, he refused to speak, or to take food or drink, and incontinently died on their hands. After which, the "silent trade" was suspended for three years, to the dismay of the Arabs and their too inquisitive "Emperor." But, happily, the desire of the negroes for salt at length overcame their fears; and, in the fourth year, the trade was resumed. In a modified form, this "silent trade," Miss Kingsley assures us,[1] continues on the Guinea Coast to the present day.

Another feature of the transaction should be noticed. In spite of the somewhat vague language of the account, it is clear that the gold offered by the negroes was not in the form of COIN, *i.e.* there was no recognition of PRICE, which is defined by economists as "value expressed in terms of money." It was the older form of exchange known as BARTER. Nevertheless, it is difficult to believe that some rough estimate of a standard value would not be formed by even the less civilised parties to the transaction, or that this rough standard would not be made the basis of subsequent transactions. Accordingly, we are not surprised to find that a somewhat later traveller in the same district, Captain Jobson, who visited it in the seventeenth century, relates that a further stage had been reached in the "higgling of the market." The salt merchants who

[1] *West African Studies*, p. 248.

were dissatisfied with the gold offered for their heaps, would subtract from the heaps so much salt as was necessary to reduce them to the equivalent, in their opinion, of the gold actually offered, placing the subtracted heap away from the gold; and would then retire, to give the negroes an opportunity of considering the amended offer. If it were accepted, a rough equivalent of gold would be found added to make up the deficit; if it were refused, the whole of the gold would be taken away.[1]

Here we have, in primitive form, the essence of the FOREIGN MARKET. But another detail added by Ca da Mostro is of great interest. He tells us [2] that the salt, to be popular, had to be broken up into lumps capable of being carried by "footmen"—*i.e.* porters, who were furnished with cleft sticks on which to rest their burdens, and that these burdens were carried great distances in various directions, though he is vague on this point. He also tells us, that the gold received by the merchants went in various directions, which he specifies with some detail, including Cairo, Tunis, Morocco, and, ultimately, Europe, through the hands of European merchants who traded to the Barbary Coast. Thus we see, that this primitive foreign trade had already resulted in the establishment of some of those ancient CARAVAN ROUTES, which were one of the earliest means of spreading civilisation, and widening the area of social intercourse.

Incidentally, we may remark, before passing on to the next stage of commercial development, that these accounts, if trustworthy (and there is little reason to doubt it), and if they are typical, seem to give the lie to the view which regards commerce as a form of war. On the contrary, they afford the strongest evidence, that one of the first effects of commerce is to substitute peaceful for warlike intercourse. For it is tolerably clear that, had the parties met without its influence, hostilities would have resulted. The merchant is, in fact, the first messenger of peace between stranger peoples; and the ceremonial exchange of gifts which takes place on the approach of strangers in Oriental countries at

[1] *West African Studies*, p. 248. [2] *Ib.* p. 243.

the present day, and which survived in purely symbolic form in the gifts made by the "Houses" of stranger merchants (pp. 112-13) to the rulers of the countries in which they were domiciled, at Christmas and Easter, well into the Middle Ages, are testimony to this truth.

The only other point which it seems necessary to make at this stage is, to note the fact that the establishment of foreign commerce necessarily involves a factor which, in the future, will play a great part in economic life, viz. the factor of TRANSPORT. In all probability, for reasons before hinted at (pp. 103-4), the negroes who brought the gold in the transactions described by Ca da Mostro and Jobson, did not realise the existence of this factor. But the more civilised party, the salt merchants, would certainly not have undertaken the long and arduous journey across the desert, unless they had, in some fairly definite way, realised that there would ultimately be a PROFIT on the transaction, not, as in pastoral pursuits, in the shape of calves and lambs (p. 41), but in some more subtle form. And, in order to produce this profit, it would be necessary that the value of the gold acquired by them should exceed the cost in labour or goods, of acquiring the salt, at least by the cost, in labour and provisions, of the desert journey. Of course, to a modern economist, the factor of transport is also always present, even in trading between neighbours. But it is, there, of much less importance than in foreign commerce, and especially in the more elementary forms of home-trading which we must now consider. As we have previously suggested, these are brought into existence by the appearance of CRAFTS, or specialised industries. And these, again, owe their existence largely, if not entirely, to advances in the knowledge of METALS and metal working.

As we have before suggested, the first great advance in the economic development of mankind comes with the substitution of stone for wood in the fashioning of primitive tools and weapons. So clearly is this recognised, that the title of the Stone Age is usually given to the period by which it was initiated, and during which it remained the chief

material employed for such purposes. The ingenuity and patience implied in the vast collections of flint axes, hammers, and spear-heads, familiar to visitors of the great European museums, are considerable, and must have tended greatly to stimulate the inventive faculties of their makers. But the limits of stone for such purposes are obvious. It is not pliable; it is very apt to split in use or to become weather-worn; in proportion to its strength, it is heavy—a most important objection when artificial transport is unknown; in a word, its strength lies in its weight rather than its fineness. It is little wonder that Man eagerly welcomed substitutes if he was lucky enough to find them.

Apparently, the earliest successors of stone were the softer and more easily worked metals—gold, copper, tin, and ivory, which last is not, of course, a metal, but is like one in many respects, and was, in fact, used as a metal by the peoples who were able to obtain it from Africa and India. The valuable qualities of this group of metals are, that they are easily detached from their sources,[1] easily worked by the simple process of hammering, and are yet greatly superior in fineness (also in attractiveness of appearance) to the older material, stone. It is difficult to imagine stone helmets, corselets, greaves, or even shields (which probably made their first appearance in the form of skin targets), to say nothing of kettles, goblets, and other useful domestic implements. But we have abundant evidence that these useful articles were made of gold and copper, or, at a somewhat later stage, of bronze (a mixture, or alloy, of copper and tin), and that these products were regarded with much pride by their fortunate owners. The Homeric poems give us a vivid picture of a society at this stage of development; it was the stage which the Mexicans and the Peruvians had reached at the time of the Spanish conquest; and it is the stage of the Jews of the Exodus.

We can hardly doubt that, even at this stage, the influ-

[1] Most early gold and tin mining is, of course, alluvial. It was, probably, through the latter that the British Islands, or *Cassiterides*, became attached to the civilisation which grew up round the Mediterranean Sea.

ence of specialism would make itself felt. The "cunning artificer in brass" (the maker of the harp and cymbals, the hammerer of corselets and greaves) is not to be found on every bush; and there is, in fact, a good deal of traditional evidence to show that the crafts of the armourer and the musician, probably also of the maker of goblets and golden ornaments, had emerged before the appearance of the great discovery which was to revolutionise the world, viz. the art of working in IRON.

The superior qualities of iron, its intense durability and hardness, its abundance and consequent cheapness, are discounted by certain drawbacks, which probably account for its late appearance in the development of industry. In the first place, it is difficult to mine with primitive implements; and this fact may, possibly, have prevented its value being even realised. If this is so, we should look for the beginnings of the iron industry in South Africa, where great heaps of iron ore are found near the surface of the ground, in a state comparatively easy to work. In fact, there is a curiously persistent legend, that the art of working in iron, the art of the SMITH, was spread throughout Europe and India by wandering bands of people whom we now call "Gypsies," but who were, even in England, known officially as "Egyptians"; and, though Egypt is certainly not in South Africa, it is getting on that way, while the long distances which, as we have seen (pp. 103-5), are covered, in quite early stages, for the sake of acquiring that most primitive and essential of all minerals, viz. salt, should make us hesitate before condemning such legends as entirely untrustworthy. Moreover, the curious fact that, in comparatively recent times in Europe, the smith, or worker in iron, was not regarded as a member of the village group, but lodged on its outskirts, or even in a hollow on a distant moor, suggests, on the one hand, that instinctive dislike of strangers which is so marked a feature of early society, and, on the other, a desire to keep from prying eyes those valuable secrets of the trade,[1] which alone made

[1] See the widespread legends of the Wayland Smith.

of the travelling gypsy or tinker a welcome, if a somewhat suspected visitor.

Again, iron is not only difficult to win, it is difficult to work. The older and softer metals—gold, copper, tin—can be beaten out cold; though, doubtless, they also can be better worked after being partially melted or "smelted," and were in fact so worked before the advent of iron. But the latter can hardly be worked at all without being smelted; and smelting is a difficult art, which can only be carried on successfully with considerable co-operation of labour, and the development of high technical skill. The early discovery of that refined art of smelting which produces steel, or "northern iron," gave to Damascus a long period of wealth and prosperity, which made her the envy of surrounding peoples.

Once, however, the art of the smith had been discovered, the variety of the uses to which it can be put made it the prolific parent of other arts, and revolutionised society, by producing new classes of men who fitted badly into the older system of the village or tribal group, and ultimately gave rise to a new and final development of patriarchal society. The smith, apparently, kept in his own hands the primary requisites of agricultural life—the iron COULTER, or plough-share (which superseded the clumsy wooden plough, made by adapting a forked tree), the new iron sickle and mattock, in later days the harrow and wheel-rim. But the carpenter got from the smith his hammer, chisel, and nails, wherewith he wrought great improvements in the ancient art of working in wood; the tailor his shears and needle; the cooper his hoops; the loriner (or leather worker) his knife; and so on. Even the older, domestic, arts felt this tendency towards *specialisation*, though they owed little to the smith's craft; and we get the appearance of the crafts of the tiler, or thatcher, the weaver, and even the baker; though the last long remained also a domestic industry. One of the highest and most profoundly revolutionary developments of iron was the art of PRINTING in metal letters; but this, of course, came long after

patriarchal society had been superseded by a later stage of civilisation.

Meanwhile, however, the development of craftsmanship had given rise to the growth of TOWNS, or compact centres of population, engaged mainly in sedentary pursuits, though their inhabitants also carried on the more primary and indispensable work of cattle-rearing and agriculture as by-industries. There is much dispute as to the origin of towns; and their old English name of "burghs," or "boroughs," suggests a military object, for a burgh is a strong or fortified place. Be this as it may, the town is everywhere a centre of craftsmanship, a place to which the inhabitants of the surrounding pastoral and agricultural districts resort for their industrial requirements, as well as for the exchange of their own productions. These two purposes give us the key to the development of towns.

The craftsmen gathered together in towns, because the great increase in the output which followed from the specialisation which their crafts produced, made it impossible for each village to maintain a complete set of craftsmen. But this meant the break-up of ancient ties—the gathering around the common hearth or the village tree, the subordination of the Kindred to the House Father or group of elders, the strong blood bond, with its system of mutual help and responsibility. The craftsman of the town was, in a modified sense, an "outlaw," a unit expelled, or at least severed, from the ancient law of the tribe or clan. He naturally felt himself to be somewhat helpless and solitary; and he proceeded to form new social groups, as nearly as possible on the old lines.

This is the meaning of the GILD. It is generally assumed that the name, in Teutonic speech, is derived from the word *geld* (gold), the *gelt* of old English speech, which appears in the *wergild* (p. 81) and the "Danegelt" of the tenth and eleventh centuries; and it is suggested that the payment of a common money-contribution was the basis of the organisation. This view seems, however, to substitute the accidental for the essential; and there is a

good deal to be said for the less popular view which finds the origin of the term in the *galt*, or offering to the tribal gods in gratitude for the help believed to have been rendered by them to the worshipper, while the strongly religious character of the medieval gilds is well known.

Putting aside, however, the precise origin of the term, we may note that the earliest form assumed by the gild movement is that of the *peace* or *frith* gild, the association formed for the mutual protection of its members, which carries with it, almost necessarily, according to patriarchal ideas, mutual responsibility for their misdeeds. But, before very long, the gild assumed a strongly economic character, based, however, on the old principles of patriarchal society. All the members of the gild followed the same craft; and the gild was primarily concerned with regulating its conduct. Quality of goods, standards of labour and skill, hours of work, fixing of prices—all these were the primary concerns of the CRAFT GILD. How these regulations were evolved, it is difficult to say. Doubtless the more artificial character of the gild, as compared with the village or the pastoral group, involved a more conscious effort at *legislation*, or formal enactment of rules of conduct. But these would, in all probability, be based on the practice of its members, unconsciously evolved and imitated; and the well-known expression, "the custom of the trade," is a significant hint of the resemblance between the gild and the clan. Then, beyond the purely economic activity of the gild, we get its strongly religious and social side—its patron saint and its contribution towards the parish church in the way of stained glass and other adornments, its "elder man" (alderman) or chief, who is the father of the "brotherhood," its schools and almshouses for its weaker members, its frequent feasts or common meals, and its system of recruiting by *apprenticeship*, which is extraordinarily like adoption, for the apprentice lives in his master's house, feeds at his table, and, ultimately, succeeds to his master's workshop. Those who have studied the completeness which the gild organisation

had attained at the break-up of patriarchal society, will recognise that it had succeeded in creating, alongside the older group based on blood-kinship, a newer, but hardly less efficient organ of that society, determined by the interests of a common calling, but based essentially on patriarchal principles.

The same principles were at work in the MERCHANT GILD. This has been a puzzle to enquirers, who have found a difficulty in connecting it with the apparently more modern development of craft gilds. The old suggestion was, that the earlier and less specialised craftsmen of a town at first formed a single merchant gild, which afterwards split up into craft gilds, as specialisation made progress. With all respect, this is an impossible suggestion. The distinction between the merchant and the craftsman is clear from the first. The former is a transporter, concerned mainly, if not exclusively, with EXCHANGE; the latter is, primarily at least, engaged in PRODUCTION. Whether there was, in early days, a body of *native* merchants sufficiently numerous to provide each town with a merchant gild, may well be doubted. At any rate, the material for the study of the merchant gild is trifling compared with the mass of documents (published and unpublished) concerning the craft gilds. Again, we notice that such evidence of merchant gilds as there is comes mainly from *port towns*—Paris, Hamburg, Beverley, Hull, Dunwich, Southampton—while craft gilds were obviously spread all over the land in towns, and even penetrated into the country villages. Finally, we note that there is little, if any, evidence that the craftsmen lived in common houses, though they met for discussion and feasting at the common gild-hall of their town as well as in their own halls, while even the scanty evidence that we have of the merchant gild shows that its members often lived in a common house, or *hanse*, strongly fortified, monastic in character,[1] looked upon with considerable suspicion by

[1] An almost perfect specimen of the old house of the Hanseatic merchants survives at Bergen; and the evidence of the Hanse

the bulk of the townsmen, though the wiser among them realised its value. The inference is irresistible, that the merchant gild was a gild of FOREIGNERS, only tolerated on account of the indirect advantages which it brought to the town. It may be older than the craft gilds; it may have had a good deal to do with attracting the craftsmen to the town; it may even have occasionally succeeded in dominating them, and getting a share, or even the whole, of the control of the town into its own hands. But it is an alien institution; and it is not the parent of the CRAFT GILDS.

The other fundamental aspect of the ancient borough is the MARKET. If our view is at all correct, there would be two classes of persons resorting to the market, viz. the craftsmen, whose booths would be permanent workshops, or, at least, stores for the display of wares, though they might also work at their houses, each in its respective ward or gild section of the town, and the country folk, with their temporary stalls, set up and taken down on each market day. For, except in the very largest towns, there are special market days, fixed by ancient custom, or, later, by royal charter; and the peculiar privileges of market law only apply on those days, and only to transactions in the ordinary wares of the market, sometimes only to transactions done under the special witness of the officials of the market. Later on, the charges made by the town authorities for the use of the market—the "toll," and the "stallage and pickage"—were an important part of the municipal revenue.

The word "market" (*marché, markt*) recalls the special perils and difficulties of ancient trade. It is the "mark," or boundary, of the various districts which it serves; even in the town itself, it is usually at the junction of the ancient townships or parishes which, in the case of the bigger towns, were absorbed by its growth. This is a survival of the ancient nervousness which, as we have seen,

merchants in London (the Steelyard) has been fully described by Lappenberg (*Geschichte des Hansischen Stalhofes*).

was carried to extreme length in the case of the negroes of Melli (p. 104). Miss Kingsley states, as we have said, that,[1] in primitive countries, like West Africa, the "silent trade" survives, even in the native market, and that, as we have before mentioned (p. 33), the protection of the goods exposed for sale is left to the seller's Ju-Ju, or special fetish. In the more advanced markets of the West, the "peace of the market" was confided to the Church, whose symbol, the market-cross, is such a conspicuous feature of English country towns, or to the State, as in the little Harz towns, where the *Kaiser-bilder* symbolise the Imperial protection. And, of course, in these more advanced communities, as well as in the *bazaars* of the East, the chaffering of the market becomes distinctly vocal; and, if report speaks true, it includes a good deal of local gossip not strictly confined to business.

But, in Miss Kingsley's account of the native market in West Africa, there is another feature of great interest. She observes that, alongside the goods displayed for sale under the protection of the Ju-Ju, are to be found little heaps of cowries or beans, of no intrinsic value, evidently the primitive COINAGE of the district, which signify the PRICE demanded for each article. This is again a result of the drawing together of different, but not entirely alien groups, in the area of the market. The ancient method of barter had begun to show its obvious inconveniences; and a common standard of value was growing up, with all its inherent possibilities. In the ancient Laws of the Ripuarian Franks, we see a time when the *wergild* (p. 81) was still paid in goods, though the Code reckons them in terms of money. "If a man begins to pay a *wergild*, let him hand over a horned ox, unblinded and healthy, as two shillings. A horned cow . . . as three shillings. A horse . . . as twelve shillings. . . . A sword without a sheath as three shillings," and so on. In fact, the earlier community, the tribe or the village, had no need of money; for it was worked on a plan which was alike self-supporting and self-

[1] *West African Studies*, p. 248.

distributing. But the exchange of goods between different communities demands a "medium of exchange"; and the cowrie and the bean, the ox and the sheep, and various other objects, serve this purpose at different times. Still, the cowrie and bean are, after all, only tokens; they cannot be used as coins, unless the traffickers have sufficient faith in one another to accept them as the equivalent of goods. For more distant traffic, coinage of intrinsic value is required; and so the precious metals—gold, silver, bronze—are used, being at the same time universally valuable, easily transported, and readily divisible into various denominations or values, though, unfortunately, the crime known to moderns as "debasing the coinage" was early and widely practised, until a higher authority took over the task of minting the coins and giving them a standard value (pp. 243-44). But the origin of many coins in the necessities of barter is shown by the fact that, in their earlier forms, they bear the impress of the ox or sheep for which they were exchangeable; and, until quite recent times, there was in familiar use a Frisian coin known as a *schaap* (sheep). Moreover, before even the precious metals assumed their present form as coins, passing by *tale* (counting), they went through an intermediate stage when they were reckoned by *weight*. The English word "pound," which may mean either a sovereign or a pound weight, is a survival of this stage; and any one who compares the lists of Hebrew coins and weights to be found in a good annotated Bible, will mark a still more complete parallel. A *gerah* is equally a twelve-grain weight, or a coin worth about a penny and a third of our money. A *bekah* is a quarter of an ounce, or a coin value about one shilling and twopence; a *shekel*, a half ounce, or a coin worth about two shillings and fourpence; and so on, through *manehs* to *talents*.

Finally, as the crown of the new order, we find that the gathering together of the gilds in the town results in a new social development of the highest importance, the CITY or self-governing municipality—the "borough" in the modern English sense. Not all the towns achieved this

distinction; but, where gild organisation was strongest, it gradually took over the entire management of urban life, establishing its customs as the local law, keeping outsiders at arm's length, levying imposts upon its inhabitants or *burgesses*, for the discharge of common burdens, holding its own courts of justice, manning its own walls, negotiating on equal terms with kings and nobles, and exacting from them charters of liberties, finally, evolving a system of government under an elected head or MAYOR, a college of ALDERMEN (the heads of the respective gilds within the town), and a COMMON COUNCIL, chosen in their ward or gild meetings by the ordinary gildsmen. The plan was not, of course, uniform for all cities; because each had its own history, its own struggles, and its own opportunities. But the self-governing municipality, or borough, was the highest achievement of patriarchal principles; and, after a dark period of repression, it gallantly took up the struggle for freedom against the newer ideas of absolute rule which produced the institution of the State. If it had its weaknesses, as it undoubtedly had, it triumphed in the end; for it was founded on the undying principles of brotherhood, freedom, and voluntary co-operation, as opposed to subordination, regimentation, and compulsory service.

Before leaving our enquiry into the nature of this far-sweeping patriarchal organisation, which has played so large a part in the shaping of human society, we may, perhaps, briefly point out the chief features in which it differed from the stage of society which succeeded it, and with which we are instinctively more familiar.

In the first place, then, it was, unlike the modern nation, based upon kinship, real or fictitious, rather than on locality; or, to put it in another way, it was PERSONAL, rather than TERRITORIAL. Of course this was only completely true of its earlier stages. In the pastoral stage, it was, broadly speaking, entirely true; and even the earlier phases of

agriculture did not destroy this feature, though the gradual adoption of INTENSIVE AGRICULTURE, and, finally, the settlement of the craftsmen in towns or cities, ultimately caused it to disappear. It is to this personal conception of society that we, probably, owe the somewhat misty "race theories" of modern speculation. Where these are not the instinctive convictions of peoples still in the patriarchal stage, they are survivals from that stage.

In the second place, as an almost necessary consequence of its personal basis, patriarchal society is EXCLUSIVE. It has no lust for numbers; that comes with the military theory of the "big battalions." Even the settled village fights strongly against the *homo migrans*, or wandering stranger, who wishes to settle within the sacred circle. The result is a big struggle, of which we shall have to say something later on (pp. 227-28). Needless to say, the gildsmen of the town were strictly jealous of their privileges, and would admit no one to their membership, or brotherhood, except by the fictitious descent of apprenticeship, which is a species of ADOPTION, and which, in all probability, in many cases, only affirmed a natural paternity,[1] or, at the least, by the costly process of "buying his freedom." The notion that any one could acquire land where he happened to find a seller, or could open a shop in a town without leave asked, would have horrified a patriarchal farmer or a gildsman; and it is possible that the institution of *suburbs*, outside the ancient city walls, is due to this jealousy in excluding strangers from the privileged area of the city.

In the third place, patriarchal society is not COMPETITIVE. Its life was based on CUSTOM, binding all alike, and fixing the scale of social duties and rewards. Ranks and classes indeed there were; and individuals might pass from one to another, but only by custom and order. A son under "power" became himself a House Father by the death of his ancestor; an apprentice became, on completing his

[1] It has been suggested, for example, that the hereditary *castes* of India were originally based on distinctions of calling. At any rate, there is a strong connection between the two things.

service, a journeyman, and, in due course, a "master" of his craft, ultimately, it might be, the alderman or chief of his gild. But not by his own pushing or striving—still less by any attempt to rival or thwart his fellow-gildsmen, or to take advantage of their weaknesses. If he attempted to set up a "multiple shop," he was pilloried as an "engrosser" (it is sad to think that the modern harmless, necessary "grocer" is descended from a member of the criminal classes). If he attempted to "corner the market" by buying up supplies, he was punished as a "forestaller"; if he held back his goods to enhance prices, he could be dealt with vigorously as a "regrater." Nor were the simpler cases of bad workmanship and cheating at all neglected by gild action, as the maker of bad bread and the user of false weights found to his cost; for the standards of these were fixed by the "assizes," or solemn sessions, of the gilds.

Finally, patriarchal society is characterised by a feature for which it is very hard to find a name, without being misunderstood. If one were to call it CELLULAR, that would, perhaps, best convey one's meaning. It was a series of concentric groups, beginning with the single household, ascending to the village or gild, finally to the tribe or city. It was COMMUNAL, not necessarily COMMUNISTIC. Each man was a member of a definite group, beyond which his immediate concerns did not go; and each group was allied by ties of blood or sentiment to other groups. Interdependence, rather than independence, was the ideal. The modern policy of *laissez faire*, or individual freedom—crudely expressed by the maxim: "Every man for himself, and the Devil take the hindmost"—was wholly alien from the principles of patriarchal society. It is, in fact, the philosophy of anarchy; and patriarchal society, despite its occasional outbursts of violence, was very far from anarchic. Its danger rather was, that it tended to repress individual effort, and restrict the free play of intelligence. The freedom of patriarchal society meant the freedom of the group, rather than the freedom of the individual.

PART III

POLITICAL SOCIETY

CHAPTER IX

THE BIRTH OF THE STATE

WE now enter upon the third, and, for the present, final stage of social development, in which all the more advanced communities of the world are living, and which the modern historian generally assumes as the basis of his study.

If we put aside, as too obscure for safe generalisation, the causes which led to the earlier settlement of Europe by the Greek and Latin tribes, and the Gauls, and the even more mythical traditions of an earlier migration from the continent of Africa, as well as the mysterious circumstances attending the formation of the great ancient Empires of the East—the Chinese, the Egyptian, the Babylonian, the Assyrian, the Persian, and the Macedonian Empires—and the modern and brilliant Oriental Empire of Japan, we know for a fact, that the modern State owes its origin, as we have before suggested, to the immigrations and conquests of the peoples which, in what we call the "Dark Ages," broke into and overthrew the vast Empire of Rome. That is to say, in the formation of the modern State, the conspicuous immediate causes are the closely related facts of MIGRATION and CONQUEST. It is possible to conceive of the two things apart. For example, we may have a migration, like that which colonised Australia or Western Canada, in which the element of forcible conquest is almost absent; or we may have a conquest, such as those which created the Scandinavian Kingdoms, in which there is little, if any, trace of migration. But, in the great majority of cases, the two facts are contemporaneous and intimately connected; and they stamp their impress on the whole of political institutions, which are essentially

MILITARY in character. For it is obvious that a migrating host, unless it finds before it an absolutely uninhabited country, or a country whose inhabitants are too timid to resist expropriation, will have to fight for its existence; and it is also highly improbable, that a patriarchal society, with its loose federation of tribe, clan, and household, its easy yoke of custom, and its non-competitive life (pp. 117-18), will submit itself to the severe and searching control of the State, without a desperate struggle. It is, therefore, to improvements in the art of warfare that we must look for the emergence of the State.

The historian Gibbon, whose knowledge of this period was profound and philosophical, has pointed out how comparatively easy it is, for a leader of genius, to convert a pastoral tribe into an invading host. No fear for his house and standing crops ties the pastoralist to a single spot of soil. His wealth goes with him, and provides him with food and drink on the march; while, in the actual day of battle, it is hidden away in the folds of the hills, in the charge of his women, till the danger is overpast. His movable tent affords him shelter on the march; the tent has been, in fact, until but yesterday, a conspicuous feature of every military campaign. The long night-watches in the fold have inured the herdsman and the shepherd to hardship and privation. He has learned to ride the camel or the horse; in his fights against bear and wolf, who would raid his flocks, he has practised courage and watchfulness. Accordingly, we are not surprised to find, that most of the western-tending migrants who broke up the Roman Empire—the Arabs of the South, the Turks of the East, and the Teutons of the North—were pastoral peoples. The Arab, save in the narrow confines of Arabia Felix, tilled no fields, but fed his cattle and sheep by the waters of the oasis. The Turks of the Altai, though their special gift appears to have been an early acquaintance with the possibilities of iron (of no small value in military affairs), soon assumed the leadership of the other Tartar tribes, who were essentially pastoral communities. Cæsar's well-known remark concerning the

Teutonic tribes which threatened the eastern march of Rome is, that "they do not practise agriculture" (*agriculturæ non student*); though, a generation later, Tacitus, another Roman historian, shows us agriculture in its primitive stages among the Germans. But the most striking proof of the inferiority of pastoral to agricultural communities, from the military standpoint, is the ease with which the Arabs overthrew the Egyptians, the corn-growers of the ancient world, the Teutons the agricultural provinces—Italy, Gaul, and Spain—of the Roman Empire, and, less known but even more striking, the victory of the shepherd Tartars (the Turks, the Huns, and the Bulgarians) over the more civilised but less military agriculturists of the Slav peoples—the Poles, the Serbians, the Greeks, and the ancient settlers in European Russia.

Another very striking feature of the conquests of this period is the adoption, by the migrating hosts, of a new type of religion—the third, or universal type, to which we have before referred (p. 61). The reason of this is not far to seek. Success in battle lies with the big battalions; and, in order to get big battalions, it was necessary to weld together related but more or less independent tribes or clans. There is, in fact, a fairly obvious, but, unfortunately, obscure stage, between the patriarchal and the political stages of social evolution, which deserves, in the light of subsequent developments, more consideration than it has received. This is the stage of the League of Clans. It has been pointed out by an acute and learned French historian, the late M. Fustel de Coulanges,[1] that, if we compare the tribal names attributed by Cæsar and Tacitus to the Teutonic groups which they regarded with considerable apprehension, with the names which appear, four or five centuries later, in those valuable monuments of antiquity, the Barbarian Codes, we shall notice certain significant changes. The later names are more comprehensive. The "Franks," the most powerful of all the invading groups, include Salians, Ripuarians, Ampsivarians, Sicambrians,

[1] *L'Invasion Germanique*, pp. 297-9.

Chamavians; possibly, Thuringians. The "Saxons" include the Chauci and the Cherusci; the "Alemanns" (*allemands*), the Quadi and the Hermonduri. But there is a deeper significance in the new names. They are MILITARY in character. The "Frank" is a wanderer or warrior; the "Saxon" a swordsman (*Sahsman*); the "Alemann," a stranger, *i.e.* an invader. The sub-groups may be the old pastoral tribes; the larger groups are more, they are leagues of warriors.

But, to achieve such a union, in the face of religious and social differences, must have been no easy task. As we have said, patriarchal society is easy-going, ill adapted to submit to the discipline and precautions necessary to successful military operations. Only a very powerful influence will bring about this result. One would have supposed, that the necessity for self-defence would have been such an influence towards union of the communities attacked. Unhappily, if we except such somewhat doubtful cases as the Armorican League in central Gaul, which offered a certain amount of feeble resistance to the invading Franks of Clovis, there is very little evidence of any such result. On the other hand, it is abundantly clear, that the acceptance of a new religion of the universal and proselytising type, was an enormously powerful influence towards union of the invaders. Under the banner of Mahomet, with his gospel of the One God, and his fierce alternatives of conversion, tribute, or the sword, the Arab tribes, welded together in one powerful host, fought their way from the Persian Gulf to the Atlantic, and, under Mahmoud of Ghazni, carried the terror of Islam into the plains of central India. The Turks, who had imbibed the same faith from the Abbaside Caliphs of Baghdad, swept over Asia Minor, overthrew the tottering remains of the Roman Empire at Constantinople, surged through the Balkans, and hammered at the gates of Vienna. The Hungarians and the Bulgarians broke away from their parent stem, and accepted different forms of Christianity; but most of the Moslem kingdoms still retain the faith of the Prophet.

The turning-point in the fortunes of the Teutonic invaders was the conversion of the Franks to Christianity, followed by the long series of missionary wars against the surrounding "heathen," which at last seated Charles the Great on his Imperial throne, and gave him the mastery over even his Christian kindred. A similar conversion of the scattered groups of invaders in England—the East, Middle, South and West Saxons, the Jutes (in Kent), the East and Middle Angles—was a powerful influence towards the making of the English State, first under the fluctuating "Bretwaldaship" of a federal league, finally under the unity of the rule of Ecgberht.

But we have to notice one significant, though often overlooked, difference between the ways in which the two unifying religions of Christ and Mahomet were adopted. Broadly speaking, the Mahometan States adhered to the older, patriarchal form, in which the offices of priest and secular ruler were in the same hands. Mahomet was both High Priest and General. His successors, in all Mahometan countries, were both Caliphs or religious chiefs, and Commanders of the Faithful. A split in religious doctrine (and there were many in Mahometanism) meant also a split in politics. To this day, religion and politics in Mahometan countries are one; the Koran is both religious guide and secular code. Not so in Christendom. In spite of the fact that European Christianity, in strange contrast with its Eastern beginnings, was adopted first by rulers and afterwards by their subjects, that Western kings received their crowns from bishops, and that a close alliance existed, especially in the Byzantine survival of the Roman Empire, between Church and State, the two offices of King and Priest remained always distinct; though occasionally, in feudal days, bishops were also secular potentates. In the councils of rulers, no doubt, archbishops and bishops sat side by side with earls and thanes; and some of the Barbarian Codes mix up religion and law in a manner which we should think strange. Still, the distinction was always there; and it tended to widen as the years went on. This

tendency was by no means always urged from the side of the State; it must never be forgotten, that the first movement towards separation between Church and State in Western Europe, came from the vigorous and successful efforts of Pope Hildebrand and his successors down to Innocent III., in the eleventh, twelfth, and thirteenth centuries, and that the Protestant Reformation did but accelerate the tendency from the other side. On the other hand, a split in politics did not, as in the countries accepting the creed of the Prophet, mean a split in religion. The unwieldy Empire of Charles the Great split into the modern States of France, Germany, the Republics of Italy, and the petty Kingdoms of Spain, later into the practically independent States of Austria, Bavaria, Saxony, Prussia, and so on. Yet the unity of Christendom remained, until it was riven by the religious Reformation of the sixteenth century; though its unity was, very significantly, symbolised by the DOUBLE headship of Pope and Holy Roman Emperor.

The full meaning of this difference between Christendom and the Mahometan world has, perhaps, never been studied; and it would be rash to attempt to summarise in a phrase its full effect. Nevertheless, its influence in setting free the idea of the State to work itself out in many directions, can hardly be over-estimated. For religion is, and always must remain, despite the desperate attempts to make it local at the time of the Reformation, a *personal*, not a *territorial* matter; while, as we shall see, one of the most important effects of the development of the State was to make it TERRITORIAL. In fact, the sole and exclusive authority of the State within a defined area, the basing of allegiance and citizenship on birth within the territory of a State, the rigid demarcation of territorial boundaries between different States, are among the essential principles of State life, as we understand it. Religion remains personal; politics have become territorial. We speak of the religion of Christ, but of the " law of the land."

Leaving, however, for the present, the consideration of this distinction, we return to another marked feature

resulting from the migrations and conquests which gave birth to the State. This was the increasing specialisation of the military art.

In a sense, no doubt, a patriarchal community recognises the liability of all physically capable members of the community to fight for its life and possessions against hostile attack, under the leadership of its tribal chief. This idea may be seen reappearing in the universal MILITIA SYSTEM which covered Western Europe after the noise of the invasions had died down, which was revived and systematised by Charles the Great on the Continent, and by the English and Scottish Kings in their systems of *fyrd* and *wapenshaw*. The word *fyrd* is suggestive. It is the *going* (" faring ") of the host on the trek; just as the *mil-es* (or soldier) is the " thousand-goer " of the Romans. We can, in fact, hardly fail to see, that an elementary sense of prudence would involve strict order and discipline on a migration through unknown and (presumably) hostile country, which would result in emphasising these military qualities. But we have plainer evidence, in the " blood brothers " who formed the bodyguard of Mahomet, in the companions (*gesiths*) of the Teutonic leaders, who fought with stoical fury around their chiefs, so picturesquely described by Tacitus, and in the " huscarls " of Knut, that there grew up, in the midst of the patriarchal society of the tribe and clan, a new nobility, chosen for their personal qualities by the war-chief, devoted to him alone, dependent on his bounty for their maintenance in peace, and practised continually in the exercises of war. These men were the predecessors of the mailed knight of later days, the earliest professional soldiers of the new order, and for long its mainstay and support. We see them in the Barbarian Codes, protected by the triple wergild, carrying out the orders of their lord with ruthless severity, gradually replacing the older blood-nobility of the tribe and clan—the Agilolfings of Bavaria, the Asdings of the Vandal tribes, the Aescings of Jutish Kent, the Amali and the Balthi of the Goths, the various Ealdormen of the Saxon shires. They, in their turn,

gathered around them humbler followers, the men-at-arms of the Norman host, who fought around them in the battle, as they around their lord. To their lords they were servants, the "King's thegns" of whom we read so much in the Old English Laws; but, to the mass of the community, they were lords, or, at least, leaders. They set the tone of society, and gradually converted it to the new ways. As "counts" and *land-ricas* (rulers), they guarded the peace of their districts. The supreme examples of the new profession were the Mamelukes of Egypt, and the Janissaries of the Turkish Sultans, those captives who, by an infamous compact with the decaying Eastern Empire, were drawn from the youth of the Balkan peoples, and trained, by a rigorous discipline in military arts, to form the irresistible armies of the Turk. As strangers and captives from alien races, they had no part in the ancient order of the tribe or clan; but the Turkish State rested upon them, as a house upon a rock.

At the head of this new military order stood, of course, the supreme chief of the primitive State, the KING. As previously hinted, the term "King" is patriarchal; the "King" (*cyning*) is the "child of the kin." But the office was new; though it had taken upon itself an old title. It was the host-leader of the migrating band, the *dux* of Tacitus, the *hendinos* of the Burgundians, the *heretoch* of the English invasions, the half-mythical Hengists and Horsas, who, as their names imply,[1] are symbolised (in a fashion which reminds us of primitive "totemism") as the weapons of war. The old tribal chiefs owed their positions to their age, their noble blood, and their presumed learning in the customs of the tribe; but, even before the great change came, we see the beginning of the new movement in the Tartar "Khan," or war-lord, the Scottish and Irish "Toisech," and the Welsh "Dialwr" or champion, chosen, doubtless, simply for their valour. Probably at first the host-leader was only a temporary ruler, like the Roman Dictator; but the migration and

[1] Hengist = battle-axe; Horsa = war-horse.

conquest made him an *institution*, the embodiment of the new State. Where warlike conditions gave place to settled order in the new land, he gradually lost his purely military character, and took on more and more of the tribal chief, in place of the old chief who had, quite likely, not shared in the expedition, but had remained in the home-land. Thus, for example, his office became largely hereditary, instead of, as at first, doubtless, purely elective, by a sort of rough popular acclamation. But it was long before its elective character was wholly lost; and the fiction of election was maintained to the end in the case of the Holy Roman Emperor, the would-be successor of the Cæsars (" Kaisers ") of Rome, and the faint image of Charles the Great. In truth, the typical title of the Head of the State is not that of " King," but the martial title of " Cæsar " (" Kaiser," " Tsar "), or that of " Emperor," *i.e.* Imperator, a commander of armies.

We have alluded before to the change which came over the character of society in the TERRITORIAL character of the State. This feature was, of course, not fully revealed until the fluctuations of the migration had ceased, and the migrating host had settled down finally upon its conquered lands. For a considerable time, the rulers of Western Europe continued to call themselves by tribal names—Kings of the Franks, of the Bavarians, of the Visigoths, of the English, and so on; and we have seen (p. 83), that there was a considerable period in European history (roughly speaking, the sixth to the ninth centuries) when law was almost as personal a thing as religion. But then came a significant change. As the shifting puzzle of the invasions settled down, the rulers began to call themselves after their *territories*, not after their *peoples*. They became " Kings of France," not, " of the French "; " Dukes (*Herzogs*) of Bavaria," not " of the Bavarians "; " Kings of England," not " of the English." This change was, no doubt, largely due to the gradual fixing of boundaries which had taken place, largely to the gradual intermingling of blood among the various peoples which owned allegiance

to these rulers, but, perhaps, most of all to the fact, that the newly conquered districts were inhabited by a people deeply committed to the fixity of intensive and settled AGRICULTURE. During the long peace of the Roman Empire, Europe had become, with its fertile soil and temperate climate, one vast agricultural area, broken only by occasional forests and wastes. This was, in fact, the rich prize which had tempted the invading hosts. Unable or unwilling themselves to practise the patient arts of the husbandman, but aware of, or at least suspecting, the wealth stored up in the vineyards and fields of Europe, the Eastern tribes had pressed westward, pushing before them the hardly more civilised Teutons, and settled down, like a swarm of locusts, on their rich prey. No permanent State was ever built, unaided, by an invading host, or even by a pastoral tribe; the State, itself, though, as we have said, intensely military in character, cannot live unless it imposes itself on a solid basis of permanent agriculture, which will supply its needs by wealth drawn from the fruitful soil.

Thus we see that the infant State was really dual in character. It was, as we have said, military in its conception; even its conquered subjects were absorbed into it by the tie of military obedience and service, though there was an intermediate period during which the peasant, or *villein* (villager), by that time reduced to a state of bondage, was not permitted to serve in the host. Ultimately, however, his value was recognised; and other duties were found for him in the social scheme. This was the great unconscious problem of internal politics with which the State started upon its career; and the way in which it was solved determined the character of early political institutions. The various attempts to solve it, and the long struggle which took place between the rival principles of the old and the new society, in the various fields of social development, will be the theme of the succeeding chapters. Before concluding this chapter, however, we must point to one other feature in which the new society, the State, differed from the older society which preceded it.

This was in its COMPETITIVE character. In summarising (pp. 116-18) the leading features of patriarchal society, we saw that it was, essentially, based on *custom*, not on individual rivalry. This was its character, in pastoral tribe, agricultural village, and craft gild. A customary society cannot be competitive; because in it each man's place is ordered for him, his duties prescribed, his share of the produce settled, by immemorial user, sanctioned by at least quasi-religious authority. Traces of this order survived into the newer epoch. The Roman historian remarks, that the Germans of his day fought in clans and families (*familiæ et propinquitates*); and in tribal society there are all sorts of claims to particular positions and duties on the field of battle. So long as any trace of patriarchal arrangements survived in military affairs, for example, during the League of Clans period formerly alluded to (p. 123), such claims were, doubtless, often heard.[1] But war is a stern business; a host-leader cannot afford to be sentimental. The successful warrior, especially the successful invader, is the man who knows how to invent new devices for dealing with new dangers. He cannot afford to rely upon custom and tradition, as the opponents of Bonaparte, the Man of the Revolution, found to their cost. More than that, he must seek eagerly for ability wherever it shows itself, regardless of rank and blood. That also was part of Napoleon's success. He "knew a man when he saw him"; his judgment of individuals, as distinct from nations, or communities, was almost infallible. His marshals and generals were drawn from the ranks; but they "made hay" of the high-born leaders of the Imperial armies, which had almost forgotten that they were armies at all. Thus the new State, essentially military in character, owing its origin, in fact, largely to improvements in the art of war, started with a strongly individualist character,

[1] The change from a tribal to a royal army is probably indicated in the story of Benhadad's war against Ahab (see especially 1 Kings, xx. 14, 17, 24). The result was not a success in that case; but for that there were reasons.

by pitting one of its members against another, praising the rivalry of comrades, each of whom strove to exceed the other in deeds of valour, glorying in tournaments and other fierce competitions, scattering rewards with a lavish hand as the prizes of distinction, utterly contemptuous of all appeals to custom, and claiming absolute obedience to the word of command. No greater contrast can well be imagined, than that between patriarchal and early political society.

Finally, before leaving the subject of the primitive State, it is, perhaps, advisable to draw attention again to a distinction touched upon in the first chapter of this book. The writer there insisted, that much confusion of thought was the result of a failure to distinguish between different things which were often called by the same names; and he suggested, that the way in which to keep a true and level-headed attitude towards the State, was to think and speak of it as an INSTITUTION, or group of institutions—that is to say, as part of the machinery by which a certain type of society, called a Nation, gets its political work done. So, unquestionably, the State has been in Europe for many centuries; so it has always been in North America, Australia, New Zealand, and other countries, which were colonised by settlers to whom the State was perfectly familiar as an institution.

But this was not so with the peoples who laid the foundations of modern Europe. They were peoples in an early stage of development, who had little idea of the future of their enterprises. They knew that they were warriors on the trek, with a vision of great cities and rich lands before them. Probably they had a fairly definite idea that, after hard fighting, they would settle down under some arrangements which would give them a good time at the expense of their conquered subjects. They were prepared to fight; they were not prepared to work, if they could help it. The typical scheme of their settlement is that of the Burgundians, each of whose warriors was quartered, as a " guest," on some wealthy provincial, of the produce of whose estate

he took two-thirds, leaving the remainder to his host; and, with some variations, this kind of arrangement lasted, all over Continental Europe, during what we call the "Dark Ages."

It is, however, one of the distinguishing marks of the invasions of Britain by the bands which afterwards became the founders of England, that they had not merely to conquer, but to cultivate the invaded country. So bitter was the struggle between them and the earlier inhabitants of the land, that these latter were either killed off, or driven, slowly and stubbornly, into the hills and valleys of Strathclyde, Wales, and Cornwall, leaving their former homes vacant for the conquerors. Much future history lay in this fact; meanwhile it is sufficient to notice, that it made the basis of English civilisation, despite its superficial differences of place and race, more *homogeneous*, or uniform, less like a series of different strata, than any other in Europe, save only the Scandinavian, and thus made of England, despite the Norman Conquest, a true national kingdom, whilst other European communities were still travailing in the birth-throes of the State.

Thus it is justifiable to speak of the primitive State as a society; for it was simply a band of warriors under a military leader—Clovis and his "antrustions," Rurik and his Varangians at Moscow and Kieff, Norman William and his "barons." But, as time went on, and the host-leader became the King, as the band of warriors settled down as the lords and rulers of their fiefs, as hereditary succession to office and title became recognised, as the gatherings around the host-leader of his foremost warriors, in planning the campaign or battle, developed into the Council of Peers for discussing the affairs of the realm, so the State began to assume, in varied forms, the character of an INSTITUTION, a piece of machinery which maintains a perpetual existence, despite the deaths of kings and barons. The State has never been, in the British Empire, at least, a CORPORATION or legal person; though it has shared many of the features of that most useful, but limited

notion.[1] It has, for many ages, been something much more than a PERSON, natural or legal; and it has never recognised the limitations which restrict the powers of a corporation. Sometimes we speak of the *Crown, i.e.* the office inherited by succeeding Kings, as a corporation; though this is a practice of doubtful authority. But the Crown, though the supreme institution of the State, is not the whole of the State, at any rate not in constitutionally governed countries. The famous boast of Louis XIV. of France—*L'État, c'est moi*"—might have been true of the France of the seventeenth century. Happily, it was never true of the British Empire, or even of any considerable part of it; and the student of history will not fail to note that the answer to the boast of Louis XIV. was the French Revolution. There is, however, another, and much more modest claim of the French royalists, which exactly expresses, with the usual skill of the French tongue, the true situation of the British Empire. "*Le roi est mort; vive le roi*"—The King is dead; long live the King. The monarch is both a human being and an institution. The State is an institution only; its character changes, but it never dies, save in the throes of social dissolution.

We have now to devote a brief chapter to that picturesque phase of development which, in Western Europe, as well as in some Oriental countries, bridged the gap between the primitive, purely military State, and the modern national State. This phase we call by the vague name of Feudalism.

[1] In the light of subsequent reflection, the writer desires to modify the expressions used on p. 70 of his *Law and Politics in the Middle Ages*. They are not, he believes, positively wrong; but they may be misleading.

CHAPTER X

THE STATE AND FEUDALISM

THERE is no phase of social evolution which has been the topic of so much writing and speaking, as feudalism. On the one hand, it has been the subject of indiscriminate praise by those who regret the advent of the conditions which have overthrown it. On the other, it has been denounced by those who welcome the new conditions, and regard them as infinitely superior to the institutions which they have replaced. On the one hand, we have appeals to the "chivalry" of the feudal system, the kindly relations between superior and inferior which it is supposed to have fostered, and the courteous and picturesque features of the life which it produced. On the other, we have denunciations of "feudal arrogance," of the spirit of patronage in the social superior and servility in the inferior, of the principles of landownership, the relation of landlord and tenant, which it did undoubtedly establish. By some historians, feudalism is regarded as the ideal of political society, binding all ranks together with ordered links of protection and service. Other writers denounce it as a disintegrating force, which tends to anarchy and the decay of the State. There are elements of truth in all these views; but they nearly all suffer from an imperfect grasp of the true part which feudalism has played in the development of political institutions. And, as the writer of these pages believes that he was the first, in this country at any rate, to suggest the true position of feudalism in the scheme of that development,[1] he may, perhaps, be permitted to repeat that, in his view, feudalism represents a compromise

[1] *Law and Politics in the Middle Ages*, pp. 310-11; *Short History of Politics*, p. 80.

between purely patriarchal and purely political society. It is the result of a conflict between the principles of the two systems, in which neither is completely victorious; and, historically speaking, it bridges the gulf between the two systems. Naturally, therefore, a study of it comes immediately after a description of that powerful institution, the State, which, as we have seen, rises on the horizon of patriarchal society, and threatens to destroy it altogether.

But, before we proceed to set out and explain the distinctive features of feudalism, we must accept a challenge which will, undoubtedly, be thrown down by those critics who deny entirely that the study of history can be based on evolutionary principles. It will be said by these critics, that there have been many States which have never passed through the feudal stage. That is, of course, quite true; but again, the writer must ask leave to point out, that he has never claimed to enunciate laws of social development which operate with the mathematical precision of inanimate Nature. The moral sciences, unlike the physical sciences, are statements only of *normal*, or average, tendencies. They are true in the given circumstances, though not universally; they represent *tendencies*, not, necessarily, accomplished facts. Thus, a writer who regards feudalism as a normal phase of political development is unmoved by the undoubted fact, that the Grecian and Roman States seem never to have passed through it. For he remembers the very limited area of the largest of the Greek States, and the fact that the Romans had thoroughly worked out their conception of State life, both in theory and in practice, whilst they were little more than a people occupying a few square miles of territory on the banks of the Tiber; and he realises that the influences which produce feudalism do not operate in such small areas. But he must face criticism from another quarter, which points to the absence of feudalism in such vast States as those of Arabia under the Prophet, Alexander of Macedon, Egypt, the Turkish Empire, and Persia, with their satraps, their emirs, their beys, and their khedives. Here again, however,

he will be unmoved; for he will remember that it is just these vast military Empires, whose governments do little more for their subjects than levy tribute and service, that have contributed little to the science of political progress. And he may even ask himself, whether the subjects of these barbaric Empires might not have enjoyed a happier fate, had they been able to interpose, between themselves and their despotic rulers, something of the mitigating influences of feudalism. At any rate, the reader will, it is hoped, feel, that a phase of society which has played so great a part as feudalism in the histories of Western Europe, India, and Japan, deserves more than a passing word.

In the first feature of FEUDALISM, the tie of military allegiance, or *fealty*, we shall readily recognise the influence of the new order. As we have seen (pp. 121-22), the essence of the State is military discipline, while the essence of patriarchal society is kinship, real or fictitious. All students of feudal institutions are aware of the prominence in them of the oath of fealty or allegiance, the forms of which were carefully regulated by law. The refusal to render it was the surest ground of suspicion; the breach of it was regarded as the supreme crime, the crime of TREASON. And no punishment was too severe for the traitor, or betrayer of his lord.

But the tie, as its alternative name of *ligeance*, or "loyalty," implies, was not a mere one-sided submission to authority. Submission by the vassal implied protection by the lord. Some feudal systems even recognised a formal right of repudiation by the vassal whose lord had ceased to protect him. It was, also, a strongly personal tie, reminding us of the intimate connection between the war-chief and his companions or *gesiths* (p. 127). In the later days of feudalism, when its original purpose had been forgotten, a *seignory*, or lordship, could be treated as property, and alienated as such by the lord, at will. But all feudal systems bear traces of a time when such a transfer was not possible without the consent of the vassal, or (as he was later called) the "tenant"; which consent was expressed in the *attornment*, or turning over, of the tenant to his new lord.

Again, the essentially military character of feudalism is plainly marked in the character of the SERVICES originally rendered by the vassal to his lord. In the later stages of feudalism, when it had become a system which covered almost the whole of society, these services were of various kinds—military, civil, agricultural, and even religious. But the true and original fief or FEUD was, as historians are never tired of reminding us, granted on condition of the render of MILITARY SERVICE, or, as it is often called, KNIGHT-SERVICE—for the aristocratic character of early feudalism is marked by its restriction to the armed horse-soldier, the chevalier (from *cheval*, a horse), whence its name of CHIVALRY. At first, too, the amount of military service which the lord might demand from his vassal was unlimited; but one of the weak points of feudalism, from the military standpoint, was, that, at any rate in Western Europe, the amount of such service which could be demanded of the vassal became strictly limited by custom, or even by express law, in proportion to the value of the fief or holding in respect of which it was rendered. This development had, in fact, as much as anything else to do with the decay and disappearance of feudalism. For, with the improvements in the art of war resulting from the introduction of gunpowder into Europe in the fourteenth century, a military commander came to have less and less use for the mailed horseman, whose terms of service rendered it almost impossible for him to make use of the new weapon, and who, at the expiry of his forty days of service, calmly abandoned the campaign until the following year.

There were also disputes about the distance to which the feudal vassal was bound to follow his lord to war, the kind of weapons he was to bring, the number of his retainers or men-at-arms, and so forth, which, combined with the influences previously mentioned, ultimately destroyed the value of the feudal array, caused the kings of feudal countries to bargain with their vassals for money payment ("shield-money," *scutage*, *escuage*) in lieu of personal service, and ultimately led to the establishment of paid

armies of "soldiers," men who "took the shilling" (*solidus*). Thus the State reverted once more to its original character of absolute military rule; but the intervening stage is decidedly interesting, for it shows that the pure military principle of unquestioned obedience to command could not be suddenly imposed by the State, as a permanent principle, upon people previously unfamiliar with it. In that respect then, even the feudal tie of allegiance, essentially military in its origin, shows the influence of that compromise between political and patriarchal ideas, of which feudalism was the expression.

This is not a book on legal history; and it is not necessary to discuss here those other incidents of the feudal relationships with which lawyers are familiar—the *aids*, or casual payments made by the vassal to his lord on occasions of special need, the *wardship*, or claim by the lord to the custody of his vassal's infant heir, the *marriage*, or right to dispose of that heir in matrimony, to the lord's profit. These incidents are suggestive; for they inevitably recall some of the features of patriarchal organisation (pp. 54-55). But a few words must be said of that extension of feudal ideas which, as has been previously hinted (p. 138), applied them, somewhat clumsily, to the non-military elements of society.

This extension resulted from the principle known as SUB-INFEUDATION. Originally, as we have seen, the tie of military allegiance was a direct tie between the host-leader, or King, and the individual warrior. This characteristic remained strongly marked to the very end of the feudal system, even after its political meaning had been lost, and it had become merely a system of land law. Not merely did the original *Grafs* (or *comites*) of Charles the Great take the oath of fealty to him; but, even in much later days, a marked distinction was drawn, irrespective of wealth, between the "tenants-in-chief" of the Anglo-Norman Kings, and their under-vassals, and between the *un-mittelbar* (direct) and the *mittelbar* (subordinate) vassals of the German Emperors, between the *fiefs* and the *arrière-*

fiefs held of the French Kings. The direct tenants-in-chief, or "barons," alone attended the councils of the King; they alone took the oath of fealty to him; and, most important of all, they alone, in most countries, could be directly summoned by the King to serve in the feudal army. The under-vassals, those knights and men-at-arms who, in imitation of the King's direct vassals, had sworn fealty to the latter, recognised only the summons, or "ban," of their direct lords. As the phrase ran: "The King has the *ban*, but not the *arrière-ban*"; and, though this maxim was but rarely accepted, fully and openly, by the kings, it did, in fact, govern the practice in nearly all the feudal countries of Western Europe, especially in France, where it was substantially admitted in the "Establishments," or code of laws, attributed to St. Louis IX., in the thirteenth century.

The consequences of this maxim were serious. Not merely did it prevent the King summoning his feudal host secretly and promptly, and render difficult the conduct of his campaign; it made possible what was, perhaps, the greatest scourge of the feudal epoch, the existence of PRIVATE WAR. For, if the under-vassal would only acknowledge a summons to the host from his immediate lord, it followed naturally that, when that summons came, he had to answer it promptly, without any too severe questioning about its object. Again, as a natural consequence, he often found himself led to battle, not against the King's enemies, but against the vassals of some other lord, with whom his own had a quarrel. or even, it might be, against the King himself. This practice inevitably reminds us of that BLOOD-FEUD system between rival kindreds which patriarchal society, as we have seen (p. 81), struggled so hard to put down; and we shall hardly do wrong in ascribing it to a survival of patriarchal ideas. But its continuance was, of course, fatal to all political progress; and we are not surprised to find, that all the best rulers of the later Middle Ages strenuously strove to suppress it. But they were only partially successful; and the feuds of Burgundian and

Armagnac devastated France, as the feuds of Welf and Waiblingen devastated Germany, and the feuds of Montague and Capulet devastated Verona, till the Wars of Religion came almost as a relief. Thus we can realise the wisdom of Norman William when, in the England of 1086, he summoned before him at Sarum, " all the landowning men of property there were over all England, *whosesoever men they were*," and made them take direct oaths of fealty to himself; for he thus destroyed the most dangerous feature of feudalism, and saved his newly won conquest from the fate of France and Germany. Doubtless there were days, as in the weak reign of Stephen, when the cherished right of private war raised its head in England; but they were, happily, rare. And the steadfast adherence of the strong Kings, like Henry II. and Edward I., to the policy of the Oath of Sarum, had much to do with the early and striking development of political institutions in England. Hardly less important was the stress laid by the Anglo-Norman Kings on the ancient duty of universal military service for defence—the MILITIA system of which we have already spoken (p. 127); for they thereby maintained, alongside the turbulent feudal array, a powerful army of civilian troops, dependent directly on the Crown, marshalled by the Crown's officers, and, by its very composition, opposed to the license and disturbance of private war.

We have, however, suggested, that the influence of feudalism spread far beyond the ranks of the professional soldier, until, in fact, it covered almost the whole of social arrangements; and we must now show how this happened. We shall best do so by turning to the second of the great conspicuous features of feudalism—the BENEFICE, or fief (*feudum*), which gives its name to the system.

Much ingenuity has been expended in speculating as to the original meaning of the word "fief" or "feud." The latter form of the word obviously suggests the old blood feud (p. 80); but there is no reason to believe that there is any direct connection between the two uses of the term, though it is possible that they may have a common origin. The most

probable suggestion appears to be, that the word is derived from the old Teutonic *fioh* (the modern German *Vieh*), meaning "cattle"; and this view again reminds us of the practice described in the ancient Brehon Laws of Ireland (p. 100), by which the *Bo-aire*, or rich lord of cattle, loaned out stock to his *Ceile*, or dependents, receiving from them part of the produce as return or RENT. And it may also be, that the *blood feud* derived its name from the common crime of cattle-raiding, which would certainly be a very frequent cause of it.

At any rate, the process described in the Brehon Laws agrees strikingly with the purpose of the benefice or fief, the essence of which is the loan, for a longer or shorter period, of a valuable object, on condition of some render for the use of it. It is the common view that, in the feudal system, this object was invariably LAND; but that is a mistake, especially if by "land" is meant landownership, in the modern sense.

For it seems unquestionable, that, in the first instance, the fiefs of the Carolingian Empire were not so much grants of land, as grants of *rule* or *jurisdiction*. The first Frankish Empire, the line of the Merovingian Kings, had fallen, in a hopeless attempt to keep up the centralised government of the Roman Empire, of which it pretended itself to be the direct successor. When that attempt had resulted in a break-up of the Frankish power, the restorers of the Frankish rule, Charles Martel, Pepin the Short, and his son, Charles the Great ("Charlemagne"), had, very wisely, seen the hopelessness of the attempt to revive the Roman system; and, though they established certain valuable central institutions (such, for example, as the periodical visits of their *missi*, or legates, which originated the system of judicial circuits), they did not attempt to rule their vast Empire, which stretched from the Ebro to the Danube, directly from their capitals at Monza or Aix-la-Chapelle. They entrusted the government of the various districts which owned their sway to their *Herzogs* (Dukes), *Markgraves* (Marquises or boundary-keepers), or their *Grafs*,

their companions or *comites*. These officials, the founders of the later European nobility, were the real rulers of the land; and, though they took the oath of fealty to their over-lord, collected his dues, and furnished soldiers for his army, they expected, and probably received, but little interference from him, so long as their districts were fairly peaceful, and the due quotas in men and money were rendered.

At first, no doubt, these appointments were intended to be of a temporary nature, at most for the joint lives of the Emperor and his grantees. But it would, obviously, have been very difficult and impolitic for a new ruler to disturb the appointments of his predecessor at the beginning of his reign; to have done so would have been certain to provoke the doubtful issue of a rebellion. On the other hand, upon the death of a distant marquis or count, the first news received would probably be in the form of a petition from one of his sons, asking to be confirmed in his father's office; and though, at first, a consent was, probably, quite optional on the part of the Emperor or King, only given on payment of a substantial sum (the "relief" of later feudal law paid by an heir in succeeding to, or "taking up," his ancestor's estate), yet, as time wore on, it would come to be regarded more and more as unusual to refuse such a petition on payment of a reasonable "relief." Thus the office, or fief, of the count or marquis would become HEREDITARY, and, probably, hereditary by way of PRIMOGENITURE; though the practice was by no means uniform in this respect, especially on the Continent of Europe, where the titles of the nobility, and, under a system of "appanages," even their estates, long remained inheritable by all sons.

By these means, the great feudal noble found himself at the head of a considerable district, in which he had, probably, large "demesnes," or private estates (possibly derived from the original plunder of the Roman Empire), but of which he was, for the most part, rather ruler or LORD, than proprietor, in the modern sense. Quite naturally, he

endeavoured to imitate the process among his subordinates, by the process of *sub-infeudation*, already described (p. 139). In many cases, no doubt, these subordinates were his own companions or followers—his "viscounts" (*vice-comites*) or *viddmes* (*vice-domini*, under-lords); in other frequent cases, he would grant by charter, or, as the English phrase put it, by "book" (*boc*), districts to one of those great monasteries which, founded in the dark days of the break-up of the Roman Empire, had since emerged from their obscurity, acquired vast wealth by their enlightened systems of sheep-farming and agriculture, and become noted for their admirable management of the estates conferred upon them by the piety of wealthy landowners. Or, finally, he would persuade the petty lords of villages (pp. 96-98) to COMMEND themselves to him, *i.e.* to make a fictitious surrender of their lordships to him, to be received back as fiefs, or benefices, on conditions of fealty and service. By such processes, repeated in successive gradations, arose the great hierarchy of feudal estates, or holdings of land and jurisdiction by real or feigned grant from a superior, tenable only on condition of the regular render of fealty and service, and liable to FORFEITURE on failure of either. Thus was evolved the great doctrine of LAND TENURE, worked out with special completeness in England, until although, as we have seen (p. 141), England was less thoroughly feudalised in one important respect than the Continent, yet, in some others, it was, at any rate so far as legal theory was concerned, the most completely feudalised country in Christendom. For there, so late even as the fifteenth century, a great English lawyer could boldly claim that the maxim: "No lord, no land" (*nul terre sans seigneur*) was universally true in his country, though it was by no means universally true in the land of its birth, or even in Germany, where, alongside the feudal estate, or fief, there existed the *alod* (*alleu*), the old patriarchal allotment of the village peasant—his FOLKLAND,[1] or land

[1] The theory of the nineteenth-century writers, that "folkland" means the land of the "nation," or folk, has been shown to be baseless.

held by ancient customary folk-law, as opposed to the BOCLAND, or land granted by "book" or charter, on terms of feudal holding.

But, as has been hinted, one striking feature of feudalism was, that it did not cease with the military class. Its influence was extended throughout the whole of social life. In addition to the *fief noble* of France, the *Edelgut* and *Rittergut* of Germany, and the "knight's fee" of England, we have the holdings of the French *rôturier* and the English "socage tenant." Mysterious as is the precise meaning of the latter term,[1] we know that the socage tenant was a "free-holder," a man whose holding was protected, not merely by the custom of the manor (p. 77), but, like the knight's fee, by the common law of the King's Courts. These men were, probably, the descendants of the old *Ceile*, or stockholders, who formed a dependent but substantial class between the "kindly tenants" and the serfs or unfree men. Either by "commendation" (p. 144), or by some more forcible process, these men were worked into the feudal scheme. Then came the great mass of the peasantry, the actual tillers of the soil—the "copyholders" or customary tenants of English law, the *Bauer* of Germany, the *mainmortables* of France. Their only protection, as regards their holdings, was the manorial court of their lord, with its local custom, which defined the services, mostly of an agricultural character, which they owed to their lords. In the early days of feudalism, they were personally unfree, bound to the soil, subject to many disabilities, such as the *merchet*, or bridal fee, payable to their lords on the marriage of their *neifs* (*nativæ*), or daughters born on the soil. Probably, at first, they were not regarded as "tenants" at all; but, gradually, their personal status rose, and the servile taint was transferred to their estates, which were then said to be held "at the will of the lord according to the custom of the manor, and at the customary works and

[1] The term "soc" (*soke*) means jurisdiction; but whether the "socager" was a man having jurisdiction, or a man under jurisdiction, seems to be obscure.

services," later commuted for a "quit," or compounded, rent.[1] Thus the ancient village community became the MANOR of the later Middle Ages, with its hierarchy of ranks and courts.

Further, the principles of feudalism were extended to the clergy, a numerous and wealthy class in feudal days. The great ecclesiastics, the bishops and the heads of the religious houses, were direct tenants-in-chief of the Crown; and, as we have seen, often received grants of jurisdiction in return for military service, not, of course, necessarily rendered in person, though some of the more martial prelates showed little reluctance to appear in arms. But many of the clerical estates had really been given in "free alms" by pious donors; and these were with difficulty brought into the feudal scheme by the fictitious tenancy of *frankalmoign*, in which the duty of the vassal was discharged by a general care for the spiritual welfare of the lord or donor. The same idea was extended to the estates of the "inferior" clergy, whose "benefices" were supposed to be held of their patrons, lay or ecclesiastical; the Christian law against simony forbidding them to render material services in return for their endowments. The famous "contest about investitures," which raged between Church and State in the eleventh and twelfth centuries, turned on this point, and was accentuated by a steady attempt, on the part of the great prelates, to convert their military estates into the easier tenure of frankalmoign. To this day, the conferring of a "benefice" on a parish clergyman, no less than the appointment to a bishopric, is full of archaic survivals of feudalism.

Finally, though with less completeness, feudal principles made their way into industrial life. Broadly speaking, the internal affairs of the gilds (pp. 111-12) were beyond their influence. But the municipal life, which, as we have seen

[1] The great event which completed, or, at least, powerfully stimulated, this tendency, was the Black Death of the fourteenth century, which swept away huge numbers, and broke up the manorial system of forced labour.

(p. 116), was often built up on the basis of the gild system, was brought within it. The cherished aim of every industrial town, to have a *commune*, or corporation, that guarantee of self-government, was jealously watched by the Kings and their great vassals; and could only be effectively secured by the grant of a CHARTER, for which a substantial rent, known as the "ferm of the borough" (*firma burgi*), was steadily exacted. Any failure to pay it resulted in a forfeiture of the cherished privileges which it conveyed; any breach of its terms by the burgesses, much more any display of disloyalty to Crown or lord, resulted promptly in its withdrawal, and a revival of the ancient claim to *tallage*, or tax without mercy, its burgesses, as serfs who had no legal rights. On the other hand, by the offer of an increase of rent or "ferm," the borough might secure an improved charter, giving it more powers of self-government, more security for its ancient customs, more privileges against the "foreigner" or outsider. Thus, under feudalism, the vigorous and powerful towns flourished; even if the feebler and poorer decayed. The wealthy borough was, of course, an even more tempting, if less easy, prey to the despoiler, than the plodding farmer. But, secure in protection of King or lord, who, if he often attempted to plunder his burgesses, for that very reason refused to let any one else do it, the chartered boroughs, on the whole, realised the benefits, rather than the evils, of feudalism. Some, like the Italian Republics of Venice and Florence, even threw off the feudal yoke altogether, and maintained a sturdy defiance of their former lords. Others, like Milan and Padua, converted their "Dukes" into quasi-paternal rulers, who strongly recall the tribal patriarchs.

Leaving till a later stage the judicial side of feudalism (p. 170), one of its strongest features, we may now endeavour to sum up, very briefly, the merits and defects of the feudal system.

In the first place, as has been before suggested, it bridged over a somewhat awkward gulf between patriarchal and political society. Owing to the circumstances of the

barbarian invasions—the example of the Roman Empire, and the brilliant conquests of the Franks—the first attempts at State life in Western Europe were too ambitious to succeed. Despite the excellent roads of the Romans, many of which fell into decay during the period of disturbance, the mere physical difficulties of communication rendered effective control of a vast Empire from headquarters impossible. The first Frankish Empire, as we said (p. 142), perished in the attempt; and the second, that of Charles the Great, only saved itself by a resort to feudalism. The smaller vassals of Charles and his successors, the counts and viscounts, even the marquises, were, at first, State officials; but the greater potentates, the Dukes of Bavaria and Swabia, of Burgundy and Aquitaine, of Lombardy and Benevento, were really the old tribal chiefs in a new dress, and mark the connection between patriarchal and feudal institutions. Their adherence, and that of their tribes, to the central authority, could hardly have been secured in any other way. In the small kingdom of England, the difficulties were not so great; and that is one reason why feudalism in England was, so far as its political influence was concerned, a comparatively small thing. So also, when the unwieldy Empire of the Franks at length broke up into the smaller independent States of France, Germany, Lombardy, Aragon, Castile, and so on, the feudal system became an anachronism, a real disintegrating force, which the rulers of these States strove, with only partial success, to put down. As with all institutions, its merits depended largely on circumstances.

Undoubtedly, also, feudalism tended to maintain, and even to accentuate, the class distinctions, with their privileges and disabilities, which it inherited from the older systems. Very marked is this tendency in the privileges of the military class, especially in the exemption from taxation which the nobility enjoyed in France and Germany, long after the reasons which originally justified it had passed away. In theory, the service the nobles rendered to the State was military; it was argued that it was unfair to

expect them to pay taxes as well. Such an example spreads; and we are not surprised to find the clergy claiming a similar exemption. In England, the bold policy of William the Conqueror (p. 141) and his successors, cut the ground from beneath this argument. Consequently, it was easier there for the Crown to resist a similar claim by the clergy. The feudal privilege also enabled the Continental nobility to claim the exclusive control of the commissioned offices in the army, long after the rank and file of the army had come to be composed of mercenaries, or, later still, of national levies. The dangers of feudalism in the matter of private war have already been explained (p. 140).

Finally, it is extremely difficult to say how far feudalism can justly claim any of those refining and artistic results which we vaguely class together under the name of CHIVALRY. In so far as it succeeded in maintaining order during a period prone to anarchy, it did, undoubtedly, smooth the path of the priest, the musician, and the poet; though it did so at the cost of maintaining serfdom, and, thereby, of accentuating the class distinctions above alluded to. By its tournaments and martial display, its system of heraldry, its affection for brilliant armour and weapons, its inculcation of courage and loyalty, it did, apparently, establish a picturesque ceremonial, and a code of honour, which were favourable to the spread of poetry, history, painting, and the finer crafts. Yet there is a somewhat artificial and superficial air about the artistic side of feudalism, as if the artists themselves only half believed in their work. We may well question, whether the future of art and literature was not safer in the hands of the painters and sculptors of the Florentine Republic and the Netherland towns, the poets of the country-side, like Piers Plowman and Walther von der Vogelweide, and the outlawed preachers, such as John Ball, Wiklif, and Hus, than with the heralds and the jongleurs, the courtly bishops and romancers, who crowded the castles of the feudal nobles. It is a terribly sarcastic picture which the author of *Don Quixote* draws of the last days of the feudal system.

CHAPTER XI

EARLY POLITICAL INSTITUTIONS

WE have now seen how the State in its earliest shape—that of a war-chief resting for support on a band of professional warriors whom he had led to conquest—had been, at any rate in Western Europe, unable to establish itself permanently in that simple form. After the immediate strain of the conquest was over, and the exceptional qualities of the host-leader had ceased to be essential to the safety of his followers, these latter had insisted on being allowed to deal with their plunder more or less as they liked; while the survival of the older type of society among the conquered inhabitants had also been a formidable obstacle to the continued exercise of purely military authority by the nominal ruler. The result has been seen in that curious system of compromise known as feudalism, which we have attempted to describe in the last preceding chapter; and we cannot altogether regret this development, for, as we shall see later, it did undoubtedly contribute to the conception of the State in Western Europe many useful elements, which have been lacking in the more rudimentary States of the East.

Nevertheless, the usefulness of feudalism has narrow limits; and it is difficult, if not impossible, for real political progress to be made while feudal ideas hold sway. We have now to see how, in Western Europe, the birthplace of modern political institutions, the State revived in its older form, definitely challenged the continuance of the feudal compromise, finally overthrew it, and started on that career which has made it the most powerful, if not the most beneficent, factor in the social life of to-day.

From a political standpoint, the greatest failure of feudalism was its inability to perform the task which it was specially organised to achieve—viz. to protect the community from external attack and internal disturbance. This task was, as we have seen (pp. 137-38), of the very essence of the feudal bond, with its allegiance ("loyalty") of the vassal, given in return for protection by the lord. When the feudal lord failed to protect, his *raison d'être* was gone. He became a mere oppressor, demanding onerous services from his vassal or "tenant," and rendering nothing in return. The theory of the lawyers, that the tenant owed his benefice or estate to the original bounty of his lord, desperately as it was worked, failed to satisfy what we should now call public opinion; because it was, as we have seen, opposed to the facts, and known to be so opposed.

Of this failure of feudalism, there can be no manner of doubt. The revival of the State in Western Europe occurred in the tenth and eleventh centuries; and it was unquestionably due to a danger which at first seemed destined to destroy it, viz. the renewed attacks upon Christendom by the surrounding "heathen"—the Northmen, or Normans, from the north, the Huns and other Tartar tribes from the east, and the Mahometan power of the south. Before these fierce attacks, the feudal Empire of the successors of Charles the Great reeled in dismay; it seemed as though the Dark Ages were at hand once more.

The situation was saved by a movement which would, to modern minds, seem most unlikely to command success; but which, owing, perhaps, to the want of cohesion among the attacking forces, did, undoubtedly, avert the danger. The unwieldy feudal Empire of the Carolings dissolved into smaller States, in which, though feudal ideas still played a large part, we can see that their day is definitely ending, and that they will ultimately fall before the determined attacks of a stronger power. This is the origin of the modern State of France, of those little kingdoms (Leon, Aragon, Castile, Navarre) which, afterwards, once more coalesced into the monarchy of Spain, and of the medieval German

Empire which, though it was (naturally) much longer in disentangling itself from the old feudal Empire of Charles the Great, became from this period a more or less compact State, stretching from the Alps to the Baltic, until it was once more dissolved into its elements by the Wars of Religion in the seventeenth century. That this is the origin of the States of Western Continental Europe—of France in the election of Hugh Capet in A.D. 987, of Germany in that of Conrad the Franconian (911) and Henry the Fowler (919), of the Spanish kingdoms in the tenth and early eleventh centuries—is put beyond all question by the chroniclers of the time. " He was elected by the prelates and magnates of the whole of the Gallic Kingdom, to expel thence the rage of the heathen madness "; that is a typical entry in the contemporary records. On the other hand, we get, in this same period, the foundation of new States, on the fringes of the old Carolingian Empire, by the old-fashioned method of conquest, such as the States founded by the Normans in Britain, Apulia, and Sicily, and by the Huns or Magyars in what is now Hungary (p. 124); while the Slavonic tribes in Bohemia and Poland, by a process of coalescing of which we should like to know more, developed into national States, accepted Christianity, and were admitted into the circle of European politics. The consolidation of the Scandinavian tribes into the historic kingdoms of Sweden, Norway, and Denmark, had already taken place, in the ninth century, by the gradual rise to power of military adventurers, who had, in the picturesque words of the *Heimskringla* Saga, subdued all rival chiefs " with scatt (taxes), and duties, and lordships." Thus the seed-bed of modern politics was sown by the end of the eleventh century after Christ.

Once more, then, we are compelled to recognise that, as on the downfall of the Roman Empire in the fifth and sixth centuries, so in the resettlement of Western Europe in the tenth and eleventh, the military principle was the basis of the State. We must not yet call it " sovereignty "; because that is a much more complex notion, which it took nearly

five centuries of history to produce. But we may fairly call it "force," or military power, with its essential accompaniments of despotic authority, extreme jealousy of interference from within or without, and its insistence on dealing directly with each individual under its sway, regardless of minor authorities or associations. No fallacy has more confused the study of social history than the sentimental doctrine that the State is an "enlarged family"; and no honest person in the least familiar with the history of social development could possibly maintain such a doctrine. The State is the very antithesis of the family, and of all institutions based on principles of kinship; and it is almost the first condition of an intelligent recognition of the proper province of each to realise this fact. Many of the gravest mistakes of social organisation have arisen from want of such realisation. The famous apophthegm of Treitschke, "The State is Power," is absolutely borne out by the facts of history; it is only in their monstrous and illogical deduction from this truth that Treitschke and his followers erred. Their doctrine, in brief, was: "The State is Power; therefore fall down and worship it." The true doctrine is: "The State is Power; therefore, while recognising its value, beware how you allow it to master you." And if the followers of Treitschke demand scornfully: "How do you propose to do that?", the answer is simple: "By the exercise of intelligence." The use of intelligence to circumvent or utilise physical force is the key of civilisation.

But, if we look a little more closely at the new States which emerged from the break-up of the feeble Frank Empire in the tenth and eleventh centuries, we shall observe that another powerful element was at work in the policy of their rulers. These were, in almost all cases, great feudal magnates, who had been elected by their fellow-magnates as military chiefs. In the former quality we see, as has been said, the original State idea, now shorn of much of its old barbarism by being employed for purposes of defence, rather than of conquest; and there is, doubtless, a certain humour in the situation which compelled the

descendants of the plunderers of the fifth and sixth centuries to organise for the defence of those possessions which their ancestors had wrested from the provincials of the Roman Empire. But the feudal magnate, besides being the ruler, or "lord," of a vast district, was himself a proprietor of great "domains," which he administered as an *owner*, rather than a *ruler*. This fact is cardinal in the States of the Western Continent; and it had distinct consequences. If the Capetian Counts of Paris had not had vast and fertile estates in the valley of the Seine and the Orléanais, they could never have ruled, however lightly, the turbulent nobles of central and southern France, after the terrors of the Hun and the Saracen had once passed away. If Henry the Fowler had not been Duke of Saxony, he could never have held together the great German fiefs of the Empire, after he had established the eastern marches against the invaders. Hugh Capet and Henry the Fowler were, in fact, elected rulers for much the same reasons as those which often induce a Town Council to elect a wealthy mayor—because he can "do the thing well."

But, as we have said, distinct and important consequences followed from this fact. Two of them may be mentioned.

The first is, that the newly formed States rapidly became HEREDITARY. In spite of the clearest evidence that the founders of the new royal lines, like the earliest war-chiefs, were elected—in spite of the formal, and, in some cases, very elaborate show of electoral rights—it is, in fact, very well known, that the descendants of Capet in France, Stephen in Hungary, Rudolf of Habsburg in Austria, and Henry of Luxemburg in Bohemia, even of Henry the Fowler and of Conrad of Franconia in Germany, continued for many generations to rule their respective States. It is as difficult to doubt the cause of this departure from the primitive military tradition, as it is to doubt its permanent importance. We have seen (p. 143) how the offices of the Carolingian Empire (not merely what might be called the territorial offices, like the countships, but even the Court offices, framed on the model of the Eastern Empire, such

as those of the Chamberlain and the Marshal) became hereditary. It is unlikely that the positions of the newly created rulers would escape the same tendency; especially when the influence was strengthened by the inheritance of great domains, which had long been recognised as hereditary. This tendency had much influence, as we shall hereafter see (p. 226), on the development of PROPERTY IN LAND; but here we notice especially its influence on the nature of the State. And it can hardly have failed to broaden the outlook of the new rulers towards their subjects; even if, on the other hand, it encouraged them to look upon these subjects as their own property. For the prosperity of his domains is the natural object of a great proprietor; and thus the new rulers would claim and exercise, at any rate in their own domains, that watchful care, and that constant and detailed management, or administration, which are the natural features of prudent ownership.

At first, no doubt, these administrative powers were strictly confined to the *demesnes* of the new rulers, as distinct from their *territories*; and nothing is more remarkable, in the history of, for example, France, than the rigid line so long drawn between the royal domains and the districts of the feudal vassals, in legislation, administration of justice, and finance. But the big royal domain soon began to grow at the expense of the rival feudatories. By a skilful use of the claim to forfeitures and escheats,[1] by diplomatic intermarriages between scions of the royal houses and the heirs and heiresses of the great fiefs, by the encouragement of complaints from the inhabitants of the feudal territories, the extent and influence of the royal domains continued to increase, and the administrative claims of the rulers of the State to have a wider and wider scope. Thus the union of the ruler with his subjects became more and more intimate. He ceased to be a mere military leader, having

[1] An escheat is an estate which, on the death of its owner without heirs, goes back to the "lord," who, or whose ancestor, is supposed to have granted it.

awkward claims upon his followers for military service; he became a ruler concerned with the general welfare of his subjects.

A second well-marked consequence of the fact that the founders of the modern States of Western Europe were great landowning magnates, was the curious attitude of their subjects expressed in the maxim that: "The King must live of his own." The persistence with which, in this country at least (and, probably, in all countries retaining monarchical forms), the official documents continue to speak of the national revenue and expenditure as the "King's revenue" and the "royal expenditure," is not a mere courtly politeness, but the survival of a deep-seated historical tradition. For, though the new rulers did, apparently, succeed in taking over the customary tribute rendered to the old tribal chiefs (known in England as the "ferm of the shire"), and their prerogative claims to such "casualties" as wreck, treasure-trove, valuable metals, rare fish, and the like, yet for many years their chief source of income was their own domains, which, as we have seen, the survival of feudal principles enabled them to augment at the expense of their feudatories. And it was not long before a skilful revival of the ancient claims to universal military service (pp. 127-28), and an acceptance of money-payments in lieu of personal render both of militia and feudal duties, introduced the system of TAXATION, without which no modern State could exist. But the difficulties attendant upon the introduction of this system were not merely the natural result of unwillingness to "pay up"; they were also inspired by the widespread feeling, that an unconscious bargain had been made with the founders of the States to "defray their own charges." And it was not until the powerful aid of the Church had been invoked to support the *aide pour le cas de croisade*, or, as it was called in England, the "Saladin Tithe," in the twelfth century, that the unpopular institution of general taxation became familiar; and, even then, in constitutionally governed countries like England, the ancient feeling revealed itself

for centuries in the distinction between the "ordinary" and the "extraordinary" revenue of the Crown.[1] But in England the same feeling also had other and more momentous results, which must be dealt with when we come to speak of that vital element in modern political institutions known as "representation."

These were the two great direct consequences of the position of the early rulers of modern European States as the lords of great feudal domains. But the influence of the same fact is clearly manifest when we come to consider the instruments by which these rulers governed their subjects. Once more, be it remembered, their primary functions were military. It would, therefore, be natural to assume that, beyond a limited circle of household officials—Chamberlains, Stewards, Chancellors, Treasurers, and the like—they would have little need for what, in modern days, is known as a "Civil Service." Moreover, in countries like France and Germany, where feudalism long remained as a strong tradition, even the military duties of the ruler were, as we have seen (p. 140), performed through the agency of his military vassals, who, in their turn, delegated much of their power to their under-vassals, and so on. To supervise the calling out and manœuvring of the feudal array, they required, doubtless, a few superior officials, such as a Constable and a Marshal, whose offices, however, splendid as they were in appearance, were, owing to the mass of privilege and etiquette which hampered the proceedings of the feudal army, often little more than sinecures, and became, in fact, hereditary dignities, rather than working offices. Moreover, the failure of these rulers to keep alive the ancient militia or *Landwehr* system of Charles the Great, rendered their States, despite the splendid appearance of their armies, essentially weak

[1] The distinction was still emphasised by Blackstone in the eighteenth century; and it even appears in some modern textbooks. But it ceased to have any real meaning after the miscellaneous "ordinary revenue" of the Crown had been commuted for a "Civil List."

in defence, as well as wanting in that direct contact between the supreme government and the mass of its subjects which is essential to sound political development. And when, owing to the failure of the feudal levies, a professional standing army, known as the " companies of ordonnance," was introduced into France in the fifteenth century, it was accompanied by the institution of the *taille*, or arbitrary tax, which, by its unfair exemptions and excessive severity, did almost as much as the *corvée*, or forced levy of labour, to alienate the mass of the people from the Crown, and to pave the way for the Great Revolution. In Germany, even this doubtful attempt at consolidation was not made; and, consequently, the nominal Emperor had no strong force at his disposal wherewith to enter upon that struggle with the feudal magnates which enabled Louis XI. in France at last to make of his kingdom a national State.

In fact, in the still feudalised countries of Western Europe, the one chance for a ruler to develope political institutions lay in his own domains. Here he was really a master, not a mere overlord. And it was here that, by a searching system of police and administration, by the appointment of bailiffs or seneschals, provosts, and mayors, as in France, of *Landgraves* and *Burggraves*, as in Germany, he could effectively direct, and, it is to be feared, also tax, the energies of his subjects. But even this system had its dangers. Where, as in France after the Hundred Years' War, the vigorous policy of Louis XI. and his successors led to the absorption of the great fiefs into the royal domains, it gradually spread throughout the country an arbitrary system of government which led directly to the absolutism of Louis XIV., and, indirectly, to the downfall of the monarchy in the French Revolution. Where, as in Germany, the feudal vassals proved in the end too strong for the Emperor, and broke up the Empire into the modern independent States, even the Imperial officials became feudal potentates, and repeated, on a smaller scale, the process which had broken up the earlier and more ambitious Empire of Charles the Great.

It was this tragedy of Continental politics in the later Middle Ages which gave the little States of Western Europe—England, the Dutch Netherlands, and the Swiss Republic—their proud position as leaders of political thought and sound experimenters in political progress. The completeness of the military conquest of England by Norman William enabled him, not merely, as we have seen, to crush at the outset the dangerous pretensions of his feudal followers, but to treat England, a small and easily traversable country, as a single royal domain. No sooner was the Conqueror firmly seated on the throne, than he began that systematic survey of his new possession which culminated in the priceless record of Domesday Book. The administrative genius of his Norman clerks, which seems to have been a blend, acquired during the century of Norman settlement in France, of the subtlety of the Gaul with the fiery energy of the Northman, bent itself eagerly to exploit the rich material laid bare by the Domesday survey. Already in the reign of William's son Henry, we find distinct traces of regular "eyres" or journeys (*itinera*) of the officials of the Royal Exchequer round the counties, enquiring into grievances, ferreting out the dues of the Crown, composing quarrels, keeping a sharp eye on the ancient local institutions of the hundred and the township, and calling them to account for the misdeeds of their members. Already we see an elaborate machine, the ROYAL EXCHEQUER, working twice a year under the supervision of the great officials of the Crown, to digest the reports of these itinerant barons and justices, as well as to receive the accounts of the royal SHERIFFS entrusted with the daily watching of their counties in the interests of the State. These sheriffs, unlike the *comtes* and *Grafs* of France and Germany, were not allowed, in spite of their struggles that way, to develope into feudal potentates. Their terms of office were short; they were bound to render the strictest accounts of their doings; when the great Henry II. heard evil reports of their doings in his absence, he held an "inquest" or enquiry which

made them shudder. Gradually their more important powers were taken away from them, and entrusted to persons more directly dependent upon the royal favour. In the twelfth century, the State took an enormous step forward by practically concentrating in its own hands the ADMINISTRATION OF JUSTICE; but this is so important a step that it must be left for description in the next chapter. The same vigorous ruler who brought the sheriffs to heel and set up the jury system, also took care to reorganise the ancient MILITIA, and thus to establish a powerful counterpoise to the disruptive tendencies of the feudal array. In the thirteenth century, the great King Edward virtually cast aside the feudal army, and, in his numerous wars, practically relied upon the direct military service of all landowners, of whatever tenure. But the political progress of England in the two centuries following the Norman Conquest was so rapid, that it has outstripped our account of the medieval State; and, before dealing further with English experiments, we must notice one other feature of State development which was common to the early monarchies of Western Europe. This was the COUNCIL (*Conseil des Pairs, Cortes*) which surrounded the medieval monarch, and which was the fruitful parent of later political institutions.

The direct origin of this body was unquestionably feudal; but it goes back to the *comitatus* or band of companions (pp. 127-28) who surrounded the war-chief, and devoted themselves to his interests. Whether, in the feudal blend, it took over some of the character of the patriarchal Council of Elders (the *Rachimburgi* of the Franks, or the Witan of the English) is a much-disputed point; certainly it was constructed on very different lines. It was based on the fundamental feudal principle, that it was the duty of every vassal to render "suit and service" to his immediate lord—service in the field, and suit (or following) at his court. Consequently, not only the supreme ruler—King or Emperor—but every feudal lord, had his council or court; but, naturally, that of the

supreme lord was by far the greatest of all, for it contained, in theory, all the " tenants-in-chief " (p. 139) of the Crown, *i.e.* all those who " held " benefices (military or civil) directly from the King or Emperor. We say " in theory "; because it is quite clear from the records, that, owing to the labour and cost of travelling, only the wealthier tenants-in-chief in fact attended regularly the meetings of the council, which was actually known in England as the Council of the Magnates, or Great Ones. Nevertheless, it was the unquestioned right of the King, as of every feudal lord, to insist upon the personal attendance of each of his direct vassals; and any refusal to attend a personal summons was a deliberate defiance, or repudiation, of the feudal lord, which involved forfeiture of the benefice.

Insensibly, by a process which is to be found everywhere at work in social progress, what was originally a DUTY became gradually a RIGHT; and a ruler who failed to consult his council of vassals when he contemplated any important step, would have found himself at a decided disadvantage. To use a modern expression, he would have been condemned by " public opinion "—that subtle force which marks the limits even of legal rights, and which lies at the base of what we call " constitutional freedom." The precise extent to which a ruler was bound to defer to the advice of his council, when summoned, was not settled till a much later stage of political development than that we are now considering; and even the famous (and much misunderstood) clause of the Great Charter of John, which insists on the summoning of a " common council " whenever certain business is toward, is studiously vague on this point. But the existence of the Council, and its growing power, are among the most important features of the early history of the State.

It would, however, be misleading to leave this subject without pointing out that, in the progressive States of Western Europe, we can trace the early appearance of a double aspect of this important body. For, in addition to the Great Council, which nominally comprised all the

tenants-in-chief, though, probably, as we have said (p. 161), only the "major barons" usually attended, there grew up, inside it, a smaller body, known in England originally as the *Curia Regis*, afterwards as the "Privy Council," in France as the *Cour de Palais*, in Germany as the *Hofgericht*, or Palace Court. This smaller body was, apparently, composed of the personal attendants of the King or Emperor, the Court officials whom he consulted in the daily business of affairs, and on matters in respect of which it was deemed unnecessary to summon the Great Council. In theory it was, like the latter, a strictly feudal body of tenants-in-chief, who held their offices directly from the King or Emperor, and whose offices were, like those of the provincial magnates, in practice hereditary. But, in England at least, as the business of State grew, it was found necessary by the Kings to add to these hereditary councillors a number of humbler persons, known as King's ministers (*ministri regis*), who, largely because most of them were celibate clerics, could not well make their offices hereditary, and who could, therefore, actually be appointed and dismissed by the King at his pleasure. Therefore, though this smaller council rapidly became, owing to its intimate knowledge of the royal affairs, a body of great importance, yet its independence was a good deal less than that of the Great Council, whose members, so long as they rendered their due services, could not be dismissed by the King. In consequence, the future of the royal PREROGATIVE, or personal authority of the wearer of the crown, lay with the smaller council; while the larger body formed the nucleus round which the restraining influences of popular, or CONSTITUTIONAL, aspirations were to gather. But we must be careful to remember, that neither the Great nor the Privy Councils of the eleventh and twelfth centuries had any really POPULAR element about them. They were not, in any strict sense of the word, REPRESENTATIVE. They stood, no doubt, at least the Great Council did, for self-government, in the limited sense in which the feudal magnates understood it; but, in

their eyes, none but the direct vassals of the Crown had any right to a voice in national affairs. Even the famous clause of the Great Charter of John, which marks the highest point of feudal aspirations in this direction, provides only for a Common Council which shall comprise the archbishops, bishops, abbots, earls, and "greater barons," who are each to receive a personal summons from the King, and "all those (others) who hold of us in chief," who are to be summoned through the King's sheriffs and bailiffs. The real novelty of the clause lies in the distinction between the two kinds of summons, which not only recognised existing practice, but provided a machinery for extending it on certain specified occasions, and thus seems to have acted as a useful hint for subsequent developments. But the Charter of 1215 was obviously the work of a group of persons whose ideas were still bounded by the feudal horizon.

With this simple machinery of King or Kaiser, assisted by a Court or daily council of household officials, who managed the affairs of the kingdom much as those of a great domestic establishment, and with the advice on greater matters of a Great Council of tenants-in-chief, the infant State in Western Europe carried out, very imperfectly, its work, until the close of what we call the "Middle Ages." But again it is necessary to insist that, in tracing the process of evolution, time is not absolute, but relative. That is to say, one community may have reached a certain stage at a given calendar date, while another, perhaps closely allied to it in blood, may not reach that stage for a century or more afterwards. This is so, even where, as in the States of Western Europe, there has always been a frequent intercourse, which has produced a community of development; much more so, in the case of more distant countries.

Thus the "Middle Ages" are rather a condition than a period. Their close is marked by the fact, that the State has definitely established itself as an INSTITUTION—*i.e.* as a permanent piece of social machinery which goes on

working, despite the deaths of those who work it. In England, this stage was reached far earlier than in any other country of Western Europe; and, for the sake of those who seek for definite dates, in the year 1272, when, on the death of Henry III., his son Edward was proclaimed King in his absence, and the " King's Peace " continued to run without break. It was long before a similar recognition of the permanence of the State took place in France—perhaps not until the reign of Louis XI. In Germany, the Kaisership remained an uncertain and casual accident, until the Golden Bull of Charles IV. (1355) fixed the electoral college which chose the Kaiser, and defined its powers; and even that was insufficient to prevent that disruption of the Empire which had commenced already under Frederick II., and which culminated in the Wars of Religion. Meanwhile, outside the sphere of the infant State, social life was still largely governed by the surviving institutions of an older system, and by the still strong influence of feudal principles. Our task is, now, to see how the State extended its sphere, until it had crushed these rivals for supremacy.

CHAPTER XII

THE STATE AND PUBLIC ORDER

IT is hardly necessary to explain why the State should, at a comparatively early stage of its career, have come to regard the maintenance of public order as one of its primary duties. In the first place, the suppression of private violence closely resembled the original task of the State, as an institution for carrying on war against alien communities. In the second, the State, as the controller of military force, was incomparably the most efficient agent for the suppression of private violence, which, as we have seen (p. 83), patriarchal society found it very hard to control. In the third, it must soon have become obvious, that a community which is torn by internal feuds is bound to be weak as a military unit; thus the State had a direct interest in maintaining internal order. But, if the task was clearly set before it in all countries, the different ways in which the State attempted to perform it in different countries are an interesting study; for they did much to mark the different lines of political development in those countries.

Broadly speaking, the maintenance of public order is effected by two kinds of agencies, those known as POLICE and JUSTICE, or judicial proceedings. These names, which are common to almost all the languages of Western Europe, are suggestive. The former is, obviously, the same word as POLITICS, and implies a close and essential connection with the work of the State (πόλις). It is concerned rather with the prevention of violence, than with the causes which lead to violence. The latter, as its name implies, is concerned with "right" or "law" (*jus*), that is, with the *adjustment* of disputes arising out of alleged breaches of

rules of conduct. The former is, obviously, much more closely related than the latter to the primary functions of the State as a military power; and we find, accordingly, that it is in the direction of police, rather than justice, that the earliest efforts of the State to maintain public order are made.

Even before the break-up of the Empire of Charles the Great, and the definite establishment of the State as an institution (Ch. XI.), the notion of the "King's Peace" had clearly made its appearance. We find, for example, innumerable references to it in the Barbarian Codes, both of the Continent and of England. The various solemnly proclaimed "Peaces" of Charles and his successors, the "King's Peace" (*cyninges-frith*) of the Anglo-Saxon Laws, appear, side by side, with the Church's peace or right of asylum (solemnly adopted as part of the policy of the Church by the Council of Orléans in 511), and the household peace, or *mund*, of the patriarchal age. After the foundation of the modern States, this idea once more became prominent in the "Peaces" of the French Kings and German Kaisers, the "Peace of our sovereign Lord the King" in England, the *ethsore* of the Swedish (West-Gothic) Code.

The definite line upon which the new institution of the "King's Peace" proceeded was the suppression of that BLOOD-FEUD system which, itself, as we have suggested (p. 81), a mitigation of the older practice of indiscriminate revenge, was yet fatal to the existence of orderly society. We have seen (p. 83), that the limit reached by patriarchal society in this direction was the establishment of the custom of accepting voluntary compositions, or blood-fines (*wergilds*), in lieu of organised revenge. The State set itself to make the acceptance of these compositions COMPULSORY; and, as the most effective means of doing so, to exact, in addition to the *faidus* (*fehde*)—the payment due to the injured party or his kindred—the *fretus*, or fine for breach of the peace, due to itself. It is, probably, also to this movement that we must attribute the reduction of the older form of the blood

feud, which took the form of a battle on a small scale between two groups of kindred, to the "trial by battle" between two individuals (the parties or their champions), under the presidency of a royal judge, which was so conspicuous a feature of the later Middle Ages. In this respect, feudal principles, though they may originally have aggravated the blood-feud system by their claim to the right of private war (pp. 140-41), probably, as time went on, by their love of ceremonial combat, helped to popularise the milder methods of judicial "trial by battle." But the State, not content with a general policy of suppressing the feud, also established special cases of peace, in which any use of violence was treated as a direct insult to itself, and punished without remorse. The natural commencement of such a policy was in the King's Palace; and, to the present day, many systems of law retain survivals of this idea, in the summary methods available for punishment of "contempt of court," or, as the technical English phrase put it, "trespass within the verge." Other examples of these special "peaces" were the sanctity of the "King's highway," and the "market peace" symbolised by the *Kaiser-bilder* (p. 114).

Here, unfortunately, the efforts of the Continental monarchs for the most part ceased for a long while. In Germany, the highest results in this direction were the *Landfriedensbezirke* (Peace Districts), and the "eight ban cases" or crimes of violence, in which the State claimed its forfeiture; whilst in France, the efforts to maintain the King's Peace were practically confined to the royal domains (pp. 155-56), where a strong and oppressive police jurisdiction was established, which, as the royal domain increased by the centralising policy, before described, of the later monarchy, gradually extended to the whole of the country. In England, however, a far more thorough and satisfactory policy was adopted by the Anglo-Norman State, which did much to introduce that "Rule of Law," which, as a distinguished writer has pointed out,[1] is one of the most characteristic

[1] Dicey, *Introduction to the Study of the Constitution* (Macmillan), ch. iv.

features of the British Empire. Briefly put, this policy consisted in *linking up the King's Peace with the older, local units of government.*

One of the earliest and most striking examples of this policy shows, indeed, that the Anglo-Norman Kings only continued and developed an idea initiated by their predecessors. The famous "Ordinance of the Hundred," attributed to the reign of Edgar (tenth century), requires that the inhabitants of the hundred shall be grouped in TITHINGS or bodies of ten, each under a "tithing-man," through whom the collective responsibility of the group for the misdeeds of its members shall be enforced; and the good laws of Knut, a century later, repeat this injunction, saying: "We will that every man be brought into a hundred and into a tithing . . . and that every one be brought into a hundred and a *borh*" (pledge). This scheme the Norman monarchs very wisely preserved as a counterpoise to the feudal principle, which held the lord responsible for the behaviour of his vassals; and the "view of frankpledge," or calling of the tithing rolls, was one of the most important duties of their sheriffs (pp. 159-60) during the twelfth and thirteenth centuries. It is worth while dwelling a little upon this enlightened policy, which, according to the most eminent of Continental historians of the Middle Ages, had no counterpart in the institutions of the Frank Empire.

Now it is well known that the origin of the HUNDRED, an institution found, under various names,[1] all over Western Europe, as the local unit next above the village, has been the subject of much difference of opinion. The popular view connects it with the settlement of a hundred warriors; but there is no evidence in support of this view, though there is good reason to believe that, in their revival of the ancient *fyrd*, or militia system (p. 141), in England, the Anglo-Norman Kings made a good deal of use of it, as they did also in the development of their judicial system

[1] It is the French *centaine*, the German *Hundertschaft*, the Swiss *canton*, the Swedish *harath*, the Irish *bally*, and the Welsh *cantrev*.

(p. 178). For reasons hinted at in an earlier chapter, the writer believes that the hundred represents the ancient "run" of a pastoral group, or clan, out of which, as agriculture developed, sub-settlements of agricultural villages, or townships, were created. The strongest evidence for this view, at any rate in England, is the fact that, at the very dawn of English history, we find the attendance, at the hundred moot, of village representatives ("reeve, priest, and four men") as a well-established institution. These periodical reappearances, which are often spoken of as the first examples of POLITICAL REPRESENTATION in England, can hardly, in origin, have been due to anything but an acknowledgment of the authority of an older institution from which the village or township was derived. Whether or not this view is correct, it is quite clear, that the English and Anglo-Norman Kings, in basing their police systems on ancient popular units, were displaying a political wisdom which was destined to have most important results.

One other remark on the policy of Edgar and Knut may be permitted. The reader who remembers the FRITH GILD (p. 111) will be struck by its close analogy with the TITHING, just described. Each is, primarily, an association of neighbours for mutual responsibility. It would be deeply interesting to know which is the older; but, in the present state of the evidence, this seems to be an insoluble question. Only it is clear, that each was a tentative step to replace the older bond of kinship by some other principle of security and mutual responsibility.

A similarly far-sighted policy was that adopted by the English State in the thirteenth century with regard to the village and the burghal WATCH. This institution was, probably, an ancient and spontaneous growth of the village and gild system, which had fallen into decay. So, first in their writs of Watch and Ward, addressed to their sheriffs, afterwards in the great Statute of Winchester in 1285, the English Kings reorganised it and made it compulsory; finally placing it under the control of a chief or

"high" constable in each hundred, whose primary duties were to arrest malefactors and strangers, raise the "hue and cry," stop brawling, prevent the carrying of unauthorised arms, and, in short, preserve the peace of their districts. By such measures as these, while the Continental police systems remained in the hands of the military authorities, or were an expression of the centralised authority of the King's Ministers, in England the police remained, though under royal supervision, a strictly local force. The result has been, though not, perhaps, without some slight loss of efficiency, that the police forces in England have never been regarded with that suspicion and hostility which were so long manifested towards the more centralised police systems of the Continent.

Equally striking was the vigorous development of the State in England in the ADMINISTRATION OF JUSTICE. Upon its resurrection after the break-up of the feudal Empire of Charles the Great, the State found itself face to face with numerous rivals in this field. The control maintained by the feudal *seigneur* over his vassals, was in no respect more strongly shown than in his claim to judge their quarrels. According to the strict principles of feudalism, this claim only extended to disputes concerning the tenure of their fiefs, or holdings. But when the vassals owing "suit" to their lord assembled in his court (p. 160), it was natural that he should fail to draw the line very sharply between feudal and other disputes. His vassals were his "justiciables"; and he strongly resented the interference of any outside authority in their affairs. The claim of the feudal lords to exclusive jurisdiction in their fiefs was virtually acknowledged in France so late as the thirteenth century, by Louis IX.; and it was only by compelling their subjects to "resort" to the neighbouring courts of the royal domains (p. 155), that the later French Kings succeeded, with the aid of their "legists," in extending their jurisdiction over their under-vassals. In Germany, the permanent grants of "immunities," or exemptions from State control, in favour especially of

monastery lands, but also of the great lay feudatories, left the feudal courts in substantial control of the administration of justice in ordinary affairs, until the definite claims of the former feudatories to territorial independence led up to the dissolution of the Empire itself.

But the feudal courts were not the only rivals of the State in the administration of justice. One of the earliest disciplinary rules of the Christian Church urged upon its members the unwisdom of bringing their disputes, especially in matters connected with religion, before the secular tribunals of the Roman Empire; and, when that Empire adopted Christianity as its official religion under Constantine, the claim of the Christian bishops to exercise jurisdiction over their flocks was fully acknowledged. With the fall of the Western Empire before the barbarians, the authority of the Bishops of Rome rapidly grew; and the compact entered into between them and the Frankish invaders greatly strengthened the claims of the Papal jurisdiction, which was still further strengthened by the separation between the Western (Latin) Church and the Eastern (Greek) Church in the eleventh century. Alongside of the great Code of CIVIL LAW of Justinian, there grew up, in close imitation of it, a great body of CANON LAW, composed of decrees of Church Councils, and Letters and Decisions ("Bulls")[1] of the Popes. Moreover, while the Civil Law lost much of its authority by the downfall of the Western Empire, and was only treated as binding in a very few districts of Western Europe, the Canon Law, enforced by a hierarchy of courts, from the Papal Curia down through the provincial courts of archbishops, and the consistorial or diocesan courts of bishops, to the petty tribunals of the archdeacons, bound the consciences of all Christian men, and was daily enforced by a whole host of clerical officials. Even the great Norman Conqueror of England, in a famous Ordinance, had to recognise the authority of these tribunals in all "spiritual pleas";

[1] So called from the *bulla* or leaden seal by which they were authenticated.

though he imposed certain sharp rules against excessive ecclesiastical claims.

Beyond these great rivals, there were innumerable petty tribunals with their local jurisdictions. As we have seen (p. 147), one of the cherished objects of a rising municipal borough was to have its own court, in which alone its burgesses could be called to account. Closely allied in character to the burghal courts, were the market courts; for each market claimed to have its court of "piepowders" (as the English called it, from the dusty feet—*pieds poudrés*—of the suitors who thronged it), wherein speedy justice should be done according to that Law Merchant which was growing up as a kind of European common law in trade matters. Finally, though becoming feebler and feebler, the ancient local moots of the hundred and the shire, wherein the elders or select-men "deemed their dooms," *i.e.* declared the ancient customary law of tribe and clan, still maintained their claims to administer "folk-right."

But the Anglo-Norman Kings did not shrink from challenging this motley array; and their policy in this respect showed equal wisdom with that which they displayed in the closely-connected subject of police. They made no attempt to wipe out of existence the old-fashioned moots. Rather at first did they insist that the courts of the hundred and the shire should be held as aforetime. Only, they introduced new and superior methods of procedure, which gradually converted them into royal tribunals for all serious cases. Thus, by the famous "Assizes" of Clarendon and Northampton, Henry II., having put under the control of the sheriffs the old popular "hue and cry," raised on the discovery of one of those "bootless crimes" for which no blood-fine could be accepted, made it the duty of deputies from the hundred moot to report on oath the names of the offenders to the King's Justices on their circuits, and ordered the latter to award instant and terrible punishment. Thus, by the institution of the "Grand Jury," did the King take over the old vague

jurisdiction of the tribal authorities (p. 83), and make himself responsible for the administration of CRIMINAL JUSTICE, whilst yet recognising the older tribunals. Moreover, whilst not denying, within their proper sphere (p. 142), the claims of the feudal tribunals (which had already absorbed a good deal of the business of the local moots), he rigidly confined it within that sphere; and never, save in very exceptional cases (such as the Palatine earldoms), did he recognise the claims of the feudal magnates to the "High" or even the "Middle" Justice. Moreover, by a series of clever and somewhat unscrupulous fictions, too technical to be explained here, he undoubtedly robbed the feudal tribunals of much of their legitimate work. His great successor, Edward I., after the disturbances of the Barons' War, closed still tighter the bounds of feudal jurisdiction, by his great *Quo Warranto* Enquiry and Statute of Gloucester (1276); until the court of the manorial lord became merely a petty tribunal for deciding offences against the village custom, and registering the changes in the serf-holdings of the manor.

Against the powerful jurisdiction of the Church, the Anglo-Norman State had a sterner struggle to wage. Whilst, in theory, the line between "secular" and "spiritual" pleas had been drawn, as we have seen, by the Conqueror, there was, in fact, a vast debatable land which each party claimed as its own. Particularly the Church disliked any assertion by the State of direct authority over the persons of the clergy; and, when Henry II. attempted to include them in his famous Grand Jury procedure (p. 172), the fiery Becket broke into revolt, saying that the Church Courts could well punish their own delinquents, and that "no one ought to be twice accused for the same offence." It was a specious argument; but Henry knew full well, that the clerical tribunals were not likely to create scandal by banishing their clerical convicts, whilst their unwillingness to shed blood would prevent them imposing the other penalties of the Assizes. So he refused to give way; and a compromise was with difficulty

arrived at, which might have saved the situation, had it not been spoiled by the outburst of temper which led to the murder of the archbishop in his own cathedral. In the face of this horrible scandal, which convulsed all Christendom, and made of Becket's tomb a pilgrims' shrine, Henry and his successors could not maintain even the compromise of 1164; [1] and, under the thin fiction of " benefit of clergy," not only real clerics, but any man who could translate a passage from Scripture which was known beforehand to be always used as a test, could get off after conviction, at least once, if not oftener. So that, in spite of the steady pressure of the King's Courts in other matters, and their writs of prohibition against clerical interference in secular lawsuits, the exemption of the clergy from the criminal law continued, until, with other abuses, it was destroyed by the religious Reformation of the sixteenth century.

But, of course, it was not to be supposed, that the State's Courts would have been really successful in squeezing out all their competitors, unless they had put something much better in the place of the old remedies of the feud, and the archaic trial by battle and ordeal (pp. 82-83). It was, in fact, their positive success in this direction which really made English jurisprudence at the end of the Middle Ages the most enlightened in Europe.

We must remember that, in however mild a form, feudal principles were definitely recognised in the England of the eleventh and twelfth centuries. The laws of that period, even the Assizes of Henry II., recognise the feudal jurisdiction of the lord over his vassal. But this recognition cut both ways. If it hampered the Kings in their work of keeping the feudal courts in check, it enabled them, as Lords Paramount, to claim jurisdiction over their biggest subjects, their " tenants-in-chief " (p. 161).

[1] There is a technical difficulty here, in the fact that the *Constitutions* of Clarendon, which embodied the compromise between Henry and Becket, are two years older than the *Assize* of Clarendon, which instituted the Grand Jury system. The latter probably only confirmed a practice which had been put into use some years earlier.

To this principle is directly due the fact that, in the critical century which followed the Norman Conquest, all really dangerous disputes between the great feudatories, which might have threatened the peace of the realm, were decided by the King as Lord Paramount, on strictly feudal lines, with the assistance of his Great Council. Moreover, the feudal theory, when strictly enforced by a powerful ruler, enabled the under-vassal to appeal "for defect of justice" from his immediate superior to that superior's over-lord, and so ultimately to the King. This theory, under the strong rule of the Anglo-Norman Kings, emphasised the position of the Crown as the "fountain of justice," and, incidentally, paved the way for the recognition of the Great Council, the later House of Lords, as the final court of appeal from the lower royal tribunals, a position which it holds to the present day.

But the ambition of Henry II. went beyond this, and aimed at making the royal justice the direct resort of all his subjects. This ambition he went far to realise, with the aid of his able officials, by the use of two powerful engines, the WRIT OF SUMMONS, and the JURY SYSTEM.

The WRIT, as its name implies, is simply a letter bearing the royal seal. Its uses were infinite; but the special application of it which was to have such a revolutionary effect in the administration of justice, was, as its Latin name of *breve* implies, a short missive, directed to a person, bidding him attend a certain tribunal on a named day, to answer a complaint made against him. As we have seen (p. 80), one of the chief defects of the older, popular, system of legal procedure, was, that there was no means, other than the clumsy remedy of DISTRESS, of compelling a recalcitrant defendant to appear before the moot, if he obstinately refused to obey the summons of the complainant. But it was one thing to defy the summons of a private person; quite another to defy a messenger bearing the royal missive. The latter constituted, in fact, the offence of "contempt," which, even before the Conquest, was known as "*oferhyrnes*," and entailed heavy penalties.

Probably the feudal courts were not quite so helpless as the popular moots in this respect; but even they were glad to make use of the royal missive. And Henry II., at some unknown date, perhaps relying upon the famous Oath of Sarum (p. 141), laid down the principle, that no one need answer "for his freehold"—*i.e.* in a suit involving title to a freehold tenement—without the royal writ. At first, doubtless, the readiness with which this writ was granted to suitors in the feudal courts, appeared to strengthen the feudal jurisdiction; but if the feudal magnates thought that they were by this means obtaining a new lease of power, they were soon bitterly undeceived. For, before very long, the same astute officials who had devised the *breve*, or royal writ of summons, invented other writs, known by the quaint names of *tolt*, and *pone*, for removing, as of course, the trial of the action thus commenced, from the feudal and local courts, to the royal tribunals. And though, under the weaker rule of Henry's son John, the Charter Barons exacted from the King a renunciation of these (to them) detestable practices, they found that the tide had set so strongly against them, that their apparent victory was neutralised by the use of the most glaring fictions.[1]

For, by the date of the Great Charter, the second of the great engines of royal justice, TRIAL BY JURY, had definitely made its way into use. As has been before hinted, the notion that the jury was, originally, an effort of popular self-assertion, is wholly unfounded. The right to compel a body of neighbours, "men of the vicinage," to answer upon oath the enquiry of a royal official, was originally a prerogative of the Roman fisc or treasury, which, after passing to the Frankish Emperors, had been adopted by the Dukes of Normandy, and by them introduced into England. Its primary object was, to discover the exist-

[1] The favourite device of the royal officials was to add, to the words of the summons to the royal court, the words "because the lord of that fief has renounced his jurisdiction" (*quia dominus istius feodi inde remisit curiam*).

ence of imperial or royal property or rights, which the State's officials suspected to be concealed. As such, it was used with telling effect, and on a magnificent scale, in the compilation of Domesday Book, which was drawn up on the testimony of sworn juries of the hundreds.[1] In the following century, it was also freely used to assess on each locality its proper quota of the Saladin Tithe (p. 156), and those other levies on movables which were becoming such an unpleasant feature of royal rule, and even to collect the amounts thus assessed. We have seen also (p. 172), that it was employed to denounce offenders against the Assizes of Clarendon and Northampton. But its special use for our immediate purpose was to substitute for the archaic methods of TRIAL BY BATTLE and ORDEAL (pp. 81-82), a trial by the "truth-telling" (*verdict*) of persons sworn (*jurati*) to answer the questions of a royal judge.

Its first use for this purpose was that adopted by the famous Grand Assize of Henry II. By this celebrated Ordinance, as is explained by the royal Justitiar, Ralph Glanville (who was, probably, its framer), a defendant challenged to battle in a "writ of right," or action to recover a freehold, might, instead of accepting the challenge, "put himself upon the Assize"—that is, get from the royal Chancery a writ to the sheriff bidding him summon from the county wherein the land lay, four knights, who should choose twelve more, the whole sixteen to swear upon oath "which of the parties had the greater right." The Grand Assize itself, by reason of its complexity, and the delays or excuses (*essoins*) which it permitted, soon became unpopular, and was superseded by a rapid extension of the same idea to simple questions of fact, at first only connected with freehold estates, but afterwards to all kinds of "trespasses" or wrongs; until, by the end of the thirteenth century, it had become the ordinary method of trying CIVIL ACTIONS. At first, there

[1] As is well known, the immediate object of the Conqueror in ordering the drawing up of Domesday Book was to revive the ancient Danegeld. "Domesday Book is a Geld Book" (Maitland).

was a good deal of resistance, not merely by the feudal courts (which tried, unsuccessfully, to get hold of it), but by the old local tribunals of the shire and hundred. But the somewhat unscrupulous use of a section of the Statute of Gloucester of 1276 (p. 173), enabled the royal judges to restrict the jurisdictions of their rivals to cases of trifling amount, which, owing to the continued fall in the value of money, became more and more trifling as time went on. Thus, by the end of the thirteenth century, the jury, though still far from "popular" in any sense, came to be regarded as the ordinary method of trial in civil cases, and, incidentally, transferred the whole of the administration of justice in civil cases, for the reason above given, to the courts of the State.

Nor was the criminal jurisdiction long in following. It will be remembered, that the same masterful King who published the Grand Assize had already laid hands on this by the institution of the Grand Jury of accusation (p. 172). But the Assizes of Clarendon and Northampton still recognised the ancient methods of TRIAL by the oath of the kindred or by the ordeal (pp. 81-82). Just one half-century later, however, in the very year in which the Barons were wringing from John the Great Charter, a Papal decree forbade the clergy throughout Christendom to take any part in the working of the ordeal system, which thereupon fell into disrepute; while it was generally felt to be scandalous to allow a man solemnly accused by the Grand Jury to get off by the mere oath of his kindred, or "wager of law." Here was a dilemma, which the royal judges, apparently, did their best to solve, by persuading the accused to "put himself on the country," *i.e.* to submit himself to the verdict of twelve jurors hastily summoned from the hundred in which the crime was alleged to have been committed. By the end of the fourteenth century, at the latest, this process had become recognised as the ordinary course of a criminal trial; and the "Petty Jury" of twelve (so called to distinguish it from the Grand Jury of accusation) had become the

normal oracle which pronounced "Guilty" or "Not Guilty" in serious criminal cases. But the informal origin of this method of trial long remained marked by the curious fact that, if the accused refused to "put himself on the country," he could not be tried by a jury, but only subjected to the *peine forte et dure, i.e.* kept in prison under heavy weights and fed on stale bread and stinking water, until he saw reason. And, as is well known, the Charter Barons, though they failed in securing their jurisdiction over their own vassals (p. 173), did succeed in securing for their own order that "trial by peers," which they set up in the Charter as the alternative of the then new-fangled and hated trial by jury.

Thus, by the end of the fourteenth century, the State had won, in England, its battle for the administration of justice, and, subject only to the clerical privileges of "benefit of clergy" and asylum or "sanctuary" (p. 83), had become the sole dispenser of justice in important secular cases, save only those which were disposed of by the COURTS MERCHANT of the privileged boroughs (p. 147), whose work was not brought directly within its sphere till the epoch-making rule of Lord Mansfield in the eighteenth century. To cope with this growing mass of business, the State had organised, long before that date, the famous "King's Courts of Common Law"—the King's Bench (to deal with matters in which the Crown was specially interested, including serious criminal cases), the Common Pleas (for the trial of cases between subject and subject), and the Exchequer (for revenue cases). And, when the conservative character of these tribunals threatened to fail the growing needs of the community, the "equity jurisdiction" of the Chancellor (the famous "Court of Chancery") applied (though without the aid of a jury) the royal prerogative to prevent "defect of justice." Finally, when the petty criminal jurisdiction of the old local moots and the manorial courts at last broke down, the creation of local Justices of the Peace in the fourteenth century served the treble purpose of preparing cases for the visitation

of the "red judges" on their circuits, of relieving them of the trial of the less serious among the "felonies" or capital crimes, by the aid of local juries, and, somewhat later, of disposing in a "summary" manner of petty criminal cases. But it was not until the introduction of secret non-jury trials and torture by the Tudor monarchs in the sixteenth century, in the famous STAR CHAMBER, that the country awoke to the value of the jury system as a bulwark of liberty, and it became really "popular," in the ordinary sense of the term.

We have dwelt at some length on the methods by which the State in England early achieved its great victory in securing the administration of justice; for it is to these methods, almost as much as its unique success in the adoption of political representation, that England owed that reputation for political liberty which made her, in later years, the admiration of great Continental jurists like Montesquieu, and great writers like Voltaire. For, whilst France was groaning under the oppressive system of *lettres de cachet*, and Germany was still under the shadow of a cruel criminal system based on the Imperial despotism of the Roman Law, England was, despite a barbaric criminal code, at least free from a despotic system of police, and a scheme of criminal justice which assumed the guilt of every accused person, and subjected him to torture to extract a confession from him. But we must now indicate briefly why the State in the other countries of Western Europe failed in achieving similar results.

An old German maxim shows that the Frankish monarchy, with its inherited traditions of the Roman Empire, at first made a serious attempt to link up the State with the administration of ordinary justice. "By Richter's ban, by Asega's *Urteil*, by Bauer's will"—so runs the maxim describing the process of a lawsuit. The *Richter* is the royal official, whose *ban*, or summons, bids the defendant attend the moot, where the *Asega*, or "forth-speaker," the ancient clan chief, pronounces the "doom" of the elders. But the sentence is left to be executed by the

Bauer, or peasant, himself, *i.e.* the plaintiff (as we should say), with consequences which may be easily imagined. And, as we have seen, the rise of feudalism in the Frankish Empire, in the eighth and ninth centuries, practically deprived the State of all direct control of the feudal territories, and handed over the latter to the feudal tribunal, with its "court of peers." An odd and unexpected variation seems to have taken place in what we now call Spain, where much of the administration of justice appears to have been handed over to the elected *alcaldes*, or burghal judges, of the great cities of Castile and Aragon.

As a natural consequence, the direct efforts of the State on the Continent were chiefly confined to the *domains*, or private estates, of the rulers. Here the German *Vögte*, the French *prevôts* and *baillis*, the Spanish *adelantados* and *perquisidores*, held their courts in the name of the King; and, in successful monarchies like the French, gradually absorbed a good deal of the rival feudal jurisdictions. But these officials were rather *magistrates*, or administrators, than judges weighing evidence impartially between accuser and accused. Even though the French Kings made a definite effort to introduce the *enquête*, or local enquiry, it was never connected up, as was the jury in England, with local institutions, and never came to be regarded as a bulwark against arbitrary injustice. Consequently, even where royal justice grew at the expense of its rivals, it enlisted no popular sympathy. Even the establishment of great appeal tribunals, the *Reichskammergericht* of Maximilian in Germany, the *Parlements* of Paris and the French provinces, failed to inspire confidence; for the unhappy suitor found himself enmeshed in the subtleties of that Roman jurisprudence which was becoming the favourite study, after the revival of learning, of the French "legists" and the German "assessors."

And each of the two leading countries of Continental Europe had its peculiar weakness in judicial affairs, for which it is hard to account by any general cause. In France, it was the extraordinary practice which arose in

the later Middle Ages, of making the office of the royal judge saleable and hereditary.[1] To an Englishman, this practice sounds so startling, so utterly subversive of fundamental principles, that it is necessary to point out that it was, in fact, found to be compatible with a good deal of uprightness and independence in the judges who lived under it. In the later days of the French monarchy, one of the chief checks upon the royal absolutism was the claim of the Parlements to refuse to enforce royal edicts which had not been registered by them; and, though registration could be enforced by the curious process known as a *lit de justice*, or personal order of the King, yet even the most autocratic of monarchs shrank from such an unpopular step. The tragedy in Germany was that, with the definite break-up of the Empire in the fourteenth and fifteenth centuries, the "reception" of the Roman Law resulted in the definite imposition upon the Imperial tribunals, and their feudal imitators, of an alien and cumbersome procedure, alike cruel and dilatory, with results so grotesque as to be hardly credible by the modern reader. It is, of course, well known to students, that the States of Continental Europe, after sharing in the general establishment of representative institutions in the thirteenth century, gradually allowed those institutions to decline in favour of absolute monarchy. But it is not always realised, that an equally disastrous failure to develope sound systems of justice contributed, hardly less, to the general break-up of political order symbolised by the French Revolution.

[1] An open recognition of the practice is contained in the royal *Arrêt Paulette* of 1604.

CHAPTER XIII

THE STATE AND POLITICAL REPRESENTATION

THE change from the medieval to the modern State is definitely marked by the adoption of the great principle of POLITICAL REPRESENTATION. So far as is recorded, the States of the ancient world knew nothing of this principle; even the enlightened governments of the Greek States and the Roman Empire were ignorant of it, probably because their institutions were based on the circumstances of civic life, in the narrower sense, which, by reason of its smaller membership and narrowness of territory, felt no need of the principle. Political representation is, however, the great engine which has enabled States of the modern world, with their vast populations and wide territories, to transform themselves from mere military despotisms into self-governing communities; and it is doubtful whether any community which did not, at least in theory, adopt it, would be admitted at the present day to the circle of civilised nations. The danger, in fact, now is, that a hasty and merely superficial adoption of a principle which demands a considerable amount of political education for its successful working, may really retard the satisfactory development of immature communities. It is worth while to spend a little time in considering the history and character of this epoch-making principle.

A fundamental mistake is usually made by writers who have attempted to deal with the history of the subject. Misled by recent developments, they have sought the origin of the principle in a wrong direction. To the modern world, political representation is the great engine for the support of freedom against despotism. It is not, therefore,

to be wondered at, that students of its history should have sought its origin in popular uprisings against arbitrary authority. In so doing, however, they have failed to allow for the working of that fundamental law of human association, which asserts that RIGHTS, or privileges, nearly always take their rise in DUTIES, or liabilities. And they have wrongly assumed, that a principle which is now almost universally assumed to be an assertion of inherent rights, necessarily must have been so regarded from the very first. The facts of history are all against this view, as regards POLITICAL REPRESENTATION.

An experience which befell a friend of the writer illustrates, perhaps more vividly than any general speculation, the true origin of political representation. He was travelling with a party of Europeans in a primitive country under the nominal rule of an Oriental monarch, furnished with an escort by its ruler. One night, valuables disappeared from the camp. The travellers, naturally, complained to their escort. The latter, rough-and-ready soldiers, discovered, hidden away in the jungle near the camp, a native village of herdsmen and farmers. Into this village they rode, distributing blows at random on any villagers encountered, and demanding the return of the stolen goods. The villagers loudly (and probably with truth) protested their innocence of the theft. The soldiers remained indifferent. Rounding up the villagers, they seized three or four of the most prosperous-looking and venerable, and announced that, if the criminals were produced within a few days, or, failing that, the loss made good, the hostages would be released. If not, the village would be plundered, and the fate of the hostages unpleasant. The villagers murmured, but complied by performing the only alternative in their power, viz. the making good of the loss.[1] The Europeans were, of course, horrified at this primitive procedure, and begged that the victims

[1] The reader will not fail to notice a reappearance of these crude methods in the proceedings of certain modern "armies of occupation."

might be spared. But the soldiers made light of their scruples, and pointed to the successful result of their measures, which probably included a substantial bonus for their own efforts in producing it.

The story is typical of early political methods. Though the subjects of the primitive State have few *rights*, they have many liabilities. A man, perhaps a royal messenger or other person under the special protection of the ruler, is found murdered in the jungle or on the waste. The three nearest villages must produce the murderers, or pay the murder-fine.[1] The King demands a sum of money, under one pretext or another, of a prosperous town. He cannot be bothered to assess the proper proportions on the inhabitants. His bailiff summons two or three of the wealthiest to his presence, and announces that, if the money is not paid by a certain day, he will seize goods at random. Meanwhile, the unhappy "select-men" are allowed to depart, to arrange the matter with their fellow-townsmen, but only on giving security to reappear with the money on the appointed day. A similar process is adopted if, instead of money, the ruler requires a quota of recruits. But here the royal demands are more specific; for recruits differ considerably in value, and only sturdy and active men will be accepted.

Thus, the earliest political representatives were not *agents*, or delegates charged with asserting the claims of their constituents, but HOSTAGES, held to ransom for the satisfaction of claims put forward by the authority with the strong hand. If any further proof of this assertion be required, it will be found in the well-known fact of the unwillingness of the earliest "constituencies" to accept the honour of being "represented," and the rule that, immediately on being elected, the deputies of the earlier Parliaments had to give security (*manucaption*—hand-holding) to appear before the King on the day fixed for the assembly.

[1] It was, perhaps, the existence of this rule which gave Henry II. of England the hint which he afterwards expanded into the Assize of Clarendon (p. 172).

Their position was unenviable. If they refused the royal demands, they were simply locked up till they were in a better frame of mind. If they promised to fulfil them, they went home to meet the reproaches of their fellows, who had to pay. Excuses were rarely allowed. One of the quaintest is that which Norman William graciously accepted as a ground for relaxing the murder-fine. If the deputies could prove the victim to be an Englishman, he would say no more about it. So "presentment of Englishry" was, for a time, a favourite defence of the accused townships.

This seems to have been the point which the State had reached in England at the beginning of the thirteenth century. Partly through the regular presence of the "reeve, priest, and four good men" of the township at the hundred and shire moots (p. 169), partly by the newly-instituted jury system previously described (pp. 176-79), the King had accustomed the local units to depute certain of their members to meet his officials, and answer the royal demands at stated intervals. Whether there was any corresponding principle at work on the Continent, it is difficult to say. Probably the traditions of absolutism inherited from the Roman Empire, whose officials recognised no intermediary between them and the individual citizen, perhaps, still more, the independence of the great feudal nobles, and their resolute policy of keeping the royal officers outside their fiefs, prevented a similar development there. We hear, however, a good deal about a certain class of persons whom the Latin texts call *scabini*—the French *échevin*, the German *Schultheiss*—who were required by the Imperial decrees to attend the sessions (*placita*) of the Frankish counts and *missi*. Though it has been strenuously argued by a distinguished historian of the Middle Ages, that these persons were officials, chosen on each occasion by the royal count or special emissary, it seems quite possible that they were not official in any other sense. It is important to remember that there was, as yet, no question of ELECTION, *i.e.* of competition between candidates

eager for the honour of representing their communities. Much more probably, the selection was either arbitrary, at the discretion of the royal official, or treated as a burden to be borne by the oldest or richest members of the community, or, as remained the rule for centuries in the Spanish Cortes, in rotation by all members, or, finally, according to the casting of lots.

Naturally, one of the most pressing and regular requirements made by the State from its subjects was the payment of taxes. The Frankish Emperors had inherited from the Roman Empire a searching system of taxation; but it had decayed in their careless hands, and, as has before been pointed out, been replaced by the feudal theory that the King should "live of his own," *i.e.* by the produce of his vast domains, and his numerous prerogative rights of forfeiture, wardship, escheat, fines on inheritance and alienation of fiefs, and the like irregular sources of revenue. But these, owing to various causes, among which not the least was the fall in the purchasing power of money, were continually proving inadequate; and the frequent quarrels between the Kings and their nobles about money claims, were a proof of the acuteness of the problem. One of the most sweeping claims of the monarchy, all over Europe, was to "tallage," or tax arbitrarily, all the serf classes; presumably on the ground that, being unfree, they had no proprietary rights. But this dangerous claim was opposed, both by the feudal magnates, who desired to do their own tallaging of their serfs, and, still more resolutely, by the great towns, whose citizens, by some process of reasoning never made thoroughly clear, were assumed to be unfree, and which were tempting victims of such a claim. For a time, apparently, this claim was compromised by the various "Charters" wrung from the Kings by the feudal magnates, in which the "aids and services" of the feudal vassal were rigidly defined, and by the borough or municipal charters, which, as we have seen (p. 147), in return for substantial tribute, contained grants of exemption from irregular claims. In England, as has been noted

(p. 177), the occasional levy of the Danegeld was converted, by the astuteness of the Anglo-Norman officials, into the regular *carucage* or *hidage*, a tax assessed on the value of land, somewhat on the model of the Roman *tribute*, which the Frankish rulers of the Continent had allowed to fall into decay. And, as foreign commerce grew, the Kings began to exact port dues, or "customs," as the price of their protection of the stranger-merchant, or for maintaining, for the benefit of their own traders, the police of the seas. Still, the State found itself without sufficient resources, and endeavoured to fill the gap with all sorts of irregular levies or *maletoltes*, which, naturally, provoked resistance.

It was, apparently, in the twelfth century, that the rulers of Western Europe began to adopt the practice of dealing with the deputies of their subject communities, on the subject of taxation, no longer by individual or local action, but as a whole, by summons to a central assembly, or Parliament.[1] The idea was not entirely new; for it was, after all, but an expansion of the feudal idea, that a lord must consult his vassals when any important step affecting their interests was toward. Accordingly, we find, almost invariably, that the nucleus of the new body is the nobles or magnates—the PROCERES, "greater barons," prelates—the great tenants-in-chief (p. 161) of the Crown. But, in the twelfth and thirteenth centuries, we note that to these are added deputies of the "third estate"—the *rôturiers* of France, the *caballeros* of Castile, the "knights of the shire" of England, the *infanzones* of Aragon, and the citizens of the privileged or chartered towns. These "estates" were, apparently, formed on the model of older systems which existed in the feudal fiefs; for we read of the "estates" of Normandy, Languedoc, Bavaria, Saxony, and the like, as well as of the "States-General" of France and the "Diets"

[1] The word "Parliament" is French, and is said to have been first used of the assembly summoned by Louis VII. in 1146. But, in later times, the *Parlements* of the French kings were law courts, not legislative assemblies.

of Germany; and one of the reasons for the success of the English Parliament may have been its freedom from provincial rivals. The Diets of the German Empire were particularly weak, not only on account of such rivalry, but from the fact that they appear to have omitted entirely the representatives of the lesser vassals, and comprised only the Imperial Electors (p. 164), the princes (spiritual and lay) of the great fiefs, and the deputies of the Imperial cities.

It was not unnatural, that bodies summoned for the express purpose of granting subsidies should quickly take up the attitude, that all attempts to levy new taxation without their consent were illegal. And, accordingly, we find this claim rapidly formulated, and, after a sharp struggle, reluctantly conceded, by the rulers of the State. By the middle of the fourteenth century, the principle may be said to have been conceded, not only in England, but in Spain, Germany (where the central government was feeble), and even in France. But it is one of the most striking facts in the history of Western Europe, that in no case, save that of England, was this apparent victory of popular aspirations really a fruitful achievement, even in finance, to say nothing of other fields of State activity. What were the reasons for this striking difference of results?

Undoubtedly, much must be attributed to the general conditions of England, previously alluded to (p. 159)—the compactness and wealth of the country, the weakness of English feudalism, the consequent absence (save during brief epochs) of the scourge of private war, the judicious use by the Anglo-Norman monarchy of the ancient institutions of the country; but, none the less, there were special features in the scheme of English political representation which made for success.

One of these was the determination, previously alluded to (p. 186), of the Crown, that no alleged limitations of the authority of the deputies should be pleaded as an excuse for refusing to answer the royal demands. The French Kings of the fifteenth century, when reproached for levying

taxes without the consent of the States-General, urged forcibly, that the deputies resisted even reasonable and obviously necessary demands, on the ground of want of instructions. Thus the French monarchy fell back on the salt tax or *gabelle*, and the *taille*, the *corvée* and the *aide* (p. 158), till the final bankruptcy of the State brought about the Revolution of the eighteenth century. A similar cause sterilised all schemes of Imperial taxation in Germany, till the Empire itself fell to pieces. Wiser, and bolder in the knowledge of their powers, the English Commons rarely refused outright the royal demand for subsidies, but imposed heavy conditions as the price of their liberality, and openly demanded, not merely the almost exclusive control of finance, but also a share in legislation, and, ultimately, in administration, or "policy." The first two demands were soon granted. Against the last the Crown fought long; but, ultimately, it became clear to the King that he lost more than he gained, by refusing the co-operation which Parliament was always willing to offer on reasonable terms. And thus the complete supremacy, or national sovereignty, of the King in Parliament, became the boast of English political writers by the end of the sixteenth century. The unwillingness of the Stuart Kings to accept a position which had satisfied their far abler Tudor predecessors, revived the struggle between Crown and Parliament, and, not unnaturally, sharpened the claims of the victorious party against its rivals, till the latter, in the view of its Continental neighbours, seemed but a phantom power. But the real justification of the sovereignty of Parliament was seen, when, amid the storm of the French Revolution, and the falling monarchies of 1848, the British throne, secured by the support of the representatives of its subjects, stood like a rock amongst the drifting leaves.

Another striking feature of the English political representation was the union of the knights of the shire and the burgesses of the towns. In the Diets of Germany, as we have seen, the former were not represented at all. In the French scheme, they ranked with the *noblesse*, until the

States-General ceased to exist at the beginning of the seventeenth century. But in England the independence and the habit of command acquired by the country gentleman in dealing with his tenants, united with the growing wealth and sagacity of the boroughs, made a formidable combination, which was strengthened by the practice, early established, of debating apart from the overpowering influence of the great nobles, and the necessity for obtaining a majority in the united HOUSE OF COMMONS. Thus, with the disappearance of the clerical House, and the growing influence of the Crown in the House of Peers, the Commons were left as the sole expression of the independent popular will, and gradually acquired the key of the position. The one danger was the uncertainty of the borough representation, both in the choice of boroughs to send members, and the exercise of the borough franchise. The unwillingness of the towns to be represented in the early days of Parliament led to an actual struggle for exemption, which left it open to the sheriff to omit from his despatch of "precepts" for borough elections any recalcitrant boroughs; and when, after electoral privileges had come to be so valued, that they were secured by borough charters, it was still open to the Crown to extend these privileges to docile villages under royal influence, which could be trusted to return equally docile members. Equally fatal to burgess independence was the concentration of the borough franchise in the hands of the municipal rulers of the borough, especially after the "purge of the corporations" undertaken at the Restoration. Thus arose the close and corrupt "pocket" boroughs which were the scandal of the eighteenth century, and which did so much to destroy the efficacy of the Commons House, until they were swept away by the Reform of 1832.

In view of proposals recently made, in this country and elsewhere, for a radical change in the character of political representation, it seems desirable at this point to emphasise the two fundamental principles on which political representation, as it first appeared in Western Europe, was based; leaving a criticism of the new proposals for a later

chapter. These two fundamental principles were COMMUNITY and LOCALITY.

It is true that, at first sight, the most obvious feature of the medieval Parliaments is their *class character.* Medieval society, even in Western Europe, recognised certain social ranks, which were regarded as so inevitable, that an ancient Scandinavian legend, the *Elder Edda,* in a vivid passage,[1] treats them as coeval with the origin of society. The noble, the knight, the priest, the burgess, and the serf, are the typical figures of the social drama. The last could, of course, claim no representation in the national assembly; for he had, in theory, no independent existence—he was in his lord's *mund,* or guardianship.[2] But the other ranks were clearly reflected in the organisation of the medieval Parliament; though, as we have seen (p. 188), not always in the same way.

But, in the purely representative part of the medieval Parliament, the most important for the future, we see that the State requires, not merely representatives of individuals, acting at haphazard, but representatives of *communities,* which can be held bound by the promises of their representatives—the shire, the borough, the diocese, the cathedral chapter. These bodies, though not all corporations, in the technical sense, were all *communities,* having property which could be seized, or, at least, members who could be made responsible. There can be little doubt that this was the idea at the back of the legislation which, in England,

[1] "Edda bare a child, dark of skin, and they named him *Thrall;* wrinkled was the skin of his hands, clumsy his fingers, dirty his face, curved his back. . . . From him is sprung the race of serfs. Amma bare a child. They called him *Karl,* the red and ruddy. . . . From him is sprung the race of farmers. Modir bare a child. They called him *Jarl;* yellow were his locks, clear his cheeks, shining his eyes. . . . He was wise in runes, he learned to understand the cries of birds." (It will be noted that the scheme of the *Edda* is even more archaic than that of the medieval Parliaments. There is no "townsman"; and noble and priest are one.)

[2] Even in England, the copy-holder, or serf-tenant, had no vote until 1832.

at the end of the fifteenth century, fixed the medieval franchise, for many centuries, in the freeholders of the shire. But the community of electors was also *local*. The freeholders of the shire, the clergy of the cathedral and the diocese, the burgesses of the town, were near neighbours. They met and talked together at shire-moot and market, at chapter-meeting and visitation; they could form a common mind, or, as we should say, a "local public opinion." The importance of neighbourhood in fostering the unity of an electorate is, doubtless, not now so great as it was in the days before the art of printing, and the improvements in the means of communication, had lowered the barriers of distance. But it may well be doubted, whether any adequate substitute has yet been found for the sight of the bodily presence and the exchange of the spoken word.

It would, however, be a very superficial view of politics to suppose that, in devising a scheme of representation based on the deep social principles of class, common interests, and neighbourhood, the medieval State had solved the difficulties of representative institutions. For, as the primitive notion of the deputy, as a *hostage* (p. 185), seized by the royal authority from a reluctant community, slowly gave way before a growing feeling of the desire to be represented, and of the honour of being a representative, the question arose: How is a difference of opinion amongst the electors (as we may now call them) to be settled? And again, as the sullen acquiescence of the collected hostages grew into the eager debate of the elected deputies, how was the final resolution of the assembly to be determined?

To a modern reader, these questions sound almost absurd. The acceptance of a MAJORITY vote seems to him the obvious and inevitable manner. And yet it is quite certain, that we can easily go back to a time when this principle was unrecognised in social affairs. In the older institutions of politics, there is no trace of it. Unanimity, not a mere majority, is required to express the voice of the community. This is the rule with the oath of the kindred (p. 82), the village community, and the jury; possibly also with the

craft gild. Probably there were more or less efficacious ways of suppressing a minority who were felt to be merely "pig-headed"; but, as a rule, if there were no unanimity, nothing could be done—a fact which largely accounts for the immobility of medieval agriculture and craftsmanship. For a minority, honestly convinced of its right, to have given way to a majority, merely because it was a majority, would have been thought cowardly. The proper thing to do, if feeling was strong, was to fight it out. Most discussions in the Middle Ages ended in a fight, or, at least, in a brawl. There are countries of which this might still be said.[1]

Though the history of the majority principle is unhappily obscure, there is good reason to believe that England, in this as in so many political reforms, led the way. Unfortunately, the early records of her Parliaments make no reference to the way in which differences of opinion were decided, either at the polls or in the Houses. But this very silence is significant; not less significant are certain traditional usages and tricks of speech which still survive. When "the question is put" in the House, the first answer is a shout; and it is the duty of the Speaker to express his view that the "Ayes have it," or conversely. If his view is challenged, the cry is "Divide, Divide"—that is, draw up the sides in order, one against the other. This can hardly be aught else than an appeal to force, threatened or actual; while the phrase "carrying an election," or, more fully, "carrying a candidate at an election," was obviously, in its origin, an achievement of physical force.

But, clearly, there are objections to the exercise of physical force, as an habitual arbiter in debate; and, dangerous as are all *à priori* arguments, it is hardly too much to say, that its inconveniences must have grown increasingly obvious, as meetings of Parliament and elections

[1] Of course it is not pretended that the recognition of the majority vote was not known to the civilised communities of the older world. But it is noteworthy, that the word "vote" (*votum*) originally meant only a "vow."

became more frequent. At some period or another in its early history, the English Parliament definitely adopted, for its own debates, the principle of submitting to the vote of the majority—*i.e.* of counting heads instead of breaking them;[1] and it imposed this principle, not with complete success at first, upon its electors.[2] The change was momentous; and it revolutionised the development, not merely of politics, but of economic life. But a grasp of its character will enable us to avoid a slavish worship of the majority principle as an expression of ultimate wisdom or truth. Acceptance of the majority vote is not a means of arriving at the truth; it is simply a practical means of getting things done without bloodshed. It is, of course, an appeal to physical force, or presumed physical force, after all appeals to reason have been in vain; but the fate of those assemblies, such as the Cortes of Aragon and the Estates of Poland, which refused to adopt it, would seem to justify the prudence of the English Parliament. And, moreover, the exercise of self-restraint which it involved was a priceless gain, not merely in political, but in social life, by the example which it set. It is significant, that the provocative practice of the wearing of swords by civilians was abandoned in Parliament long before it was discarded outside.

No less remarkable, as a contribution towards civilisation, is the development of that PARTY SYSTEM, which has had so great a share in the success of English representative institutions. The party system is, doubtless, in origin, dangerously akin to the old discredited practices of the blood feud and private war (pp. 80, 140). But it differs from it in being, as Burke showed, an appeal to principle

[1] It is probable that the assembling of Parliament within the limits of the royal palace had a good deal to do with the acceptance of the principle; for we remember (p. 167) that a breach of the King's Peace, especially if "within the verge," was a heinous offence.

[2] The principle is clear in the statute of 1430, which regulated the shire elections ("A voice equivalent"). It is implied in the earlier statute of 1407.

rather than to force; and the true distinction between *party* and *faction* lies just in this point. A party, like a faction, gathers round a leader, and opposes a rival party, as a faction opposes a rival faction. But, whereas the aims of a faction are *personal*, the aims of a party are *public*; and all the severe criticism, often only too well justified, directed against specific examples of partisanship, really amount to this, that the party acts as a faction, *i.e.* that it aims at securing benefits for its members, rather than at carrying out a programme of public policy. And, admittedly, the wholesome working of the party system demands of its workers a degree of self-restraint which is difficult for average human nature to achieve, and the absence of which has, in many cases, proved disastrous to the development of sound political institutions. Nevertheless, it is difficult to see how representative institutions could have been successfully developed without a resort to it, or to doubt that, to a wise and moderate use of it, England owes her pre-eminent place in the history of representative government. For, though it is possible to conceive of a purely tax-granting body acting without the guidance of party organisation, it is difficult to see how either legislation or policy can be produced by a representative body, without some such machinery for disseminating ideas among its members and electors, for putting them into practical shape, for ensuring systematic criticism of concrete proposals, and for stimulating and keeping alive that intelligent interest in public affairs, which is the very life-blood of successful representative institutions. These are the no mean services which the party system has rendered to the progress of political development.

As for the representative principle itself, it has had, as is well known, a curious history. For, after its widespread growth in the twelfth and thirteenth centuries, it had disappeared, almost entirely, in Western Europe by the seventeenth, save only in the British Islands. There, on the other hand, just when it had disappeared elsewhere, it achieved its greatest victory, in bringing beneath its sway,

not merely finance and legislation, but the daily conduct, or administrative policy, of the Government. How this end was achieved, almost unconsciously, by the evolution of the Cabinet System, based on the earlier party organisation of the Civil War and the Revolution, is too special a subject to be described in detail here.[1] But it is material to notice, that the success of representative government in Great Britain was undoubtedly responsible for its adoption and rapid development in the New World of America, which, colonised largely from the British Islands, was, just at that very time, awaking to vigorous political life. Only, it should be pointed out that, owing to the fact that the founding of the great American Republic was coincident with, if not actually caused by, a temporary failure of the Cabinet System in Great Britain, that system was not, to the regret of some, at least, of its ablest statesmen, adopted by the new Constitution of the Federal States. And when, with the bursting storm of the French Revolution, the representative principle reappeared in Continental Europe, not as the outcome of slow historical development, but as the philosophical panacea for the evils of despotism, and an expression of the "natural rights" of Man, it rapidly attained a theoretical completeness which, as hinted above, is perhaps hardly justified by an equally complete practical success. Still truer is this view of the nations of South America, which, on the break-up of the Spanish Empire, caught the reflection of the Rights of Man from the burning torch illuminated by Rousseau. On the other hand, the steady stream of historical development carried the representative principle once more from Great Britain to Canada, Australia, and South Africa, as well as, in less degree, to other countries beneath her sway, where it has taken root and flourished, for the most part, in soil prepared by centuries of tradition to receive and nourish it.

How far the undoubted success of representative institu-

[1] Readers who desire to see a short analysis of the system, and a brief sketch of its history, may be referred to the writer's *Government of the British Empire* (3rd edn., Murray, 1924), ch. v.

tions justifies the student of political science in regarding the representative principle as a normal stage in the development of social evolution, is a large question, which can only be briefly touched on here. Doubts are beginning to be expressed by sceptics as to its ability to bear the strain which is being put upon it; and, unquestionably, the proposed extension of it to such novel fields as India and China will be watched with bated breath by all who have at heart the future of mankind. Against this doubt, however, the successful adoption of representative principles by the intelligent nation of Japan would seem to show that these principles will bear transplanting, even to Oriental soil, provided that the community which adopts them has reached the suitable stage of political development; while their proposed extension to the industrial sphere at least argues continued faith in those countries which have long practised them.

But this is essential. For the representative principle is no ideal solution of the problems of humanity; it is merely an instrument of exceptional power and range, which has, in the writer's view, already achieved great results, and may yet achieve more. Primarily, it is an appeal to reason and faith—to the reason which is willing to make sacrifices to secure benefits, and to the faith which trusts in the honesty of one's fellows. Surely, in this appeal, it evokes the higher nature of Man, and urges him towards the goal of peace. On the other hand, in its acceptance of the majority vote, as settling, for practical purposes, disputes which reason has failed to solve, and suspicions which faith refuses to allay, it recognises the inherent weakness of human nature, and the fact that if, for deliberation, reason is the only guide, it may be needful to rely upon force, when action is essential.

CHAPTER XIV

THE STATE AND LEGISLATION

By "legislation" we mean the formal announcement of general rules of conduct intended to be more or less permanent. We do not usually apply the term to rules of conduct which spring up spontaneously, such as the raising of the hat by way of salutation, or the practice of driving on the left-hand side of the road. These we call "customs"; even though the failure to observe some of them may involve legal consequences. Again, we do not speak of acts, even of the sovereign authority, which affect only a very limited number of people—such as a Divorce Act or an Act settling a pension on a distinguished public servant—as *legislation;* though they are produced under much the same forms as true legislation. Finally, we do not call a mere temporary order, such as the fixing of a day of public thanksgiving, legislation; or, if we do, we use a qualifying adjective which shows that we doubt the strict appropriateness of the term—as, for example, "emergency legislation."

On the other hand, at least one well-known definition of legislation tends to convey false ideas. When people define legislation as the "command of the State," they are apt to assume, first that it is *only* the command of the State, and, second, that it necessarily involves *new* rules of conduct. Both these assumptions are false; and they obscure the true nature of legislation, and, therewith, its proper sphere. In fact, legislation is a complex idea; and, as in the case of most complex ideas, there is no better way of understanding its nature than by tracing how it came into existence.

Now we have seen that, before the establishment of the State, the force which, in the modern community, is expressed in the form of legislation, was expressed by CUSTOM. It was custom which provided the rules of human conduct which governed men's actions. We recognise the similarities, but we recognise also the differences, between these two forms of expression. There is the same generality, the same permanence; but, in LEGISLATION, as distinct from custom, we observe new features. For legislation is enacted by a definite authority—a person or a body of persons. It is also formally and openly enacted, without mystery and without secrecy as to its origin. Moreover, it is almost always accompanied by a precise statement of the penalties, or "sanctions" (as a jurist would call them), which will follow upon a breach of its provisions. Very often, it explains the reasons for its provisions. Whence come these new features?

We have also seen, that the State is military in its origin; and personal authority is of the essence of military institutions. It may be that patriarchal society also, in its origin, rested largely upon personal authority—the authority of the House Father. But this was an authority of narrow range, exercised over small groups of people. And it tended, as we have seen, with the growth of ancestor-worship, and the gradual spinning of the web of custom, to substitute tradition for personal rule. Military authority, on the other hand, is, if it is successful, exercised over large bodies of men; and it remains directly personal. There is no time, in the heat of battle, to consult oracles or doomsmen. Moreover, in the conduct of military operations, new situations are constantly arising, which can only be successfully met by prompt and rapid decisions, immediately obeyed.

In other words, every military leader has to issue ORDERS. Now these orders are obviously, in some respects, like laws; and the issuing of them is, in some respects, like legislation. They impose rules of conduct; and they usually state, and always imply, penalties for disobedi-

ence. In a sense, they may also be said to impose *general* rules of conduct; because they often affect large numbers of persons. But they are usually of a temporary character, and are at least supposed to be prompted only by military necessity. Even the most autocratic commander-in-chief would hesitate about altering the rules of inheritance, or defining the nature of slander, by an Order of the Day. Moreover, and this is very significant, these military orders are personal to the commander who issues them. They do not bind his successors. They can be altered as easily as they are made.

This is the point at which the State starts in its career of legislation. All States which have preserved anything of their original character—even such a highly developed State as the British Empire—recognise the right of the executive authority, the most direct representative of the original military ruler, to issue orders; though the scope and duration of these orders are matters of keen controversy, in which State systems differ widely. The extreme form of them is known as " martial law," or " the suspension of constitutional guarantees," or a " state of siege "—phrases which significantly point to their origin, and assume that, for the time being, the State has returned to its original form as a body of persons under military rule, in which the executive commands of the military leader are the sole authority. But such a state of things is, even in the most autocratically governed of communities, regarded as exceptional. What is the normal position?

If we examine the legal records of any of the numerous States which evolved from the break-up of the Roman Empire, we shall see that their rulers obviously claimed the right to issue ordinances, orders, edicts, or decrees. Of course this was extremely natural, in view of the fact that the Frank Emperors, both of the earlier (or Merovingian) and the later (Carolingian) line, either believed, or at least pretended to believe, that they were the lawful successors of those mighty Cæsars who had legislated for the world from Rome and Constantinople. It is true that the Roman

text-book writers, conservative in their language, handed down the ancient tradition of republican freedom in their well-known definition of law (*lex*) as "that which the people commands and ordains." But in reality that definition had long ceased to represent the facts—had, even in theory, been opposed by the inconsistent maxim, that "what pleases the Prince has the force of law." And in the great Theodosian Code, with which his Greek and Italian scribes made him familiar, the Frankish Emperor could see the Imperial ruler at Constantinople directing the affairs of the world by his "constitutions," "decrees," "epistles," "rescripts," and "edicts."

It is hardly to be supposed, that such an object lesson would be lost on an ambitious ruler. The earlier Frankish conquerors were fond of adopting the Roman titles of "patrician" and "consul"; what wonder that they sought to adopt the powers implied in these titles, and to exercise the prerogatives of the fallen Emperors of the West? In fact we have, from the later half of the sixth century, a series of publications, to which the general name of "Capitularies" has been given by modern collectors, of very varying character, but all resembling one another by the superficial feature, that they profess to emanate from royal authority. Of the earlier of these, something will hereafter have to be said; but of the later, especially those which were issued during the second, or Carolingian phase of the Frankish Empire, we observe, particularly, that they seem to be concerned with two subjects, namely, the conduct of military and official affairs, and the management of the royal domains. There is, practically speaking, nothing to correspond with them in the equally ancient promulgations of the English Kings, though King Edgar's famous Ordinance of the Hundred (p. 168) may, perhaps, be said to recall them; and we must, undoubtedly, be on our guard against drawing general inferences from a practice which was largely derived from the peculiar circumstances of the Frankish Empire. Still, it seems not unreasonable to assume, that the Capitularies of Pepin III.,

of Charles the Great, and of their immediate successors, represent the view, that the military founder of the State was admittedly entitled, in view of his military position, to issue ORDERS for the control and direction of his soldiers and officials, and for the management of the domains which had fallen to his share as the result of his conquest.

The same phenomenon reappeared in the new kingdoms which were set up on the dissolution of the Frankish Empire. Though there was, for a long time, very little of what we should call "general legislation," we observe that the new rulers issue, from time to time, orders of a somewhat comprehensive character, such as the "Constitutions," or, as they are later called, *Ordnungen*, of the German Kaisers, the *Ordonnances*, or, later, "edicts" or *arrêts*, of the French Kings, the "Assizes" of the Anglo-Norman Kings. William the Conqueror, though he solemnly promised to preserve the English "law of the land," issued his famous Ordinance of the Curfew, his Ordinance separating the lay and spiritual courts, and other important decrees. His grandson, Henry II., by his famous "Assizes" of Clarendon and Northampton, regulated, as we have seen (pp. 172-73), his new criminal procedure, by his Assize of Arms, the levy of the national militia, and, by his Assize of Woodstock, the management of the royal forests. None of these, it is to be observed, were very intimately concerned with the daily affairs of ordinary life; and, though there was, undoubtedly, a feeling that, when the King's Orders imposed any general burdens, they should be discussed in an assembly of the "barons," or military tenants of the King, just as there had been a tradition in the old Frankish Empire that such promulgations should at least be accepted by a *Champs de Mars*, or gathering of the direct military vassals, yet, in fact, these ordinances were usually the work of the ruler and his intimate counsellors. And, in fact also, such manifestations as there were, in favour of anything that could be called a "popular" claim to share in the making of royal ordinances, did not, so long as these ordinances kept within the limits above indicated, amount to very much.

But, long before the development of the royal ordinance had reached the point we have described, another, and equally important, movement had made itself felt. All over Western Europe, from the earliest days of the barbarian invasions, there had been attempts on the part of the invaders and conquerors to record the CUSTOMS of their subjects. These attempts fall into two well-marked groups, an earlier and a later.

To the earlier group belong those tribal customs to which we give the name of Folk-Laws. As this name implies, they are not so much *local* as *personal* usages. They date from a time when the map of Europe was still a moving maze of shifting groups, each clinging to its ancestral customs, and, as we have seen (p. 83), refusing to be governed, at least in private affairs, by any others. We see plainly, in the Barbarian Laws of the Frank Empire, the difficulties which arose from the admitted principle, that a "Roman" (*i.e.* a man who, or whose ancestors, was a subject of the fallen Roman Empire) shall be judged by Roman Law, a Burgundian by Burgundian Law, a Salian Frank by Salic Law, and so on. In England, the problem was less difficult; because the English invaders did not, for the most part, settle down as over-lords of the native population, but drove them ruthlessly out, and appropriated, group by group, little patches of territory, to which they ever afterwards clung with desperate tenacity. Thus the old customs of the Kentish men rapidly became the Custom of Kent, the customs of the Mercians the Custom of Mercia, and so on. And thus the Old English Laws, though some of them are quite as old as the Continental *Leges Barbarorum*, really form the connecting link between the earlier and the later of the two groups of laws which we are now considering.

The later group of "custumals" is distinguished from the older, not merely by the fact that its productions were, as we have said, *local*, rather than *personal*, in character, but by the additional fact, that the compilers of these productions were not Emperors or Kings, but unofficial, unauthoritative, and, in many cases, anonymous writers.

The first of these differences is readily accounted for by the fact that, by the time at which this later group appeared, the inhabitants of Europe had settled down, more or less peacefully, to permanent occupation of the soil, and had rebuilt the cities sacked in the barbarian invasions, or built new ones. But the latter fact is mysterious, and has never been satisfactorily explained. It may be called the Period of the Text-Books. For reasons which we shall shortly have to notice, its importance in England was not very great; though the *Quadripartitus* and the so-called *Laws of Henry the First* [1] are interesting. But, for centuries, the familiar and unquestioned "custumals" of Germany were the *Saxon Mirror* ("Sachsenspiegel"), the *Swabian Mirror* ("Schwabenspiegel"), and the *German Mirror* ("Deutschenspiegel"); of France, the *Coûtumiers* of Normandy, Toulouse, Brittany, and Poitou; of Sweden, the anonymous West Gothic Law or Uplands Law; of Iceland, the *Grey Goose Book* (Grágas), and so on. Most curious of all, there were attempts to promulgate a sort of general feudal custom, in spite of the claim of each fief to enjoy its own privileges; and the so-called *Books of Feuds*, tacked on, by a bold effort of imagination, to the Code of Justinian, and the *Assizes of Jerusalem*, that is, of the Latin Kingdom set up by the Crusaders in Jerusalem in the twelfth century, are amongst the curiosities of this period.

But the feature of vital importance which is common to all these productions is, that they do not profess to be *created*, or invented, by the persons who drew them up. A private and anonymous author could, of course, have no claim upon the obedience of Germans or Frenchmen; but the feature is equally clear in the members of the earlier group, avowedly issued under royal auspices. The Emperors and Kings who drew up the Kentish, Salian, Bavarian, and Burgundian customs, professed only to "record," "fix," "settle," "ascertain," or "establish" these customs. We may suspect that they did a certain amount of editing

[1] So called because the work commenced with Henry I.'s coronation charter.

—that particularly archaic customs, especially those abhorrent to their Christian counsellors, were quietly dropped out; whilst it is a matter for regret that the custumals, as was, after all, natural, seem to devote themselves mainly to disputed points, rather than to universally admitted rules. Still, the great point is, that the State, though it had taken the important steps of ascertaining and publishing the customs of its subjects, as yet made no claim to alter or create them.

In England, as has been hinted, the State had, by this time, taken a bolder step. Despite a faint legend to the contrary, it may very well be doubted whether the Anglo-Norman Kings ever made any attempt to collect and formulate that "law of the land" which they promised in their charters to observe. For one very good reason, there was no such thing in existence; and an enquiry after it would only have revealed, as did the later enquiries of the French Kings, a bewildering variety of local customs. The Anglo-Norman policy was much subtler and more effective. As we have seen (pp. 175-79), its framers, in the twelfth and thirteenth centuries, succeeded in drawing to their courts, by their systems of writ and jury, the great bulk of that business which, in Continental Europe, was still being transacted in other tribunals. In dealing with this business, the State's judges inevitably learnt a great deal of English customs; and, by a process never yet satisfactorily explained, they succeeded in welding them into one COMMON LAW. They were even more profuse than the royal compilers of custumals in their assertions that they only "interpreted," and did not "make," this "common law or custom of the realm." But by their masterly policy of confining juries to questions of *fact*,[1] whilst they themselves laid down the *law*, by a crafty framing of writs so as to assume the exist-

[1] It is not so well known as it might be, that the earliest trial-jury, in the "Grand Assize" (p. 177), was directed to answer a question of law. If this model had been followed, there would have been no "common law" in the thirteenth century; because each jury would have followed its own local customs.

ence of legal rules of which they approved, they did, in fact, succeed, in little more than a century, in formulating a LAW OF THE LAND, hundreds of years before the State in France and Germany, with its feebler judicial systems (pp. 180-82), had been able to do so. For even the powerful French monarchy of the fifteenth and sixteenth centuries, though it took elaborate pains to draw up and record the "customs" of its various provinces, by that interesting process known as the *enquête par tourbe* ("enquiry by the crowd"), did not succeed in harmonising and unifying these customs. On the contrary, the very fact that they had been so carefully recorded and officially issued,[1] seemed to give them new life; and even the great French jurists of the seventeenth and eighteenth centuries, though they did their best, did not succeed in producing a common law of France. That result was not achieved until the furnace of the French Revolution had welded the customs into one, and cleared the way for that great Civil Code which is the proudest title of Bonaparte to enduring fame. In Germany, the paralysis of the Empire which followed on the reign of Frederick II., left such attempts at law-enacting as there were to the rulers of the great fiefs; though there was a real attempt, in the fifteenth and sixteenth centuries, to provide a true Imperial criminal and police law in connection with the new Imperial Court of Appeal (p. 181). Accordingly, we find in Germany a number of provincial "land laws" (*Landrechte*) drawn up about this time, such as the Austrian Land Law of 1298, the Bavarian of 1346, and the Würtemberg of 1555. There was also, in the Germany of the later Middle Ages, a good deal of recording of Town Laws, such as the Hamburg and Augsburg Town Laws of the thirteenth century, the Bremen and Munich of the fourteenth, and so on. But these, and later compilations, only served to emphasise local differences; and, in truth, it was not until the close of the nineteenth century, that united Germany

[1] These official custumals of the fifteenth and sixteenth centuries must be distinguished from the older private compilations alluded to on p. 205.

achieved a common law in the Civil Code of 1900. The only successes in the production of truly national laws which, in the thirteenth and fourteenth centuries, can compare with that achieved by England, took place in Scandinavia, where, in Norway, Magnus Lagabōtir's Land Law (1274), and, in Sweden, Magnus Eriksson's Land Law of 1347, may fairly be described as national codes; though they obviously left a good deal of independence to the local customs of the great commercial port towns, such as Wisby and Copenhagen.

But now we have to notice another important fact. Hitherto, as we have seen, the part played by the State, at least in theory, in the production of private, or civil laws, had been that of recorder and publisher only, save only in England, where it had also undertaken to enforce them. On the Continent, the process of record and publication had been openly performed by deliberate and formal enquiries, such as the French *enquêtes par tourbe* (p. 207). In England, on the other hand, the process had been subtler and more complete, viz. by the unifying directions given by the State's judges, on circuit and at Westminster, to the local juries. In other words, the State in England had not merely recorded the local customs, but had unified them, and then enforced the "common law" produced by this union. Consequently, the record of the common law is to be found in England, not in "custumals," or in "land laws," but in the Register of Writs and the Plea Rolls of the King's Courts.

This difference, seemingly so superficial, has left a deep mark on English law, and given it more than one of its most striking peculiarities. It has made it a tower of strength against the arbitrary encroachments of that very State which produced it. More than any other cause, it has led to the establishment of that Rule of Law (p. 167), which refuses to admit that the officials of the State, even though they act in the King's name, are entitled to any peculiar privilege which exempts them from liability for breaches of the law. This striking peculiarity of English

law and the systems derived from it, which was the topic of unstinted admiration by Continental observers, such as Montesquieu and Voltaire, in the seventeenth and eighteenth centuries, is unquestionably due to the formal and official character of the records of the English common law. It was impossible for the State official to deny the existence of rights which were solemnly embalmed in the State's own Register of Writs, each bearing the King's Great Seal, or in the Plea Rolls of the King's own Courts. And when, in imitation of Continental methods, the King's officials, in later days, attempted to argue, that an implied exception from these strict rules must be raised in favour of officials acting in the interests of the State, the answer given by the King's own tribunals, through the mouth of a famous Chief Justice, was, that " the common law does not understand that kind of reasoning." If, on the other hand, the way in which the English common law was drawn up made it somewhat narrow, inelastic, hard to bring into touch with changing conditions,[1] we must never forget that it has guaranteed to Englishmen, better than charters and formal " Constitutions," their freedom from *lettres de cachet*, arbitrary arrests and searches, irregular taxation, forced services, and similar devices of an executive authority unrestrained by the bonds of an equal law. No one of the many peculiar features of English political development has excited more universal admiration, or done more to make England the guiding star of political freedom.

But, of course, we must not forget that, very soon after the State in England had produced the English common law, it also developed the English Parliament. It was hardly possible that this great institution should long remain without influence on the common law; but the precise nature of that influence is often misunderstood.

[1] One of the best proofs of this defect is the appearance of the famous Court of Chancery, in the early fifteenth century, to deal with grievances for which there was no remedy " at the common law."

It has been insisted, in the preceding chapter, which attempted to give some account of the origin of the English Parliament, that, like its Continental relatives, it was no spontaneous uprising of popular desire to take part in politics, but an unwilling response to demands for money, that brought this new institution into existence. Yet, as has also been pointed out, the natural result of the feeling of national unity produced by the creation of Parliaments was everywhere to stimulate such a desire; and the preceding chapter has also (pp. 189-91) endeavoured to point out why this desire succeeded in realising itself in England, while on the Continent of Europe it gradually died away. We have now to see how this desire led to the appearance of State LEGISLATION.

One of the most conspicuous features of early State life is the presentation of PETITIONS to the ruling power. We need not seek far for the explanation of such a practice. The military ruler who has set up the State is so conspicuously the most powerful individual in the land, that it is the natural instinct of every one with a grievance to redress, or a favour to seek, to approach him for help. No ruler with any knowledge of human nature openly discourages such approaches, however much he may be bored by them; for every such ruler is aware that nothing is more dangerous than a sense of stifled wrongs, while he knows, on the other hand, that a few gracious words of sympathy, even if they are unaccompanied by practical help, may convert discontent into loyalty. Accordingly, it is a real object with able monarchs, especially of the primitive type, to prevent access to the throne being blocked by corrupt or harsh officials; and many of the most picturesque stories of benevolent Kings and Sultans are concerned with these efforts.

Now there is plenty of evidence to show that, even before the appearance of Parliaments, the rulers of European States had been in the habit of receiving countless petitions of all kinds, and had even developed a regular machinery for dealing with them. But the establishment of

Parliaments, Estates, and Diets (pp. 188-89) greatly stimulated the practice, and lent additional weight to the prayers of the petitioners. For, while it was comparatively easy, though, as has been said, not entirely safe, to disregard the petition of a private individual, it was by no means so easy to ignore a petition presented by a Parliament from which the person petitioned was demanding a grant of money. Nor, on the other hand, is it difficult to see why the individual petitioner should entrust his petition to the knight of his shire or the deputy of his borough, who was "going to London to see the King"; for he would naturally suppose that, while he himself would be saved the expense and labour of the journey, his "representative" would be a better advocate of his cause than he himself would be.

This is, in effect, exactly what happened. One of the very first steps taken at the assembling of a Parliament at Westminster or a States-General at Rheims or Paris, from the earliest times, was the "trying," or examination, of the petitions, or, as the French called them, *cahiers*, which the deputies brought from their constituents. Many of them were still of a purely personal nature, being very frequently complaints of abuses by State officials. These were distributed among the various officials concerned, with an intimation that, unless the grievance was remedied, more would be heard of it. Others, seemingly susceptible of a remedy by ordinary law, were referred for treatment to the ordinary Courts. Others, again, were for remedies of "grace," which could not be claimed as of right, or, perhaps more often, could not be enforced in the ordinary Courts because of the powerful influence wielded by the wrong-doers; and these it was the practice to refer to certain high officials, such as the Treasurer or the Chancellor, to be dealt with "according to equity and good conscience." This class is specially interesting, because it gave rise in England to the equitable jurisdiction of the Court of Chancery and the Court of Exchequer, to supplement the deficiencies of the common law, and in

Continental countries to similar tribunals. Where these steps were deemed insufficient, Parliament might, if satisfied of its justice, adopt the petition as its own, and pray the Crown to grant its prayer. This is the origin of what is now called "Private Bill legislation."

But the most interesting class of petitions adopted by the early Parliaments were those complaining of a breach of the "good and lawful customs of the realm." Of course, where it appeared that these were based on occasional or individual offences, the petitioner would, naturally, be referred to the ordinary Law Courts. But, if they disclosed an habitual course of illegality, especially by the royal officials, such as "purveyance" (or irregular seizure of provisions and carts for the royal use), unauthorised levies of taxation, even unreasonable interpretation of common-law rules by the judges, then Parliament would proceed to petition the King to issue a general Order against such practices, and would hold up supplies until a favourable answer was furnished. This was, as all students of English history know, the great weapon with which the Parliament won its chief victories, and, ultimately, established its right to share with the Crown the whole powers of government. And when, after an attempt of the royal officials to blunt its edge, by framing the promised Order in such a way as to leave loopholes for future evasion, Parliament gave it a still keener sharpness, by submitting its petitions in the form of BILLS,[1] which merely required the assent of the Crown to assume formal legal shape, the ACT OF PARLIAMENT—the public, unquestionable, supreme expression of the law—made its appearance. But it should be particularly observed that, in its origin, it did not, any more than the judges' decisions, profess to *make* law, but only to declare, proclaim, and enforce law already existing. Indeed, for nearly two hundred years after the com-

[1] This right, which was definitely established by the English Parliament of 1414, though valuable in itself, has, undoubtedly, had the effect of laying undue stress on the very words of an Act of Parliament.

mencement of Parliamentary legislation, the Law Courts expressed grave doubts as to the power of Parliament to enact anything contrary to the common law.

But now, to complete our story, we must turn back for a moment to the power of issuing *Orders* (*Ordonnances, Ordnungen*) which, as we have seen (pp. 200-3), was claimed by the State as part of its inherent military authority. These, on the Continent of Europe, continued to multiply, and, in some cases, to assume a true legislative form, such as the *Reichsabschiede* of Germany, and the greater French *Ordonnances* of the late sixteenth century. But the marked failure of the representative States-General and Diets of the Continent to make good their claims, or even to maintain their existence, left their countries without satisfactory organs of national legislation—a defect which in Germany in the sixteenth century was repaired by the wholesale " reception " of the Roman Law of Justinian!

Very different was the story in England. As might naturally have been expected, the establishment of a national Parliament with unlimited powers was the signal for a definite challenge of the authority of royal Ordinances; and, before the Parliament was half a century old, it had won a brilliant victory in the struggle. For, on the fall of the " Lords Ordainers " in 1322, it procured the assent of the youthful King to an Act declaring that " the matters which are to be established for the estate of our Lord the King and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in Parliament, by our Lord the King, and by the assent of the prelates, earls, and barons, and the commonalty of the realm." And though, doubtless, there were struggles to come, over " Proclamations," " dispensing " and " suspending " powers, and other devices by which the Crown strove to evade the great principle laid down in 1322, yet these were in the end unavailing; and it was clearly settled, at least by the end of the seventeenth century, that the power of the royal Ordinance, or " Order in Council," is, in substance, limited to upholding and

enforcing the existing law, and carrying out duties entrusted to the Crown by Parliament itself.

But, with that practical wisdom which has distinguished so many of the occupants of the British throne, the Plantagenet and Tudor monarchs soon saw that it was not difficult, with the exercise of a little diplomacy, to give an enormously wide and unquestioned authority to its own ordinances, by the simple process of turning them into Acts of Parliament. All that was necessary was, to catch Parliament in a favourable mood, present to it a "project," or Bill, ready cut and dried, for carrying out the royal Orders, and secure its approval by the two Houses. This practice, in fact, accounts for the majority of the earlier Acts of Parliament, down to the end of the sixteenth century, or later. Here and there we get a genuine and spontaneous Parliamentary enactment, such as the Act of 1322, above referred to (p. 213); but, for the most part, the Parliamentary statutes of the fourteenth, fifteenth, and sixteenth centuries, are, as their preambles expressly say, "enacted by the King's Most Excellent Majesty, by and with the consent and advice" of the Parliament. That is to say, they are "Government legislation," accepted by, and clothed with the authority of, Parliament, but, in substance, the expression of the will of the Crown and its advisers. It was a great triumph of policy, which placed the English Act of Parliament high, in point of effectiveness, above the French *Ordonnance* and the German *Ordnung*.

Thus we see that legislation, historically, is not the simple exercise of sovereign authority which it is usually conceived to be. Its initiative may come either from the State, through the mouth of the "Government," or from the Nation, through its representatives. The initiative of the former is nearly always in the direction of *change;* for the State is always wanting to make new rules to enable it to do its business more effectively. The initiative of Parliament is just as likely to be in the interests of the *status quo;* though, of course, in later times, this tendency

has been much less marked than in the early days of Parliament.

Can we go further, and say that each party to legislation does, or should, take the initiative only in its own concerns—that the Government, for example, should only propose legislation about its own duties, leaving the initiative in matters concerning the private affairs of the citizen to the latter's representatives? Owing to the peculiar arrangement by which, not only in England, but in some parts of the British Empire, the Ministers of the Crown are also, for the most part, popular and influential representatives of the Nation, the question is peculiarly difficult to answer there. We are more concerned, in concluding this rather long chapter, to suggest a slightly different question: What are the proper limits of legislation itself?

Of course, in countries with written "Constitutions," or schemes of government, this question is partly, though not entirely, a legal one. In the Republic of the United States, for example, the powers of the federal legislative body, or Congress, as well as of the States' legislatures, are defined, within wide limits, by the Constitutions themselves; and, time and again, the Courts have refused to enforce legislation which has exceeded the limits of those powers. But the Parliament at Westminster is, and long has been, in name, a SOVEREIGN BODY, acknowledging no legal limits to its powers save those imposed by physical conditions. In the well-known adage: "Parliament can do everything but make a man a woman and a woman a man," we have the idea expressed in popular language. Here, and, within the wide limits laid down by their Constitutions, also in other countries, the question is not one of law, but of political wisdom. None the less important, and more difficult, to answer.

And, if our historical account of the growth of legislative power is at all correct, History here, as so often, gives us the clue to the answer. Historically, the rôle of Parliament, as distinct from the Crown, began with the upholding, declaring, and enforcing of the "good customs of the

realm," inherited from previous ages. At first sight, this looks like a counsel of intense conservatism, almost of fossilism. But the fallacy is easily exposed. In theory, custom does not change; in practice, in all progressive communities, it does in fact change, from year to year, from generation to generation. We no longer travel in stage waggons, or light our streets with oil lamps. But the changes which slowly revolutionise the life of progressive communities come from within, not from without. They are suggested by men of inventive genius, taken up by men of energy and practical ability, gradually adopted by the mass of the people. Not all of them are good; some of them, after fair trial, are decisively condemned by that judgment of the better class of citizens which we call "public opinion." But there are always some laggards who refuse to adopt real improvements—who, for example, continue to build insanitary houses, and sell contaminated milk. And there are also plunderers, men of great ability, it may be, but of low moral character, such as "profiteers" and financial swindlers of all kinds, who take advantage of the unsuspecting honesty, or the weakness, of their fellows, to introduce new and evil practices. It is these two classes with whom the legislator has to deal. His function is, not to devise a new order of life for his community, for such artificial schemes are sadly apt to prove unworkable, but to assist, by means of the powerful machinery at his disposal, the community to work out its own salvation. If he makes this his aim, his efforts evoke at once a response from the best minds of the nation; and the supreme value of the *representative*, as opposed to the *autocratic* legislature, is, that it enables the legislator to keep constantly in touch with the efforts of the better minds of his community, to assist their efforts towards social betterment, and to punish attempts by the laggard and the evil-minded to thwart them. No doubt, in the government of "backward" communities by rulers far above their subjects in enlightenment and knowledge, there is a great temptation to introduce reforms "over the

heads of the people." But the benevolent intention usually ends in disappointment; and the reformer learns, by bitter experience, that the true path of reform lies, not in the sudden methods of revolutionary change, but in the patient education, by example as well as precept, of the better minds of the community to aspire after improvement, and to seek their own ways of realising it. Then, and only then, the valuable aid of the State legislature comes in to complete the task of reform.

If it be objected, that this is to reduce to a humble place the heroic remedy of sovereign legislation, the reply is, that this is the way pointed out by History, which is, after all, but the reflex of the nature of Man. Rarely has there been a case in which a legislator, or a body of legislators, patiently studying the aspirations and efforts towards self-government of the community which he or it is set to govern, and striving to aid those efforts with the forms at his disposal, has failed to win the respect of that community, and to advance its welfare. On the other hand, the history of the world is strewed with the wrecks of governments which have treated their subjects as children, expected to follow blindly and unhesitatingly the unexplained decrees of an omniscient Providence, or, worse still, as the instruments of an ambitious policy of conquest and plunder for the benefit of a governing caste. In other words, the function of the State, in its legislative as well as in its other activities, is to give effect to the will of the Nation.

CHAPTER XV

THE STATE AND PROPERTY

THERE is hardly any dogma of political controversy more misleading, than that which defines property as the "creature of the State." It is misleading, because, while it contains an element of truth, it is profoundly inadequate as a statement of the whole truth. It is based upon a generalisation from certain obvious facts, which are wrongly assumed to be the whole of the facts. For, whilst it is manifest that property, in its many modern forms, could not enjoy its present security and completeness without the protection of the State; whilst it is even true, that the State has deliberately fostered the creation of certain kinds of property; it is profoundly untrue to say, that property did not exist before the appearance of the State, or even that the State is directly responsible for all the different kinds of property which have come into existence since the State made its appearance. It is the object of this chapter to point out, with some care, what elements of that wide-reaching institution which we call PROPERTY, upon which so much of modern social welfare, and, on the other hand, ill-fare, depends, have been contributed by the State.

Property, in its earlier and simpler forms, may be defined as the appropriation of physical objects to individual uses. That it is produced by, or at least responds to, deep-seated instincts, not merely of human, but of all animate Nature, can hardly be denied by any one who has observed, ever so slightly, the habits of beasts and birds. There is hardly a single creature, at least among the higher animal intelligences, which does not to some

extent reveal it, by the provision of food and shelter. In the lower grades of intelligence, this provision usually consists simply in appropriating (making "proper" to the taker) certain parts of the physical surroundings. Even in this crude stage, the acquisition of property cannot be dismissed as pure "robbery";[1] for it involves at least the exercise of foresight, and, in all probability, of some labour and skill, as, for example, in the capture and storing up of food. In the higher animal intelligences, such as those of the bee and the beaver, the elements of patience, labour, skill, and perseverance are clearly shown; and, as the "property" which these creatures accumulate undoubtedly represents the exercise of *industry*, it may fairly claim to be acquired by the honourable title of PRODUCTION. At any rate, so far as human beings are concerned, there may be fairly said to be no "natural property," *i.e.* no physical objects which are worth appropriation, without the exercise of at least some degree of labour. Even the gathering of wild fruit, or the hunting for grubs and snails, involves some labour.[2]

We must then, if we are to form just conclusions about this vitally important institution, distinguish carefully between PROPERTY and the MEANS OF PRODUCTION. The latter term, though not, perhaps, the most accurate that could have been devised, has come to mean the material upon which human labour is exercised to produce valuable things; and it is unfortunate, in the interests of clear

[1] According to another, and equally fallacious dogma, "property is robbery." (*La propriété c'est le vol.*)

[2] There is an American story which admirably illustrates this truth. A Utopian lecturer was picturing to his audience a Golden Age, in which, without toil, each man should enjoy the bounties of "Nature"; and he pictured the future citizen reposing in bowery glades, sustained by the rich fruit hanging above him. A "Weary Willie" in the audience enquired how the fruit was to be conducted to the expectant mouth. "You will merely," said the lecturer, his face aglow, "have to stretch out your hand and take it." "Ah," groaned the tramp, disgustedly: "I knew there was a hitch somewhere."

thinking, that the term "property" should be so frequently applied to what are really only means of production. The difficulties in which such a careless use of terms places a speaker or writer may be seen in the appearance of such terms as "public property," to signify objects which have not been appropriated, or turned into property, at all.

Yet another caution may usefully be given to those who are seriously studying the subject of property in the light of history and sober fact. The root idea of property, or appropriation, is USER. The appropriator, or owner, desires to enjoy the various advantages to be derived from the exclusive control of the object appropriated. But, as we have already seen, the idea that, among such advantages, is included the right to TRANSFER the object, early makes its appearance, in the form of *barter*, or, later, *sale;* and though, as has again been indicated, this idea is certainly older than the establishment of the State as an institution, yet we shall find that, in this direction, the State has contributed very powerfully to the development of the institution of property. So also in the closely connected incident of INHERITANCE,[1] which is, obviously, in modern times, at least, only a particular kind of TRANSFER; in this direction the influence of the State has been direct and powerful, though it has had to take account of earlier ideas. Nowadays, we are so familiar with the "transfer of property," that we hardly regard a man as owner of a thing unless he can transfer it freely. And yet we ought to remember that, despite its obvious interest in promoting the free transfer of property, the State has, even in modern times, been obliged to recognise some kinds of property as inalienable; as, for example, the "restrained income" of a married woman, the essential furniture, tools, and bedding of a bankrupt, and the "homestead," inalienable and unseizable by creditors, of the settler.

[1] A lawyer, of course, will distinguish between *intestacy* and succession under a will or *testament*. But the popular use of the term "inheritance" includes both, and will be followed here.

And, despite modern ideas, we ought, as students of social institutions, to realise, that the institution of PROPERTY might well exist, though, doubtless, in a different form, without the elements of transfer and inheritance.

Let us again summarise, very briefly, the extent to which the institution of property had developed before the appearance of the State. We may say that, so far as "chattels" or movables were concerned, communities in the patriarchal, and, to a very limited extent, even in the pre-patriarchal or primitive stage, had recognised the earlier idea of *appropriation*, and that patriarchal communities had clearly also recognised the idea of *transfer*. Where there is no right of appropriation, there can be no law of *theft*, though there may be a law of *robbery* (*i.e.* theft accompanied by violence); and the law of theft is certainly older than the State. Furthermore, in the institution of the MARKET (pp. 113-14), as well as in the handing over of chattels in satisfaction of blood-fines (p. 114), patriarchal society had, as we have seen, definitely recognised the possibility of TRANSFER. About the recognition of INHERITANCE by patriarchal communities we are, unfortunately, much in the dark; but certain very ancient rules of inheritance suggest, beyond much possibility of doubt, that chattels in which an inchoate right of property in individual owners was recognised during their lifetime, passed, on their death, to their household or clan group. A patient examination of the scattered and difficult evidence about the rules of the BLOOD FEUD would probably also yield interesting discoveries as to the way in which the blood-fine was shared by the relatives of a slain man. There are even clear traces of the institution of WILLS or *testaments* in patriarchal society;[1] though the reluctance with which such dispositions were admitted is proved by

[1] For further proof of this assertion, the reader may be referred to the writer's *Law and Politics in the Middle Ages*, pp. 234-6. Sir Henry Maine's statement (*Ancient Law*, p. 172) to the effect that the Barbarians had no testament until they borrowed it from Roman Law, cannot be supported.

the very interesting survivals known as the *retrait lignager*, and the *retrait communal*.[1]

The action of the State in further developing the incipient rules of voluntary transfer is abundantly seen in the protection which it afforded to the conduct of markets (p. 113), its ultimate recognition of informal sales and gifts of chattels, its early enforcement of the law of theft, and in its fruitful and far-reaching law of TRESPASS, or infringement of possession. The history of the law of trespass to chattels is too technical to be related here; but its most important effect, for our purpose, was the recognition of temporary or partial alienations of chattels, by protecting the possessor who clearly was not the owner. Thus the law of property became enriched and developed by such transactions as hiring, pledging, borrowing, deposit, carriage, and the like—usually summed up in the comprehensive term " bailments." It would be untrue to say that the State *created* such developments, which arose spontaneously out of the developing economic and social needs of the community. But it would be equally false to deny that, by the powerful protection which the State extended to them, by providing remedies for their breach, it did much to encourage and stimulate them.

Nor, again, can we possibly overlook the influence of the State in developing the practice of transfer, by its various schemes of TAXATION. In early days, as is well known, most of the State's dues were paid in *kind*. The valuable document known as the *Dialogues of the Exchequer*, clearly shows that this practice prevailed as late as the twelfth century in England. But, of course, it was highly inconvenient to the State; and scholars are coming to the conclusion, that one of the great causes of the establishment of the MANORIAL SYSTEM (pp. 145-46) in Western Europe in the eleventh and twelfth centuries, was the desire of the State to transfer the labour of collecting dues in kind from its own officials to the shoulders of the landowning class,

[1] *i.e.* the right of the kindred or the village-group to forbid a proposed alienation, or, at least, to anticipate it by pre-emption.

who, in return for rights of jurisdiction over the peasant farmers, undertook to pay to the State the equivalent in coin. This system, however, despite its accordance with feudal ideas, was essentially vicious and reactionary; and its downfall in England was early presaged by the establishment of direct taxation of movables, of which the Saladin or Crusading Tithe (p. 156) is a familiar example. As this experiment was repeated, until it developed into regular "subsidies," or "tenths and fifteenths" levied on goods, the stimulus towards transfer of chattels naturally became more powerful; for though, as the terms imply, the "tenths" and "fifteenths" were originally rendered in kind, we may be fairly sure, that the royal officials put strong pressure on the taxpayer to modify such an inconvenient form of render, by selling his corn, beasts, and other goods, and paying his taxes with the proceeds.[1]

But the two chief and most clearly marked directions in which the State early stimulated the transfer of chattels were the enforcement of debts by levy of "execution," and the recognition of wills or testaments.

We have seen (p. 80), that even patriarchal law recognised the seizure of goods by way of DISTRESS, to compel an accused person to come before a tribunal. But we saw also, that the right of the claimant was limited to *seizure*. He could inconvenience the recalcitrant debtor (if we may call him so); but he could not exact payment of the debt by selling the debtor's goods. Even in the long-persistent remedy of DISTRESS FOR RENT, the distraining landlord had, for centuries, no right of sale. If the debtor remained obstinate, there was no further legal remedy. We have seen also (pp. 175-79) that, by substituting its own writ of summons, and its own tribunals, for the less effective methods of the older law, the State, where it was, as in England, successful in acquiring the administration of justice, had, incidentally, abolished, to a very great

[1] It is, undoubtedly, to this desire to accumulate coin that we owe the early claim of the State, everywhere admitted during the Middle Ages, to forbid the export of money and precious metals.

extent, the dangerous remedy of distress. But it could not allow the decrees of its tribunals to be defied with impunity; and, if a debtor, after judgment solemnly pronounced against him, still refused to pay, the State, very naturally, instructed its own ministerial official, the sheriff, to "levy" or to "make" of the debtor's goods sufficient to satisfy the judgment. The very ancient English writs of *levari facias* and *fieri facias* cannot, unfortunately, be dated with precision; but we may be fairly sure that the former, in which the sheriff was directed to hand over an equivalent of the debtor's goods to the creditor, in satisfaction of his claim, is the older, and that the inconveniences to which it gave rise were the cause of the substitution of the latter,[1] by which the sheriff was directed to "make," *i.e.* to sell, of the debtor's goods, sufficient to pay the creditor the amount of his judgment. But these State remedies, as well as the popular imitations of them which early appeared,[2] obviously did much to familiarise the community with the notion of TRANSFER of CHATTELS.

In its recognition of wills or TESTAMENTS of chattels, the State did not work so directly. It was powerfully assisted by the Church, which, for its own reasons, had a direct interest in furthering it. For much of the wealth of the Church came from the "death-bed gifts" of the pious, suggested, or, at least, not discouraged, by the efforts of the attendant confessor. There is evidence that State and Church were not, at first, entirely at one on this important matter; for the Church desired to establish wills of land, as well as of chattels—a desire inconsistent with feudal, and even older, principles. But, apparently, about the twelfth century, all over Western Europe, there was effected a great compromise, by virtue of which the Church took over the whole *execution* of the deceased's desires

[1] The English *levari facias* had become so obsolete in later times, that its rediscovery a generation ago came as a shock, and had to be dealt with by special legislation.

[2] *e.g.* "statutes merchant" and "statutes staple."

with regard to his chattels,[1] or the *administration* of them in the event of his dying "intestate," *i.e.* without a will. At first, the Church displayed a lamentable indifference to the claims of creditors and kindred, as compared with her own; but a little pressure from the State rendered her cautious lest she should lose so valuable a privilege as the control of succession to chattels. Accordingly, in her ecclesiastical tribunals (p. 171), she granted "probate," or admitted proof, of the deceased's will to his named executor, or, in the case of intestacy, "administration" of his goods to a kinsman, merely reserving to herself certain rather handsome fees, any legacies left for "pious uses," and the decision of any disputes about the validity and interpretation of a will, or the application of the rules of succession. One of the striking features of the Church's control of wills of chattels was the long-prevailing rule, that any evidence of a will, even purely oral, was sufficient to "prove" it. For the "confession" of a dying man is usually oral; and, in the Church's eyes, a will of chattels was a part of a last confession, and a means of doing penance for sins.

Even more obvious than its influence in encouraging the development of property in chattels, has been the influence of the State in developing the conception of PROPERTY IN LAND. It is not necessary to repeat what has been said in a previous chapter (pp. 147-49), of that compromise between the incipient State and older, patriarchal, principles, which produced the widespread condition of society known as FEUDALISM. But it is necessary to point out, how the doctrine of TENURE (pp. 144-45), the central principle of feudalism in its social aspect, paved the way for the modern conception of individual property in land. The essence of tenure is the personal relation of lord and man, as expressed and guaranteed by the holding of the FIEF, or estate. At first a purely military, or at least, political, principle, we have seen (pp. 145-47) how it was extended to

[1] On the Continent, the right to make a will was not always restricted to chattels, as it was in England.

cover all social relationships, and how, by the practice of "commendation" (p. 144), and other similar devices, it was carried downwards to the lowest ranks of a society chiefly dependent upon agriculture for its existence. The insistence of the State on this principle, expressed in the well-known legal maxim: "No lord, no land," which appears, over and over again, in documents emanating from the State, was a definite, and, ultimately, irresistible challenge to the older principle, which regarded land as the endowment of the communal group; and, the stronger grew the grip of the fief-holder on his land, the more intense grew the principle of individual ownership, until the office or "lordship" of the *landholder* became the property of the *landowner*. This is so clearly the origin of the great landed estates of the later Middle Ages, that it is hardly worth while labouring the point, save to remark once more the curious fact, that, in England, where feudalism as a military and political system was feeble, its influence as a scheme of landownership was greatest. It is true that a faint shadow of the origin of feudal landownership survives, in theory, in the "eminent domain" of the State; and on this theory some ardent advocates of "State ownership" have rested serious hopes. But the theory of the overlordship of the State, though it still works in the isolated incident of "escheat,"[1] practically disappeared with the recognition of perpetual inheritance, freedom of alienation, and, ultimately, of devise, with the complete abolition of "feudal dues," and of the claim to "forfeiture" for treason or felony.[2] It is not to be supposed, of course, that this transformation of the original principles of feudalism was accomplished without a struggle; it represents, in fact, a number of severe struggles, sometimes very protracted. But the details would lead us into legal technicalities

[1] If the owner of a freely inheritable estate dies intestate and without heirs, his estate "escheats" to his lord. Owing to causes too technical to be explained here, the benefit of an escheat usually goes to the Crown, the supreme "overlord."

[2] This took place in England only so late as the year 1870.

unsuited for these pages, and occupy too large an amount of space to be consistent with the general plan of this book.

Equally unmistakable has been the policy of the State in its relations with those communal groups, which, as we have seen (pp. 94-96), represent the ideas of patriarchal society with regard to landownership. Three distinct lines of attack, two of which go back to the earliest days of the State, show how that institution, despite its reliance for many purposes on the communal liability of the village group (pp. 185-86), yet bent its energies to destroy its exclusiveness and solidarity, and to convert it into a mere locality of individual proprietors.

The first of these lines of attack consists of introducing alien elements into the *commune* or village group. The Barbarian Laws of the Continent show the clearest traces of a controversy which raged about the *homo migrans*, or "wanderer"; and, in spite of the obscurity and scantiness of the texts, it is impossible to doubt the meaning of the struggle. The *homo migrans* is a detached individual, not improbably one of the State's soldiers, who desires to make a home for himself in a village to which he is a stranger, by taking up fresh land, or, possibly, by purchasing land from a member of the village group. The village is up in arms at once. "This fellow knows nothing of our ways; he will try to introduce new-fangled methods of ploughing and reaping. We have as much land under the plough as we can manage; why should we be put to the labour and bother of working and distributing more? How do we know that he isn't a spy? Why should he take land out of our waste?" And so on. We have only to think of the absolute isolation of the village group eight hundred or a thousand years ago, to realise the position, or, perhaps better still, to think of a stranger at the present day trying to force himself as a "paying guest" upon an unwilling household. No wonder that there were rows. But the State was resolute. It put down with a heavy hand any disturbances of that kind. Furthermore, and this is very significant, if the

intruder brings with him "letters of settlement" from the King, and he is then interfered with, the King will treat the interference as direct rebellion, and visit it with the severest penalties. It is easy to see how a strong case could be made out for the action of the State. With land a superfluity, and corn none too plentiful, the establishment of new settlers could be urged as a humane and enlightened policy. None the less, it drove a wedge into the solidarity of the village group.

Still more solvent was the action of the State in encouraging the alienation of their shares by members of the village group. As industry developed, and men became less fearful of changing their abodes, it would inevitably happen, that an unsuccessful farmer would think he would be better off in another village, or as an artisan in a town. But the idea of freedom of transfer was almost as inconsistent with the principles of a communal village as the admission of a stranger, even when it did not involve the latter step. Accordingly, in the earliest examples of sales of land, the assent of the village moot was clearly required. But then comes a significant change. Instead of the village elders, the King or one of his officials presides over the sale, and ratifies it with his approval. Another step in the same direction is the conveyance by fictitious lawsuit,[1] in which the purchaser pretends that he is the true and original owner, who has been dispossessed by the present occupant, and the judgment of the State's Court gives him an indefeasible title. More deadly still is the resolve of the State to make the individual farmer's land liable for his personal debts, not, necessarily, by forced sale, but by handing it over to the creditor until the debt is paid. This step was taken in England towards the end of the thirteenth century;[2] and it practically converted the communal *alod*, no less than the feudal estate, into an individual, alienable holding,

[1] Known in England as the "Fine" or the "Common Recovery," in Germany as the *Auflassung*.

[2] By the writ of *Elegit*, issued in pursuance of a great statute of the year 1285.

and completed the break-up of the village community on its personal side.

After this, it was merely a question of time for the physical side to be attacked also. This result was effected by the great ENCLOSURE MOVEMENT, which, beginning in England in the fifteenth century, dragged intermittently along until the nineteenth. It traversed two distinct stages. The first applied only to the arable and meadow lands of the village. The arguments in its favour were specious, and were well and amusingly put in a well-known rhymed tract of the fifteenth century,[1] in which the superiority of "several" to "champion" (*i.e. champaign*, open) husbandry is vigorously maintained. Nor can there be much doubt that the old "intermixed farming," previously described (pp. 95-96), was enormously wasteful and unenterprising, while the new method of carving up the land into individual plots, each surrounded by hedges, and worked according to the individual taste of the owner, gave better economic results.[2] But the fierce and often-repeated riots which attended its introduction by order of the State, showed that the mass of the peasants realised that more was involved than a mere economic improvement. They were losing the shelter of an institution under which they had lived from time immemorial, and entering upon a new social order which they distrusted. They knew that the grantees of the monastery lands were not landowners "for their health"; and they dreaded, not without reason, a conflict between their individual wits and those of their landlord's bailiff.

The story was the same in the second stage of the movement, when the waste lands of the villages were enclosed, in the eighteenth and early nineteenth centuries. Here, again, the arguments for the change were plausible. But

[1] By Thomas Tusser, *Five Hundred Good Points of Husbandry*, Mavor, 1812. A more scientific advocate was Fitzherbert, who combined success in law and agriculture.

[2] Compare Diagram B, the plan of the enclosed village, with the same village under the old system in Diagram A, at the end of the book.

the villagers, though they had by that time sunk from being owners of their lots of arable and meadow, to the position of day-labourers, or, at best, precarious tenants of great landowners, fought desperately to retain their rights of grazing, turf-cutting, and trapping (pp. 98-99) on the COMMON WASTE. But a landowners' Parliament, with its Inclosure Acts, was too strong for them; though, in theory, their rights were preserved by the allotment to them of little patches of the waste in individual ownership. At last a more enlightened public opinion awoke to the hygienic, rather than the economic, danger of closing public spaces, especially near growing towns, where, for reasons later to be alluded to, the enclosure movement was strongest. And so a fragment, but only a fragment, of the old communal England survives to the present day. Compared with this far-reaching enclosure movement, it seems almost unimportant to mention the individualising process, probably connected with it, which followed the confiscation of the MONASTERY and GILD lands in the sixteenth century. The best excuse that can be offered for this wanton break-up of a social system which had existed for ages was, perhaps, the havoc in it which had already been wrought by the terrible visitations of the "Black Death" in the fourteenth century, which virtually made the manorial system of serf-labour unworkable.

But now it is a noteworthy fact, that, just when the State had succeeded, most completely, in breaking up the old LAND COMMUNITIES, and also, almost as completely (as we shall see when we come to deal with the State and Industry), the old INDUSTRIAL COMMUNITIES, or gilds, it began to be extremely active in establishing new COMMERCIAL COMMUNITIES, or, as they are commonly called, COMPANIES. The precise steps by which this result was achieved are too technical for these pages; but the barest outline of the process may be indicated.

The germ lay in the old "regulated" companies of foreign merchants, such as the Hanse League, in which members of the company, and they alone, were allowed to

carry on trade, under certain regulations, in certain areas. We have seen (p. 111), that there was a certain amount of common liability attached to these associations; but they differed from modern commercial companies, in that their members did not trade upon a COMMON STOCK, but each ventured his own capital, at his own risk, in his own dealings. The idea spread rapidly after the great geographical discoveries of the fifteenth and sixteenth centuries, and was extended to companies of native merchants trading to foreign parts. Examples are the English Levant Company, Russian Company, Guinea Company, and, most famous of all, East India Company.

Then came a vital change, in which the last-named company, in England at least, is believed to have led the way. Instead of each member trading with his own stock, he contributed a certain SHARE of capital to the COMMON STOCK, and received a DIVIDEND or proportionate return on his contribution, out of the profits made by a governing body of "Directors," who traded with the common stock. No particular part of the actual goods or money employed belonged to the individual member; his share was, in legal language, "incorporeal," *i.e.* it was not concentrated in tangible objects like specific bales of cloth or spices, but consisted merely in the right to a proportionate share in the profits, and a liability to bear a proportionate share of the losses, of the business as a whole.

The difficulties in the way of working this revolutionary idea were great; but they were ultimately solved by the application to the new commercial communities of the then novel device known as the CORPORATION, or "legal person."[1] We have seen already (p. 147), that this device, probably derived from the ecclesiastical community, such as the monastery or the cathedral chapter, had begun to be applied, at the close of the Middle Ages, to the municipal community, or BOROUGH, which, by its aid, had established itself firmly as a legal person, with considerable powers,

[1] The alternative expressions "fictitious person," or "artificial person," are to be deprecated, as suggesting false views.

not merely of government, but of holding PROPERTY. Unfortunately, this device was never extended in England to the rural communities of the shire, the hundred, or the village; or their fate might have been very different from its actual history. But it was freely applied, and with conspicuous success, to the new commercial communities or companies; always, however, with the strict reservation (in this country at least) that no corporation could be created without the express sanction of the State, which, as we have seen, was inclined at first to be very jealous of it.

Now the root idea of a CORPORATION is, that it is a body of individuals[1] acting together for a common purpose, which has a legal existence apart from the individual legal existences of its members. In the monastic community, the individual existences were merged completely—at least, so far as the outside world was concerned—in the corporate existence of the community; the man or woman who entered it became, at least before the religious Reformation, "dead to the world," and his separate existence was no longer recognised for secular purposes. But in the later municipal and commercial corporations, no such result was desired; and the merger of the individual existence only extended so far as the common affairs of the corporation were concerned. Consequently, the individual member may even deal, as an individual, with the corporation of which he is a member—may contract with it or commit offences against it. This result took a long time to establish itself; and the difficulties it occasioned are amusingly illustrated in the old reports of legal cases. For instance, a burgess of a Midland borough was prosecuted for stealing the corporation plate. He pleaded, that he was a member of the corporation, and could not be prosecuted for stealing

[1] In the most common case, that of the "corporation aggregate," there are several individual members at the same time. Where there is only one member at any given time, *e.g.* a bishop or rector, the corporation is said to be "sole." The corporation "sole" is difficult to work, and is said to be peculiar to English law.

"his own" plate. Nevertheless, the device, with all its difficulties, proved to be enormously useful, and has constantly been developed and amended during the last two centuries. One of its most important developments has been that of LIMITED LIABILITY, the principle by which the liability of each member of a company, or economic corporation, to contribute towards the debts of the company, is limited to the amount of his share in the capital of the company. Naturally, there was much hesitation on the part of the State in recognising the validity of this principle; and special precautions are taken to protect the public when it is adopted. Nevertheless, if we may judge by the rapidity with which it has spread, its advantages[1] outweigh, in public opinion, its disadvantages. A much more doubtful development in this country is the "private company," *i.e.* a company whose shares are not offered to the general public, and cannot, without the consent of the company, be alienated beyond a restricted circle. This development, in effect, enables an ordinary private partnership, or even an individual,[2] to enjoy most of the advantages of private trading and public enterprise, without the inconveniences of either.

By these steps the State has succeeded in creating, or, at least, in fostering, a new type of PROPERTY, now of immense importance — the "share" (*action, Aktien*), "stock," "debenture" — which differs from the older kinds of property in not being concentrated on any definite physical objects, such as land and cattle, but in being only a right to receive a proportion of any profit which may arise from a series of commercial transactions. Nevertheless, the ultimate connection of this "ideal" or "incorporeal" property with tangible objects, is shown by the

[1] The great advantage is supposed to be, that enterprise will be stimulated by the concurrence of large numbers of small capitalists, who are willing to risk some, but not all, of their capital; while the profits of successful enterprise will be widely diffused.

[2] The so-called "one-man company," worked by an individual through a small group of nominees.

technical name of "chose (or thing) in action," applied to it by English law.[1]

We have now, in concluding our sketch of modern developments of property, to notice two other and still more "ideal" examples, in the establishment of which the State has also played a great part, and of which one, at least, is of great economic importance.

These are the two kinds of property known as PATENTS [2] (including "trade-marks") and COPYRIGHT (including "designs"). The essence of both is the same, viz. the claim to a monopoly of the right to prevent any goods, produced as the result of the protected invention, being sold, except by the inventor himself. Consequently, the right is negative in character, and would be purely selfish and anti-social, but for the fact that it is merely used (in genuine cases) to enable the inventor to obtain a fair share of the proceeds of the sale of the manufactured goods. The actual origins of the two kinds of property are different; though both are closely connected with State action. PATENTS are monopolies, and, as such, *primâ facie* inconsistent with that freedom of individual enterprise which is regarded as essential to the prosperity of the community. In England, at least, they owe their origin to a grudging admission by an Act of Parliament of the early seventeenth century, which, while sternly denouncing monopolies as a whole, allowed a strictly limited grant of a monopoly for any "invention new within the realm, to the true and first inventor thereof." COPYRIGHT is the result of severe police measures undertaken, on the introduction of printing, to regulate the activities of the Press—a policy which made it penal for any one to issue printed matter without a State licence.

[1] The term was first applied to claims for fulfilment of contracts, such as bills of exchange, and claims to recover land or goods alleged to be unlawfully detained. The transfer of these was regarded with suspicion by the Courts, as likely to lead to oppression.

[2] From the fact that they are, in this country, protected by "Letters Patent," which, in return for a limited protection, reveal the nature of the process to any one who cares to look at the State's records.

Quite naturally, the persons who actually acquired licences to print their productions, acquired a practical monopoly of them; and the abolition of the licensing system was speedily followed by legislation definitely recognising this monopoly, under certain restrictions. A precisely similar, but much less justifiable result was produced, on an infinitely larger scale, by the system of issuing licences for the sale of ALCOHOLIC LIQUOR, developed in the eighteenth century, and followed, after many years of tacit recognition, by the statutory guarantee of monopoly accorded by recent legislation.

We are now in a position to sum up the respective contributions of the State and the community to the fully developed institution of PROPERTY, and then to consider for a moment whether this record suggests any useful hints with regard to the future of this vital institution.

Broadly speaking, the State has not *created* property as a whole. The instinct of property, *i.e.* appropriation, is so deeply seated in humanity, that it finds clear and definite expression long before the appearance of the State; it is, in fact, justified by some philosophers on the ground that its realisation is essential, not merely to citizenship, but to human personality. On the whole, it seems impossible to question the justice of this view, as applied to a world in any way resembling that in which we live. In such a world, the absolutely property-less person is a slave; because he is dependent for the very means of existence on the will of others. It is the question of degree which is really important.[1]

But again we ask: If property is *appropriation*, from or of what is it an appropriation? And then we find, on examination, that all *valuable* property is a compound of the skill and labour of the appropriator and the resources of the community. This is true even of mere loot, or plunder,

[1] There have been many noble attempts to lead a useful life without the aid of property, *e.g.* by the Mendicant Orders ("Friars") of the Middle Ages; but these have been successful only by virtually abandoning their professed principles.

whether acquired by the older methods of brute force, or by the modern methods of the unscrupulous financier. It is also true, at the other end of the scale, of the inventor, the author, and the painter; for, even if these owe nothing to the intellectual and artistic inheritance they have received from the community, which is far from being the case, their productions would be of no value *as property*, unless the community were prepared to give services in return for them. The difference between the two cases is that, in the former, the labour and skill of the appropriator are of a low and anti-social character, whilst, in the latter, they are of great social value, probably much greater than any return received for them.

It has often been objected against attempts to analyse the nature of property, that it is impossible to distinguish between "raw material" and "finished products"—that both alike involve human labour, directly or indirectly. This is perfectly true. Even coal at the pit's mouth, or iron at the blacksmith's forge, is a "finished product," so far as the miner or the smelter is concerned; though it is the raw material of the smith. But, so far as the smith is concerned, it is his "means of production," as we have called it; and, so far as he is concerned, it is part of the resources of the community. The problem of appropriation arises each time that the product changes hands; and the great question is: Does the new acquirer give the community value for his appropriation?

Now, so far as the direct creation of property is concerned, the power of the State is limited by its character. The State, as we have seen, is essentially military in character; its methods, whatever its ultimate objects, are mainly non-productive—*i.e.* they do not produce values, but merely preserve or destroy them. It is, however, familiar from its earliest stages with the policy of annexation, or plunder, whether conducted at the expense of alien communities or its own. It can, therefore, create property, by handing over the resources of the community to individuals or small groups of individuals; and this is, in effect, what the State has

done, by creating individual or private property in land (pp. 225-30), and protecting it with all its overwhelming power. No doubt, originally, the State received some return for this reckless squandering of the resources of the community. On the other hand, the obviously limited extent of the resources thus alienated, their vital necessity to the community, their constantly increasing value (due to the discovery of processes or elements unimagined when the appropriation was made, and to the increase of population dependent upon them as " means of production " [1]), cannot but raise, in the minds of thoughtful students, the question whether the policy of the State in that respect is really irrevocable, or whether a Statute of Monopolies, somewhat like that applying to chattels (p. 234), could not also with advantage be applied to land.

And, if the State has done little to *create* property in chattels, it has done, as we have seen, a great deal to protect and develope it. It is probably not quite true to say, that property in chattels could not long exist without the protection of the State; but the parlous condition of Trade Union funds before they were protected by recent legislation, shows how important is that protection under modern conditions. It is, therefore, essential that the State should, on the one hand, not refuse to extend its protection to property to which the contribution of the appropriator is high, both in value and quantity, and the amount appropriated from the resources of the community small, and, on the other hand, that it should not allow its protecting shield to be a bulwark for predatory and anti-social exploitation of the resources of the community. A conspicuous example of the latter weakness may be seen in the abuse of the peculiarly English device of the TRUST, by which a small number of individuals, or a single individual, stands forward as legal owner of property, the economic

[1] This is, of course, the explanation of the " unearned increment "; and the vice of the Enclosure System (pp. 229-30) was, that it gave almost the whole of this enormous potential wealth to the great landowners.

advantages of which he is bound, by the most solemn liabilities, to hand over to others. Originally devised for the purpose of protecting women, children, ecclesiastics, and others to whom the legal liabilities of property-holding were unsuited, and supported by the powerful machinery of the Church, it is now employed as a cover for vast commercial transactions, some of them of very doubtful morality, by persons perfectly well able to bear the burdens of legal ownership.

Finally, the State has, as we have seen, done much to alter the original character of property, by its insistence on the free development of alienation, or TRANSFER. If the philosophical justification of property, before alluded to (p. 235), is sound, property must be regarded as an endowment enabling a man to develope his personality. As such, if our view of the origin of property is at all correct, it probably began its history. What a man required for his essential needs of defence against attack, for shelter, clothing, and food, he appropriated, in accordance with the general sentiment of his community. It was not until the possibilities lying concealed in the processes of PRODUCTION and EXCHANGE (pp. 102, 112) revealed themselves, and, therewith, the multiplication of desires, that the practice of individual accumulation began. Quite naturally, this practice inevitably stimulated the desire for free alienation, which, as we have seen (p. 223), the State, for its own reasons, also favoured. Freedom of transfer is, in truth, an essential of individual, or even of corporate industry, on a great scale.

But this kind of transfer implies alienation only between living persons, or, as lawyers say, *inter vivos*. A dead man cannot carry on industry or commerce; the inheritance or legacy of a fortune is not an industrial transaction, nor is a "settlement," *i.e.* a donation prompted merely by charity, affection, or caprice. Any ethical claim which the appropriator of the resources of the community may have to retain his appropriations perishes with him; but for the State's rules of testament and inheritance, he could

control them no further. This truth, obscured by the survival of the traditions of the petty community of the clan and the gild, is beginning to be perceived by the larger community of the nation, as witnesses the increasing scale of Death Duties. In truth, this rising scale only testifies to a logical appreciation of the changed circumstances. In an older condition of society, the clan, or the household, or the gild, was, in fact, the community, from whose resources the accumulated property of a deceased member was drawn; it was fitting, therefore, that it should return to that community on his death. Now the community from which a man draws his property is the nation; it is fitting, therefore, that the nation should inherit an ever-increasing share of the property of its deceased members.

But the poverty of the arguments with which unlimited rights of testamentary disposition and inheritance are defended is, perhaps, the most suggestive sign of the indefensible character of such rights. The anarchic claim to "do what I will with mine own" ignores, not merely the fact that, but for the State's assistance, one's "own" would be a precarious possession, but the fact that, in no serious sense, can a dead man be said to "own" property. The natural distress which a parent would otherwise feel in the prospect of leaving young children unprovided for, could be met by a strict limitation of a moderate equipment to actual dependants, or, better, by an endowment by the parent during his lifetime. The familiar argument, that a confiscation of wealth by the nation on the death of its owner would do away with incentives to industry, is contradicted by experience, especially by the comparative rarity with which rich men give away their wealth, even to their children, in their own lifetimes. The real incentives to industry are habit, the joy of work, the stimulation of the nervous system which it engenders, the prospect of success and its consequent esteem, and, of course, the desire to satisfy the ordinary needs of existence. Secure to the worker the product of his labour during his lifetime, let him show it or conceal it, according to his instincts; and

he will not be discouraged by the thought that it will go to the nation after his death. Doubtless there are occasional instances of abnormal egotism, such as that of the banker Thellusson, who deprived all his known relatives of interest in a large part of his fortune, in order that it might accumulate and preserve his memory for the benefit of unknown generations. But we already regard such freaks as anti-social, and legislate against them. It is but to extend the principle.

How far the further restriction of property in the lifetime of its acquirer might be safely attempted, is a more difficult question, opening, as it does, the whole question of the value of large accumulations of wealth in promoting the well-being of the community. It is generally contended that, without such accumulation in the hands of individuals or small groups, industrial progress is impossible; and it certainly seems a condition precedent to any serious attempt to abolish CAPITALISM, that non-capitalist producers should show themselves capable of providing for the essential needs of the community. It may then be considered whether the superfluity is desirable. But this is a problem which more properly belongs to a later chapter. It would seem that, regard being had to its character, the true functions of the State in connection with property are, to refuse to protect or favour any appropriation without a due return on the part of the appropriator, to restrain abuses of property, to raise the necessary revenue of the State from those best able to contribute to it, and to restrict the duration of proprietary powers within reasonable limits.

CHAPTER XVI

THE STATE AND INDUSTRY

In order to appreciate rightly the history of the relations between the State and Industry, we must once more remember that the State, in its origin, was not an economic but a military institution, which concerned itself only with industrial life as that life was necessary to maintain its own existence. An army cannot, of course, live without supplies of men and material; and we have seen (pp. 132-33) how, in its earliest days, the State, formed by immigration and conquest, sometimes adopted a crude and simple system of plunder to satisfy its needs. But, in the nature of things, such a system could not continue indefinitely; and the State, gradually established as a permanent institution, was obliged to bring itself into permanent relationship with the industrial life of its subjects, whence alone (apart from wars of conquest) the supplies necessary for its maintenance could come.

We have seen, also, how the inability of the gigantic Empire of the Franks in Western Europe—that pale imitation of the ancient Roman Empire—failed to achieve the task of directly relating itself to its individual subjects, and how, by the mysterious compromise known vaguely as Feudalism (Ch. X.), it ultimately succeeded in placing between itself and its subjects a governing military class, which should, on the one hand, supply the requirements of the State in men and money, while, on the other, that class exercised almost unfettered control over the mass of the people, by means of its seignorial or manorial organisation. For a long while, historians laid undue stress upon the military side of this organisation, which was, in itself,

doubtless, important. But more modern research has shown, that the elaborate system of "works and services," or *labour dues*, upon which the manorial organisation was founded, played an equally important part in the scheme. The manorial lord undertook responsibility for the economic as well as for the military dues of his "tenants." In principle, the direct claims of the State on the individual farmer or craftsman—the "tallage" of England, the *taille* and the *corvée* of France—only applied in the royal domains, where the King governed directly. A notable instance of this truth is the famous Domesday survey of England, directly undertaken as a basis for the rendering permanent of the Danegeld. "Domesday Book is a Geld Book."

But, with the decay of feudalism, and the accompanying revival of the State, the latter sought, naturally, to come into closer contact with its subjects; and, as we have already seen (pp. 156-57), one of the first efforts which it made was to establish a system of DIRECT TAXATION. The nucleus of this system already existed in the port dues, or "customs,"[1] which, from very early times, had been exacted by rulers from foreign traders as the price of admission to their territories, and from natives on the plea of the necessity for policing the seas. But, in the twelfth and thirteenth centuries, at first under pretence of a Crusading or "Saladin Tithe," subsequently under a plea of general necessity, direct taxation of land and movables was introduced by the State, though not without fierce opposition; and we have seen (pp. 187-89) how that opposition led, everywhere in Western Europe, to the establishment of representative institutions, or PARLIAMENTS, whose

[1] It is true that, in modern practice, "direct" taxation means taxation which falls immediately upon the individuals who are intended to bear it; and, in this sense, port dues are classed as "indirect." But, as they are collected directly by State officials, they are obviously different from the feudal dues. There was an intermediate stage, lasting a long while in some countries, in which "farmers," or contractors, undertook to collect the port dues for fixed sums, retaining any surplus as profit. This may be regarded as a kind of fiscal feudalism.

earliest and most important function was the regulation of taxation. This result was destined, in the course of time, to change the whole character of the State, and to transform it from an aloof military organisation into an organ of the national will. But, as is well known, and has before been pointed out (pp. 189-96), the decay of the Continental Parliaments, which was complete by the end of the seventeenth century, left the working out of this momentous change practically to Great Britain, and gave that country its unique position in the history of political development. Thus this chapter will, inevitably, deal mainly with British experience, until it reaches the period when the great French Revolution caused a sudden revival of representative institutions all over Western Europe.

Incidentally, we may here mention one immediate result of this closer relation between the State and its subjects, which had, ultimately, a profound effect on industry. This was the restriction to the State of the issue of COINAGE. Though this rule of the later Roman Empire had survived in tradition, yet, in fact, many feudal nobles and chartered boroughs claimed the right of private coinage until well on into the Middle Ages; and it was not until the thirteenth century, that the State made a determined effort to stamp out the practice. But that efforts were then made, both in England and France, is clear, as well as the fact that, on the whole, they were successful. It is quite possible, that a desire to profit by the immoral but alluring process of "debasing the coinage" influenced the policy of the State; but it is tolerably clear to any one who reads, for example, in the twelfth-century *Dialogues of the Exchequer*, of the difficulties which confronted the State revenue officials in the calculation of the true value of a miscellaneous collection of coins,[1] that a great extension of the system of State taxation inevitably compelled the reform. And one has only to think of industry being conducted to-day under

[1] The English Exchequer had to keep an elaborate staff of weighers, testers, fusers, and the like, to deal with the freaks of bad coinage.

the medieval system of private coinage, to realise the economic importance of the change. Incidentally, also, the change was responsible for the familiar policy of the fourteenth and fifteenth centuries, which forbade, under the severest penalties, the exportation of native coinage and the importation of foreign. For "bad money tends to drive out good."

But by far the most dramatic event of the later Middle Ages, from the standpoint of this chapter, was the occurrence, in the middle of the fourteenth century, of the Great Plague, or Black Death, which devastated the whole of Europe, and swept away, with appalling suddenness, a portion of the population variously estimated at from one half to two thirds. In England, the visitation was, perhaps, more fatal even than elsewhere; and the whole social system reeled under the shock. The immediate difficulty was, of course, the shortage of labour, and the consequent danger of famine. The elaborate MANORIAL SYSTEM, partly co-operative and partly servile (pp. 145-46), went by the board, after a desperate attempt to maintain it which ended in the Peasants' Revolt of 1381. The way was thus prepared for the crusade in favour of "enclosures." But, long before Thomas Tusser wrote his famous poem (p. 229), serfdom had practically ceased in England; and the former serf, finding it more profitable to put up his labour for sale in the open market than to continue to work his little farm after half his fellow-farmers had disappeared, had become a wage-earner, and the "proletariat," or landless and craftless mass, had become an established fact. Needless to say, the governing class, threatened with bankruptcy by the loss of their labour dues, took strong measures to avert the danger, and, making use of the new Parliament, in which they were strongly represented, embarked on a policy of State regulation of wages, under which industry was carried on, substantially until the Industrial Revolution of the late eighteenth and early nineteenth centuries produced the modern factory system. At first, the State attempted directly to fix the standard of wages (and, incidentally, of

hours) by statute; but, after a time, the impossibility of maintaining a rigid standard in the face of harvest fluctuations compelled the State to delegate the fixing of local rates, based, roughly, on the price of bread, to the Justices of the Peace at their annual sessions. At first, also, the Statutes of Labourers applied mainly to agriculture and its allied industries (weaving, tiling, and the like); but, with the dissolution of most of the craft gilds at the Reformation, their scope was greatly extended, and only landowners, members of skilled or learned professions, and those who had satisfied the test of a rigid apprenticeship system, escaped their net. All other persons were bound to work for any one who wished to hire them, at the standard rate. To pay or receive more was a criminal offence in employer or employed. To entice away another employer's man made the "seducer" liable to an action for damages. Employees who left their service during the year of hiring could be pursued and brought back. Persistent deserters were punishable as "vagabonds"; and an unwise bracketing of the punishment of vagabonds with the relief of the "impotent poor"—a matter rendered urgent by the dissolution of the monasteries at the Reformation—rendered the well-meaning Elizabethan scheme of POOR RELIEF unpopular and ineffective. Add to these, the fact that, to recoup themselves for their losses in agriculture, the greater landowners revived, with marked success, the institution of great sheep-farms, which required less labour, and the great maritime discoveries of the fifteenth and sixteenth centuries, with the consequent development of foreign commerce on a great scale, and it is not difficult to see how the social system of the Middle Ages, with its countless little communal groups of manors and gilds, changed suddenly into a great individualist society, divided into two camps, in one the privileged and capitalist class, in the other the great unorganised mass of wage-earners. Thus the great modern industrial problems, *e.g.* the proper share of Capital and Labour in the profits of enterprise, the conditions of work, the provision for unemployment and sickness of the

wage-earning class, loomed on the horizon; though the survival of the small farmer and *entre-preneur* (the representative of the gildsman), and the continuance on a considerable scale of "home industries," obscured them, until the emergence of capitalist farming in the middle, and the appearance of the factory system at the end, of the eighteenth century, practically abolished these medieval survivals. In the circumstances, it was inevitable that the State should be drawn more and more into the realm of industry.

During the earlier Tudor period, when the burgess representation in Parliament (p. 191) was still, probably, more or less genuine, there seems to have been an honest attempt to fill the gaps left by the disappearance of the old village community and the gilds, by industrial legislation aimed at the protection both of the producer or workman and the consumer. Several well-known statutes regulating the tiling and weaving industries, the breeding of cattle, sheep, and horses, the provision of cottages for agricultural labourers, and other industrial matters, are extant; and there is no reason to believe that they were not honestly intended and worked in the interests of the community as a whole. But the decay of the old industrial "boroughs" (p. 116), brought about by the change of trade routes, the neglect to give representation to the new centres of industry which rapidly sprang up to replace these, and the deliberate creation of new "rotten" boroughs by the Crown to secure its influence in Parliament (p. 191), gradually filled the borough seats with a new type of member. Either (as in the case of the new "rotten" boroughs) he was a petty Crown official or "placeman," or, as in the case of the old decaying boroughs, he was a newly enriched merchant who had made his fortune in foreign trade, or the nominee of a neighbouring landowner who had managed, by the judicious expenditure of money, to "pocket" the borough. In either case, the newcomer would hardly be an intelligent and enlightened sympathiser with the needs of the wage-earner; while he would have a lively sympathy with the policy of Capital. It is not surprising, therefore, to find that,

after the turmoil of the Civil War in the seventeenth century against the Crown (in which the county members played an honourable and pre-eminent part), both the county and the borough members united in a policy which, though it could be speciously represented as in the interest both of the safety of the realm and the prosperity of the wage-earner, was marked throughout by a strongly capitalistic character, both on its positive and its negative sides. On the one side, the long series of protectionist statutes, from the Navigation Laws of the Commonwealth and Restoration to the Corn Laws of the early nineteenth century, tended unquestionably to strengthen the power of capital; on the other, the almost equally long series of "Combination Laws," culminating in the great statute of the year 1800, practically made it impossible for the wage-earners to organise themselves, by treating every association formed to raise wages or shorten hours of work as a criminal "conspiracy" against the system set up by the Statutes of Labourers. It is not necessary to assume that, in this policy, the capitalist classes were prompted by conscious injustice. It is quite probable that, in the total absence, not merely of representation but of voting power, among the wage-earners, they still thought that the system of regulated wages was sound; and it may never have occurred to them that, to justify the system, a corresponding regulation of profits was necessary.

As has been previously remarked, the course of industrial development on the Continent, during the seventeenth and eighteenth centuries, lagged as much behind the English as did the political; and it is impossible to doubt the connection between the two facts. In France and Germany, the events of the seventeenth century produced a strong development of centralised autocracy,[1] which was accompanied by an almost complete stagnation of industrial development. Everywhere the peasantry remained

[1] Of course it should be carefully remembered that, in those centuries, there was no "Germany," except as a geographical expression, and that many of the German States were very small.

virtually in a condition of serfdom; while even the efforts of the enlightened French economists of the eighteenth century, such as Turgot and Calonne, failed to overcome the natural aversion of the French industrialist to "great" industry. Not unnaturally, the French Revolution swept away agricultural serfdom in France, and, very largely, in Germany. But it is at first sight curious, that one of the earliest measures of the revolutionary Republic should have been the dissolution of the *corporations*, or *métiers*, which had survived the English gilds by at least two centuries; and the explanation, apart from the passionate individualism of the Revolution, is, probably, to be found in the fact, that the French Kings of the sixteenth century, while carefully preserving the form of the *corporations*, had brought them completely under State control, and, finally, made of them instruments of arbitrary and unpopular taxation. In Germany, on the other hand, there seems to have been no feeling against the *Zünfte*, or gilds, either on the part of the State or of the people; perhaps by reason of the stagnation of industrial development. At any rate, they seem to have lasted until the revival of industry, and the introduction of competitive principles, in the nineteenth century.

Meanwhile, a substantial victory had been won by the wage-earners in England in the passing of the Repeal Acts of 1824 and 1825, which, for the first time, rendered lawful the existence of Trade Unions, *i.e.* organisations of wage-earners formed for the avowed purpose of improving the conditions of labour. The differences between the two statutes, which appear, at first sight, to be almost word for word, are obscure but important. They may be studied in detail in the contemporary accounts;[1] but, in substance, they amount to this: that whereas the earlier statute of 1824 not only repealed the long series of "Combination Laws" which had culminated in the Act of 1800 (p. 247), but also the alleged "common law" or judicial decisions on the subject of trade conspiracies, the later statute of

[1] *e.g.* in the *Life of Francis Place*, by Graham Wallas, 1919 (Allen & Unwin).

1825, which superseded the Act of the previous year, merely repealed the *legislative* provisions against Trade Unions. Thus, when, alarmed by the rapidity with which Trade Unionism developed,[1] the Government and the employers revived the ancient doctrine of "criminal conspiracy" in the case of "strikes," the main effect of the statute of 1824 was seen to be merely to shift the *onus* of proof on to the prosecution. Doubtless the mere existence of a Trade Union was no longer an offence against the law; but effective action—*e.g.* a "strike"—was treated as a criminal conspiracy, though it was admitted that, since the repeal of the Statutes of Labourers, it was no offence, criminal or civil, for isolated individuals to throw up their jobs after due notice. And when, by the Trade Union Acts of 1871 and 1876, the doctrine of "criminal conspiracy," as applied to peaceful strikes, was abolished, the employers successfully appealed to the yet more shadowy doctrine of "civil conspiracy," a doctrine never applied in practice to any other persons than members of a Trade Union,[2] which held responsible in damages any group of persons who induced others to leave the service of their employers, and, finally, those who persuaded others not to enter the service of a particular firm.[3] The weakness of this doctrine, from the employers' point of view, was, that only the persons actually engaged in the acts complained of could be made liable; and they, being, as a rule, wage-earners, could not pay much. But a startling decision by the House of Lords in the year 1901,[4] which held the large funds of the Trade Unions responsible for acts of "civil conspiracy" by their

[1] In fact a few Trade Unions, carefully disguised as "Friendly" or "Benefit" Societies, had maintained a precarious existence before 1824. But the great development of the movement begins from that date.

[2] The inconsistency of the doctrine is shown by the fact that the House of Lords, sitting as a judicial tribunal, refused to apply it, in the year 1892, to a shipping "ring" which threatened to boycott all merchants who patronised its rivals. ("Mogul" Case.)

[3] The "Belfast Butchers" Case, in 1901.

[4] The "Taff Vale" Case.

officials, not merely extended the doctrine of agency in a remarkable way, but reversed the whole attitude of the State towards Trade Unions, by treating them, after long refusing to do so, as "legal persons" or corporations. Had the State, at the same time, conferred upon the Unions the legal power, enjoyed by every corporation, of making and enforcing contracts, at least within the scope of their objects, there might have been something to say in support of the "Taff Vale" decision. In the circumstances, it was regarded as an act of war, and was treated as such.

The opportunity of the Unions came in 1906. The Reform Act of 1883 had conferred upon the male wage-earners, to a considerable extent, the political franchise; and, in the General Election of 1906, the position of political parties enabled them to throw the whole weight of their political influence into the scale, with decisive effect. One of the first results of the victory was the passing of the Trade Disputes Act, which swept away, not only the "Taff Vale" decision, but the whole doctrine of "civil conspiracy," as applied to trade disputes. The individual employer or employee who breaks the law can still be prosecuted or sued, according to the nature of his offence. But the mere fact that such an act is alleged to have been done at the instigation of an employers' association or a Trade Union, does not make the association or Union liable in damages; while, at any rate in connection with trade disputes (the only matter in which the doctrine was ever applied), the doctrine that it is unlawful for A and B to combine to do an act which, done by either independently, would not be unlawful, goes by the board. Much nonsense, some clever, some very stupid, has been talked about the Trade Disputes Act; and it was, undoubtedly, in the nature of a "reprisal." But the responsibility for the reprisal hardly lies upon the shoulders of its promoters. It may be, and probably is, desirable, that the legal rights and liabilities of powerful unincorporated bodies like Trade Unions, Employers' Federations, political "Leagues," and religious associations, which, in fact, exercise great power, should be carefully

regulated. But such regulation must not take place by a series of sniping attacks, but by a comprehensive scheme based on impartial justice.

Before leaving the subject of English Labour organisations, one other recent event must be mentioned. The bulk of the older English Trade Unions, especially those of a local character, play the double rôle of a benefit society, making provision for the old age, sickness, and out-of-work contingencies of its members, and an armed champion of their cause against the alleged invasions of their rights, or neglect of their merits, by their employers. Both these functions involve the expenditure of funds, sometimes on a very large scale; and it is obvious that undue attention to one involves risk to the other, unless the funds available for each are kept distinct. If a Union expends all its money, for example, in an unsuccessful strike, it will have none to expend in sick pay or other " benefit."

This was the point raised in the " Osborne judgment," where it was held, that a member of a Trade Union, duly registered under the Act of 1871, was entitled to the assistance of the Courts in resisting a compulsory levy upon him to provide funds for political propaganda, with the alternative of expulsion and loss of benefits if he refused to obey. The various decisions of the Courts, which covered the period 1909-11, raised many abstruse technical questions as to the legal position of Trade Unions; and they emphasise the necessity for a comprehensive definition of Trade Union status. But the precise point in dispute in the Osborne Case was disposed of by a statute of the year 1913, which, in effect, divides the funds of an ordinary Trade Union into two parts, an economic and a political, and makes levies on behalf of the latter optional upon its members. The effect of the Act was, however, largely discounted by the adoption of the principle of payment of salaries to members of the House of Commons; for the necessity of finding the means of support for their representatives in Parliament had been one of the chief charges upon the political funds of the Unions.

We must now deal very briefly with the subject of wage-earners' organisations in other countries, before going on to allude to other aspects of industry with which the State has been called upon to deal; always remembering, that this book does not propose to treat of industrial organisation as such,[1] but only with the attitude of the State towards it.

Apparently, the law of 1791, before alluded to (p. 248), put an end to workers' organisations in France for the best part of a century. But, as the conditions of modern industrial organisation spread across the Channel, the desire of the French artisans for protective organisation gradually developed. After a political struggle, into the details of which we cannot enter, the Waldeck-Rousseau Law of 1884 definitely legalised the formation of *syndicats*, or industrial associations, which thereupon sprang up in great numbers. These associations, following the general trend of French industry, are largely local in character, though they have created organs for the general expression of their aims, such as the *Confédération Générale du Travail* and the *Fédération des Bourses du Travail*, now working in concert. It is noteworthy, that the *Bourses du Travail*, or Chambers of Industry, so long as they remained purely local, were actually subsidised by the State, through the municipalities; but this support was withdrawn when the *Bourses* formed a national organisation. As is also natural, the division between employer and employed being less sharp in France than in England, the aim of making the *syndicats* producing as well as organising bodies has been more marked in France, and has given rise to that conception of economic society known as "Syndicalism," which aims at securing for the industrial organisation the complete control of its industry, and the entire extrusion of the State from industrial affairs, and, indeed, ultimately, its complete extinction. But this is a point which will be more conveniently considered in a later chapter.

[1] This will be found admirably described and discussed in a little work by G. D. M. Cole, entitled *The World of Labour*, 1917 (Bell & Sons).

It seems at first a little surprising that, in Germany, where the prevailing conception of the State would appear to be completely hostile to independent associations, there should, seemingly, have been little opposition by the State to the formation of *Gewerkschaften*, or workers' unions, which followed upon the disappearance of the old *Zünfte* in the middle nineteenth century (p. 248), and which have since attained a high degree of organisation and extent. But the explanation of the mystery appears to lie in the fact, that the new Unions, many of them conservative and religious in character,[1] have, from the first, kept themselves rigidly outside politics, leaving the political interests of the proletariat entirely in the hands of the Socialist Party, a highly organised body, with which the State and Imperial Governments have had seriously to reckon. In Italy, on the other hand, the tendency of the workmen's organisations to enter upon politics of a highly inflammable character, combined with difficulties arising from the different conditions of north and south, has prevented them as yet achieving any great industrial results. The growth of Labour associations in Sweden is equally modern, and has already met with one severe check (in 1909); but it would seem that the check was administered, not by the State, but by a highly organised Employers' Union, which skilfully chose a moment of trade depression to enforce a general "lock-out."[2] In the United States of America, Trade Unions, despite their large numbers of members and a high degree of organisation, have not, owing to the immense "pool" of alien unorganised labour upon which the employers can draw, threatened to control the situation, and have, apparently, been (apart from war conditions) ignored by the State, which has confined its attention to regulating physical disturbances caused by trade disputes. In some, at least, of the self-governing Dominions of the

[1] *e.g.* the so-called "Christian" and "Hirsch-Dunker" Unions.

[2] It is significant that the demand of the Unions upon which the dispute arose was for universal suffrage—primarily a purely political object.

British Empire, however, especially in Australia and New Zealand, the State has not merely recognised, but has actually encouraged, the formation of Trade Unions, and has even entered into active co-operation with them, in manner to be hereafter alluded to (p. 256).

It may, not unnaturally, be asked whether there has been, on the part of the State, any action as regards employers corresponding to that which, as we have seen, in England at least, until the year 1824, restricted the association of wage-earners. In the Middle Ages, when great industry was, practically, non-existent, there were certain laws about "engrossing," "regrating," and "forestalling,"[1] which may, conceivably, have had this object. There was the great Statute of Monopolies (p. 234); and it is just possible, that a strict interpretation of the "conspiracy" doctrine may have included associations of employers as well as workmen. But there is little evidence, if any, to show that it was so interpreted. Prosecutions for "lock-outs" were as rare as prosecutions for "strikes" were common in the first half of the nineteenth century; while the elaborate series of arguments in the "Mogul" Case (p. 249, n. 2) failed to convince the judges of the applicability of the doctrine of conspiracy to capitalist associations. On the other hand, the creation by the State of new and liquid forms of capital by means of joint-stock companies (pp. 230-32) has immensely facilitated the formation of capitalist associations, which, in fact, are now almost as numerous as Trade Unions commonly so called.[2] Only in the United States of America does there appear to have been any definite attempt to restrict the scope of capitalist associations; while in Germany, as is well known, the State has, in recent years, actively encouraged the formation of such bodies.

[1] "Engrossing" = buying up (more particularly of "multiple" products); "regrating" is buying cheap and selling dear; "forestalling" is (as its name implies) buying up goods on their way to market.

[2] In Great Britain, a "Trade Union," in the important Trade Disputes Act of 1906, includes employers' associations. The full effect of this piece of political strategy remains to be seen.

The State has, in fact, shown a much greater disposition to confer direct benefits on the wage-earner, than to allow him to redress his own grievances. Even before the lowering of the political franchise had enabled him to exercise legislative pressure, and in spite of the opposition put up by the employers under the motto of *Laissez Faire*, the State had begun to pass Factory Acts directed specially to prevent the exploitation of wage-earners' children, the working of excessive hours, the allowance of insanitary conditions and dangerous machinery in factories. It is not too much to say, that many of the wisest of these restrictions were often bitterly opposed by the wage-earners themselves; but they continued to be issued, with ever-increasing effect, until they culminated in the Public Health Acts, the Old Age Pension Acts, the Education Acts, and the various schemes of National Insurance which prevail in different countries.[1] But, perhaps, the most interesting and significant movement on the part of the State in recent years, in its relations with industry, is the attempts from time to time made by the State to effect a settlement of industrial disputes, by means of conciliation or compulsory arbitration.

At first sight it seems wholly impossible for an industrial dispute, not involving an actual breach of law, to be settled by judicial or quasi-judicial methods. There is, it is said, no common standard. This was not always so; and it is not universally known that, in the later days of the system set up by the Statutes of Labourers (p. 245), there was actually a machinery of compulsory arbitration for disputes too complicated to be settled by any but experts.[2] With the introduction of *Laissez-Faire* principles, all that machinery disappeared; and, for the greater part of a

[1] An early and primitive form of wage-earners' insurance is that known in Great Britain as "Workmen's Compensation," which makes employers liable for accidents to their workmen arising out of their employment. The advantage to the wage-earner of this form is, that the whole cost falls on the employer. On the other hand, it involves many risks; and its scope is narrow.

[2] See the English statute of 1825 (cap. 96).

century, it was assumed as axiomatic, that an industrial dispute could only be settled by industrial war.

The credit for the first serious attempt on the part of the State to introduce a better system seems to belong to New Zealand, where, in the year 1894, certain previous spasmodic efforts received legislative sanction. The scheme has a double object. First, it compels the parties to a dispute to attempt a definite agreement under the auspices of a Conciliation Council representing both sides, under an impartial Chairman. If the efforts of this body are successful, the terms agreed to may be embodied in an industrial agreement,[1] breach of which entails a fine; if they are unsuccessful, the dispute is then referred to an Arbitration Court, of a judicial character, appointed by the State, whose award is final, legally binding, and enforceable by penalties upon those who disregard it. One apparently striking feature of the scheme is, that it is only open to registered associations of employers or workmen; but, as the conditions of registration are easy, this means, apparently, that either party to a dispute can compel arbitration. On the other hand, compulsion appears to be only binding upon a registered association; and so it is possible, by cancelling registration, for any party in effect to evade the penalties of the Act. The verdict of a well-informed critic [2] is, that the scheme, which has been adopted by at least two other Australian States,[3] has had considerable

[1] Incidentally, the award may prescribe a minimum wage.

[2] See Cole, *The World of Labour*, pp. 292, 299.

[3] The South Australian Act does not require initiation of proceedings by a "registered association," but allows them to be commenced by any twenty employers or employees in the same industry. On the other hand, it absolutely forbids, under severe penalties, any "strike" or "lock-out"; as does the Commonwealth legislation, instituted in 1904 to deal with industrial disputes extending over more than one State of the Commonwealth. But the most striking feature, perhaps, of the Commonwealth legislation, is that which empowers the Arbitration Court to give a preference, both in claim for employment and in the rate of wages, to members of "organisations"—*i.e.* Trade Unions.

effect in improving the conditions of notoriously underpaid industries, but that it fails to attract support from workers who, without being notoriously ill-treated, seek to better their conditions. Obviously the difficulty is to find a common standard; and the tendency has been for the Arbitration Court to adopt as its guide the practice of the best employers, and to turn that into a rule—a plan which is safe enough as a basis of legislation, but not satisfactory as a basis of reform.

A somewhat less ambitious scheme is that known as "Compulsory Conciliation," which is said to have originated in Canada in the year 1900, and to have extended to the United States and to South Africa. It seems to be mainly confined to "public services," such as railways;[1] and it aims only at compelling the parties to a dispute to suspend hostile operations ("strikes" and "lock-outs") until the dispute has been investigated by a Board representative of both parties, though usually nominated by the State and presided over by a direct representative of the State. When this body has issued its award, it is still open to either or both of the parties to refuse it, and resort to industrial war; but it is evidently hoped by the advocates of the scheme, that such an award will carry with it a weight of public opinion which will compel the parties to accept it.

A third variation of the movement we are describing is that known as the "Wages Board" system, which is specially connected in origin with the State of Victoria (Australia), but has, to a limited extent, been applied in England.[2] It aims, not directly at the prevention of industrial disputes, but at the fixing of a rate of wages and hours below which it is illegal for any employer in the trade to fall. Again the difficulty is the standard. Where

[1] Of course, the railways of the U.S. and Canada are not strictly public services, because they are not worked by the State.

[2] By the Trade Boards Act of 1909. The State is directly represented on the Trade Boards, which have power to fix a minimum wage.

conditions of labour are notoriously bad, and the exposure of them creates a public scandal, the system has been effective in raising wages; even though there is nothing in it to prevent an employer, save a consideration of his business interests, closing down his works. But, at least in some cases, the Boards are forbidden by statute to fix the minimum rate above that paid by the best employers in the trade; so that, in these cases, the effect, though by no means negligeable, is, practically, to extend a particular agreement, or group of agreements, over the whole trade.

The great question, therefore: Whether it is desirable, in the interests of the community, to allow the parties to a great industrial struggle to carry on their warfare by the means allowed to individuals in bargaining for their individual dealings—for this is all that "strikes" and "lock-outs," unaccompanied by fraud or violence, really amount to—does not seem yet to have been settled by the State. And this is, obviously, because no solution of the question has yet been arrived at by public opinion, which, at any rate in democratically-governed countries, decides the policy of the State. On the whole, there is a general tendency to answer the question in the negative; because it is felt that such extended warfare is a palpable danger to the community. But the tendency is not decisive; because public opinion has formed no definite views upon industrial justice. The great majority of men and women are inclined to accept as inevitable the conditions which history has up to now produced; but there is growing a group of powerful thinkers who see the fallacy of assuming that any stage of evolution is final, and who come forward with proposals for fundamental changes. Some allusion to these, as they involve action by the State, will be briefly made in the concluding chapter of this book. But we have first to say something as to the different forms which the organisation of the State has, at different times, assumed.

CHAPTER XVII

KINDS OF STATES

IN examining the types of political organisation at present existing in the world, the student must beware of the danger of catch-words. No aspect of political science is fuller of language survivals, which have not only lost their original meanings, but are positively misleading when applied to modern institutions. If, therefore, this chapter appears to deal largely with discussion of words, there is a reason.

One other caution may be advisable. In this chapter, we deal with different TYPES of State organisation. We shall distinguish between federal and unitary, "flexible" and "rigid," "common law" and "prerogative" Constitutions, and so on; and shall, naturally, give frequent examples of States adopting each type. But it must not be assumed that these types run parallel, *i.e.* that each State will fall exclusively under one or the other list of contrasts. On the contrary, the crossing of types is almost universal; and the result shows the extraordinary varieties which political life is capable of producing. Thus, to take examples at haphazard, France has a written Constitution, is "unitary" (p. 266) in character, and has an elected President and a Parliamentary Executive (pp. 268-70). Holland has a written Constitution and a Parliamentary Executive; but her Constitution is federal, and the headship of her State is hereditary. America is federal and has a written Constitution; but she has an elected President and a fixed Executive. In fact, of all the "types" that we shall examine, only two seem to be inevitably connected; a federal Constitution and a written Constitution are almost

inseparable. But, after all, this does not mean much; for there are now very few first-class States which have not written Constitutions.

Generations of students nourished on Aristotle's philosophy, pure or diluted, have been accustomed to think of all possible State forms as necessarily falling under one of his three classes—Monarchies, Aristocracies, and Democracies. This famous classification is, of course, based on the numerical relationship of the governing person or body to the rest of the "free" members of the community. Where the government is in the hands of one person, the State is a Monarchy; where it is in the hands of a select few, it is an Aristocracy; where all the free (male) citizens have a voice in the government, there is a Democracy. Such was the simple reasoning of Aristotle; and it may have fitted the States of which he had knowledge. But it is worthless in our day, when a "Monarchy" may, in common speech, include a personal autocracy like that of Frederick the Great, a bureaucratic autocracy such as that which ruled Russia in the name of the late Tsar, a caste autocracy like that of the German Kaiser, and a popular rulership like that of Italy; and when a "Democracy" will cover such widely different types as the two Republics of France and the United States of America. The once intense interest in these ancient terms has long worn thin; though the terms themselves, as has been urged, still exercise unconscious influence. It would be idle, therefore, to treat this classification as of serious importance at the present day. Save for a few doctrinaires, no one really now cares very much by which name a State is called.

We touch a more practical point, not remotely connected with Aristotle's classification, if we try to distinguish between SOVEREIGN and NON-SOVEREIGN States. The term "sovereignty," originally meaning little more than "supremacy" or eminence,[1] came, owing to the political ferment caused by the religious Reformation of

[1] The writer has found the Heads of Cambridge colleges described as "sovereigns" in a fifteenth-century law report.

the sixteenth century, to have a peculiar and somewhat artificial significance. In the well-known definition of Grotius, who used the idea largely to build up his doctrine of International Law, it has two aspects. It implies that the Power of which it is used neither submits legally to the interference of any other Power, nor allows its own subjects to question its omnipotence. As a matter of fact, few ruling persons or bodies have, at any rate in modern times, attained such a position; as a matter of law, a certain number of ruling persons or bodies claim it. Others, while admitting external control, claim internal omnipotence. Others again, while admitting that they are restrained by constitutional bonds in dealing with their own subjects, claim complete independence as regards external authority. The classification, though, as we have said, related to Aristotle's famous analysis, cuts across it. Thus, a democratic State, like the American Republic, may be independent in all external matters, whilst exercising legally restricted powers over its own citizens; another democratic State, the British Empire, likewise acknowledging no external authority, also claims to exercise, through the Imperial Parliament, unfettered control over its citizens and subjects. The subject of " sovereignty " is so interesting, and so practically important for the future, that a little further attention may well be given here to its influence.

Nothing could, at first sight, appear more hopeless as a basis of International Law, than the theory of external sovereignty. Law implies submission to authority; and the doctrine, that the world is composed of sovereign States, looks like an open recognition of anarchy in international affairs. Grotius, the father of modern International Law,[1] was driven to it by sheer necessity. As a practical statesman, he was well aware, that the old order, which recognised a vague international authority in the overlordship of Pope and Holy Roman Emperor, a far-off

[1] Grotius' famous book, *De Jure Belli et Pacis*, was published in 1625.

survival of the ancient Empire of Rome, had been shattered for ever by the Reformation—that at least the Protestant States would no longer tolerate any active interference in their concerns by the Papal See. Despairing (as well he might) of finding any definite human authority to which States would bow, he took the bold course of admitting the complete international independence of States, and, at the same time, of urging them to submit to the rules of the "Law of Nature." The very vagueness of this famous phrase recommended it as an ideal; and Grotius' work is chiefly occupied with an attempt to expound its meaning. Describing it briefly as "the dictate of right reason," he based his exposition of its principles, in substance, on the practice of classical antiquity, as exemplified in Greek and Roman history; and, owing to the popularity in his day of the revived study of ancient history, with astonishing success. The Wars of Religion had shocked the conscience of the world by their savageness, and the suffering which it had produced; and, everywhere in Western Europe, Princes and Generals grasped at the solution offered by the Dutch writer. Successive authors developed his ideas—some on the theoretical side, by logical expansion of his principles, others on the political side, by gradual agreement, through treaties and conferences, as to what practices were permissible in the intercourse of States. A whole new chapter was added by the development of the rules of Neutrality, an attitude barely imagined in Grotius' day. Next to the great religious writings of the world—the Bible, the Koran, the Sacred Books of the East—the work of Grotius stands pre-eminent among literary works which have swayed the destinies of mankind.

Nevertheless, the theory of Grotius had one obvious weakness. It made no provision for the appearance of a Power, strong enough, and immoral enough, to defy the opinion of the civilised world and the sacredness of treaties, and to treat the doctrine of external sovereignty as a doctrine of anarchy. A time came, as we all know, when such a Power appeared; and, for a time at least, the temple

which Grotius and his followers had built with laborious care, seemed to lie in ruins. Of the proposals for its rebuilding, we must say a word in the final chapter of this book; but, before leaving the doctrine of external sovereignty as an apparent failure, we ought in fairness to point out that it has, at least in theory, contributed one very important principle to the doctrine of international affairs, viz. the equality before the law of all independent States, however they may differ in size and power. Difficult as it may be to apply this principle in practice, it has at least stood as a constant protest against the anarchical doctrine that Might is Right.

The other aspect of Grotius' doctrine, viz. internal sovereignty, used by him chiefly to enforce the very useful lesson that one State has no right to interfere with the internal affairs of another State, became also, in the hands of other exponents, the basis of a doctrine of government. One of the most conspicuous of these exponents was the English philosopher Thomas Hobbes ("of Malmesbury"). It was easy for the average man to grasp the theory, that an autocratic monarch could recognise no legal limitations on his authority. But Hobbes went further, and claimed that the same rule applied to all governments, whatever their form. Here, again, the simplicity of the doctrine, and its usefulness in discouraging "rebellion," made its reception favourable, at least amongst all who wielded, or aspired to wield, the powers of government. And it happened to fit very well the circumstances of the time and country in which Hobbes lived.[1] It was favoured alike by the supporters of Divine Right, who preached "non-resistance," and by the Parliamentarians, who believed in the omnipotence of Parliament. The latter were the more in accord with the facts of history. For, while there had, for centuries past, been, in England, legal limitations on the power of the King, there had never been (except in a vague and long-exploded judicial theory) any legal limitations

[1] Hobbes' great work, *Leviathan, or the Matter, Form, and Power of a Commonwealth*, was published in 1651.

upon the power of the King in Parliament. Thus, for about two hundred years, the doctrine of internal sovereignty became the accepted doctrine in that British Empire into which England gradually expanded, in spite of the fact, that an unwise attempt to put it into practice led to the severance between the mother-country and her American colonies, in the latter part of the eighteenth century.

It was, however, natural and inevitable, that the blow dealt against internal sovereignty in practice by the American colonies, should react against the theory itself. The Americans had found that a sovereign Parliament was no more to be trusted than a sovereign King. They determined not to recognise the principle in America. For not only did they strictly limit the power of the President and the various State Governors, but they even limited the powers of the President and Congress combined, as well as the combined powers of the several Governors and legislatures of the States of the Union. Thus, though the several States of the Union insisted on describing themselves as "sovereign," they are, evidently, not sovereign in the sense of Grotius and Hobbes, either as regards their external or their internal affairs. And, when they went further, and committed their political future to a system in which such power as was tolerated was rigidly divided between the Federal Government at Washington and the several States Governments, the doctrine of internal sovereignty became in America, even if men continued to pay lip-service to it, a mere theory. The same result had happened in the earlier federations of Switzerland and Holland, which may have been one reason why Grotius, a Dutchman, laid little stress on internal sovereignty.

But, though the adoption of a federal system makes the most obvious breach in the doctrine of internal sovereignty, it must not be supposed that the breach did not also come in "unitary" States, *i.e.* States organised under a single central government. And the cause of the change is interesting; for it is one of those cases in which the instruments employed affect the character of the work. The

French Revolution itself, the great event which cast modern Continental Europe into the crucible, was passionately devoted to "sovereignty"—the "sovereignty of the people." But the practice of adopting written Constitutions, to which it gave rise, was fatal to the legal theory of internal sovereignty.[1] For, when it came to actual discussion of the terms of a Constitution, no "Constituent Assembly," or Constitution-making body, ever could bring itself to grant unlimited power to the government which it set up; and thus, in effect, all the written Constitutions of Europe, with the possible exception of the Italian *Statuto*, in express terms limit the powers of the Diet, Congress, Assembly, or other chief governing body of the State. And though, in form, the theory of the sovereignty of the Imperial Parliament still survives in the British Empire, it disappeared in substance with the grant of Responsible Government to the Dominions, in the latter half of the nineteenth century.

In view of the rapid growth of FEDERALISM during the last century and a half, and of the hopes which are entertained for it in the future, it may be desirable to say a few words as to its character. It has been well described by a distinguished writer,[2] as the kind of Constitution which results when several hitherto independent States desire union but not unity. Though this epigram hardly takes into account the instances, few in number, in which federalism has been imposed from above, it admirably indicates the essential feature of the typical federal State, viz. that it is founded, not on force, but on agreement. It is, practically, impossible for such a delicate mechanism as a federal Constitution to be brought into existence, still less to be worked, without the willing co-operation of the several units affected by it. It is not too much to say,

[1] Oddly enough, England led the way with a written Constitution, in the various attempts of the Commonwealth. But these disappeared at the Restoration.

[2] Professor Dicey, in his *Introduction to the Study of the Constitution* (Macmillan), 6th ed., p. 137.

that even the victory of the Northern States in the American Civil War could not have preserved the Union, unless the South had consented to bury its grievances and join heartily in upholding the Republic. The lamentable treatment of the conquered provinces of Alsace-Lorraine by Germany after the war of 1870-1, was a cynical admission of the same truth. Even the anomalous Federal Empire of Germany was founded on the agreement—in some cases, doubtless, reluctant—of the hitherto independent German States; but Alsace-Lorraine was no part of it,[1] though a grudging admission of a few representatives of the district to the Reichstag was allowed.

It is also of the essence of a federal Constitution, that the spheres of activity belonging respectively to the central (or federal) government and the governments of the uniting States shall be clearly marked out by the Constitution, and that the boundaries laid down shall be such that neither party can encroach upon the sphere of the other. If the central government can alter the arrangements at its pleasure, there is no true Federation, but only a "unitary" State with a highly-developed system of local government (pp. 271-72). In theory, the British Empire is such a unitary State; in substance, it is a Federal Empire, so far as the self-governing Dominions are concerned, for no attempt on the part of the nominally sovereign Parliament to alter the powers of government of the Dominions, without their own consent, would be tolerated. One striking recent example of the spread of federalism, is the way in which smaller federations have grown up within the greater federation of the British Empire. For the Dominions of Canada and South Africa, and the Commonwealth of Australia, are true federations; though again, in form, the Union of South Africa is a unitary State, with provinces technically subordinate to it. It is significant, that nowhere has the system which presupposes government by consent developed so freely as in the British Empire.

[1] Alsace-Lorraine was made a *Reichsland*, not a *Reichsstaat*. *i.e.* a country governed by the Empire, not a member of the Empire.

Naturally, the precise proportion of power accorded in the federal Constitution to the central and the "State" governments varies according to the circumstances of each case. Where the federal group claims, as a whole, external sovereignty (p. 261), the exercise of that sovereignty is invariably entrusted to the central government; but, so far as internal affairs are concerned, the balance varies almost with each case. Two types are, however, obvious. In the one, certain specified powers are entrusted to the central government; while all else remains, subject, of course, to their own Constitutions, to the governments of the various units, usually (but not invariably) known as "States." Of such federations, the American Republic is the typical example; while Switzerland and the Australian Commonwealth are also of this type. In the other type of federal Constitution, specific powers are conferred on the governments of the different units, or "provinces"; while the "residuary" power belongs to the central government, which, not infrequently, exercises a veto over the acts of the provincial governments. Examples are Holland, the Dominion of Canada, and the Union of South Africa. The type is usually, but not always, determined by the historical accident of priority in age of the respective authorities. There is a tendency to assume that federal States are necessarily Republican in form, *i.e.* that their executive Heads are elective; but that is manifestly untrue, as witness the late German Empire, Holland, and the British Empire itself.

A federal government almost necessarily implies a written Constitution, and a Supreme Court, independent of the federal executive and legislature, especially charged with the duty of interpreting the Constitution. These two features would, one would naturally suppose, guarantee the predominance of law (p. 272) in all its actions, at least so far as internal affairs are concerned; and that, undoubtedly, should be one of the first aims of federal arrangements. Strangely enough, this is not always so. In spite of its written Constitution and its Federal Court,

the late German Empire did not recognise the Rule of Law (p. 273), except in the paradoxical sense in which it may be said that the Rule of Law is expressly excluded by the Constitution itself. On the other hand, the British Empire, with no written Constitution, and only a quasi-independent Supreme Court (the Judicial Committee),[1] is the parent and shining exemplar of the Rule of Law.

Finally, before leaving the subject of federation, we may point out that, although, by every true federal Constitution, interference by the central government in the internal affairs of the member States is prohibited, yet, in practically all cases, the central government has power to enforce its legitimate orders and decisions throughout the federal territory, by its own Courts and executive officials. This power has been found essential to the stability of federal institutions; and it is to be seen even in the Constitution of the United States, where the autonomy of the several States is jealously guarded. In fact, a Government which has not this power would hardly rank as a federation at all; though it might claim to be a CONFEDERATION, a type of union which has practically ceased to exist, and which has been condemned as a political failure, except, perhaps, by way of temporary expedient.

Another first-class distinction of type in modern States divides them into those which have PARLIAMENTARY and those which have FIXED EXECUTIVES. Practically all the great States have now representative or Parliamentary LEGISLATURES; but whereas, in some, the chief executive officials are appointed at pleasure by the Head of the State, or elected for definite periods, independently of the approval of the legislatures, in others, these officials, though nominally appointed and dismissed by the Head of the State, can, practically speaking, only hope to hold

[1] It need hardly be said that, morally speaking, the Judicial Committee amply maintains the reputation of the British Bench for independence and impartiality. But, legally speaking, its composition could be entirely changed, by the legislative, and even by the executive, act of the central Government.

their offices by the continued support of the legislature. This last type of Government is the peculiar invention of England, which adopted it, in the early eighteenth century, as a compromise between the claim of the King to appoint and dismiss his Ministers as he pleased, and the claim of the House of Commons (actually realised for a short while during the Civil War) to appoint directly the Ministers of the Crown. In England, this compromise was based on a strong party organisation which developed naturally out of the Revolution, and thus attained a considerable stability; one party assuming responsibility for a definite line of policy, while the other systematically criticised it, until it persuaded the electorate to return a majority of members favourable to its (the Opposition's) views, when the latter, in its turn, assumed the responsibilities of government, and drove its former adversaries into opposition. In spite of its obvious drawbacks, this system has worked well in British politics, and has been extended from the United Kingdom to the Dominions, where, under the name of " Responsible Government," it has become extremely popular. It has also been adopted, though with less success, in many other countries, *e.g.* France, Italy, Spain, Holland, and Scandinavia, and even Japan; but, in these countries, the absence of clearly defined party lines has prevented it attaining the stability which it has shown in Great Britain. But, though Responsible Government claims to be a means of guiding policy by public opinion, it must not be supposed that its only alternative is " autocracy," *i.e.* government according to the personal will of a single ruler or privileged caste. Two of the most truly democratic States in the world, viz. the Republic of the United States of America, and the Republic of Switzerland, have never adopted it. In the former case, the electors directly choose the Head of the Executive for a fixed period, leaving him to appoint and dismiss his colleagues in office; in the latter, the chief officials, as well as the President, are elected, for fixed periods (the President only for one year), by the Federal Assembly of the two

Houses of the legislature, sitting jointly. Thus it is clear, that the Parliamentary Executive is not the only means of realising national self-government; all that can be said is, that it is, apparently, incompatible with the existence of autocracy in the sense above indicated. But the claim sometimes put forward, that a Parliamentary Executive cannot be worked in a federal system, is manifestly unsound; as the examples of Canada and Australia show.

Yet another important distinction of type is that which separates the so-called "rigid" from the "flexible" Constitution. In the latter type, the Constitution itself can be amended, by the same body, and in the same manner, as any other law. In the former, special machinery, often of a very complicated kind, is required for the alteration of the Constitution itself. In spite of the fact that the distinction places on one side only the British Empire and the Kingdom of Italy (with, apparently, the late German Empire),[1] and, on the other, all the remaining States of the civilised world, it is not without importance; for the "flexible" Constitution of the British Empire has certainly somewhat to its credit, and, if it has undergone great changes, has not always changed for the worse. The danger of the British type is, that important changes of principle may be effected as the result of party or personal intrigue, sometimes without any direct legislative sanction, sometimes even unperceived for many years by the public. On the other hand, the difficulty of changing a "rigid" Constitution may sometimes be so great, that obviously desirable changes may be long delayed, or never made at all. It is, perhaps, going too far to say that, had the Constitution of the United States not been of the "rigid" type, the Civil War which nearly destroyed the Union might never have occurred. Yet it is clear that, had that

[1] In Germany, however, no amendment of the Constitution could be made if fourteen votes were cast against it in the Upper House, or Federal Council. As Prussia controlled seventeen votes, she could veto any change. There were also certain long-standing arrangements made with other powerful States of the Empire, which were declared to be unalterable.

Constitution been of the "flexible" type, the possibilities of compromise or peaceful solution would have been greater.

Another, hardly less important, distinction of type is that between CENTRALISED and LOCALISED States. This distinction must not be confounded with that between federal and unitary States; indeed it appears to have little connection with it, despite the superficial resemblance. In a federal State, the rights of the federated units stand on the same footing as those of the federal Government; in a merely localised State, the local organs are subordinate to the central authority. In America and Switzerland, which are legally federal, the local institutions—county, borough, *Gemeinde*, or *commune*—are highly developed; so they are in the United Kingdom, which is a unitary State. On the other hand, in the federal German Empire, and in unitary France, the local units, despite an appearance of power, are really weak before the central Executive. Historically speaking, the difference is due mainly to the way in which the State has been founded. England was formed by INTEGRATION, *i.e.* by the gradual coalescence of petty rulerships into the Heptarchic Kingdoms, and of these into one Kingdom, on fairly equal terms.[1] France was formed by ABSORPTION of the provinces into the domain of the Kings at Paris, whose territory at first only extended to the valley of the Seine and the Orléanais. England, and the countries whose institutions she has directly influenced, have usually shown strong local independence; while the French tradition of centralisation has continued, from the *ancien régime*, through the Revolution and its many changes, to the present day. The true test is not so much the legal powers of the local units, as whether, within those limits, the local governing body—county council or borough council—is really able to order the affairs of the locality according to its own wishes, or whether, influenced by officials appointed by the central

[1] Of course the German Empire, in which local government was weak, was also formed by integration; but the federated States, the immediate superiors of the local units, were not.

government, or obliged to secure the approval of the central authorities for every step, it is really a mouthpiece of the central government.

It is impossible here to enter upon a thorough discussion of the merits and demerits of local government. It is supposed to foster resourcefulness, good will amongst neighbours, adaptability of institutions to local needs; and to provide a useful training ground for recruits to the wider service of the State. On the other hand, it is accused of tolerating corruption and inefficiency, and of encouraging a narrow or "parochial" outlook on public affairs; and it is said to be difficult to get men of ability to take part in it. But it must not be supposed, that a centralised government necessarily displays the merits in which local government is weak. Even highly centralised governments have been known to be short-sighted, corrupt, and inefficient; the highly centralised monarchies of eighteenth-century France and Germany were conspicuous, in many cases, for just these defects. And it is manifest, that the defects of a centralised government, being on a greater scale than those of local units, may have far more disastrous results.

Finally, there is a profound and far-reaching distinction between COMMON LAW and PREROGATIVE States, though it is not very easy for any one but a lawyer to grasp. Perhaps it may be best explained by saying that, in the former class of States, the Government or other public official stands on precisely the same ground, as regards legal responsibility for his acts, as the private citizen; while, in the latter, the Government official is in a privileged position, is at least always presumed to be right, and his alleged offences are tried, not by the ordinary public tribunals, but by special Courts, composed, ultimately, of members of his own class, sometimes sitting in secret session. Of course the distinction must not be exaggerated. It is not contended that in Great Britain, for example, which is the home of "common law" traditions,[1] or in the United States, which have inherited

[1] Doubtless the "royal prerogative" is familiar in Great Britain; but the term is there only another name for the executive authority, which is strictly limited by law.

them from her, the Government official cannot lawfully do things which the private citizen may not do. Of course he can; but only *if they are authorised by law*—not necessarily by statute law. Thus, for example, in England, a sheriff's officer, duly warranted, may seize a man's furniture for payment of a judgment debt, which a private person (even the plaintiff himself) may not do. But no British Government official may do an act, to the prejudice of a private citizen, merely because he thinks it advantageous for the State to do so; unless his act is clearly warranted by law. And the fact that he acted under obedience to the orders of his official superiors, even of the Crown itself, will not save him from a criminal prosecution or a private action. By a well-understood rule of English law, the "King can do no wrong"—*i.e.* no proceedings alleging a wrongful act can be directed against the King personally. But this rare immunity, granted for obvious reasons, does not extend to protect those who act by the King's orders; that point was finally settled on the impeachment of the Earl of Danby, more than two hundred years ago. And, though the King can pardon a convicted criminal, he cannot pardon an accused person before conviction; and he cannot intervene to stay a private lawsuit. This great RULE OF LAW extends even to the acts of the military authorities, both in war and peace; and the only occasions on which its application in this respect has been seriously questioned in recent years, have arisen out of the employment of soldiers to quell disturbances of the peace. Of course soldiers can be so employed, in case of necessity; but so also can civilians—indeed the latter, at any rate male adults, are liable to fine and imprisonment if they refuse to assist the properly constituted authorities in quelling disorder. In fact, when the soldier takes part in suppressing a riot, he does so, not as a soldier, but as a citizen, and is judged by the same standards; though, doubtless, in consideration of his military traditions, rather more leniency than in the case of a civilian is extended towards his behaviour, in the event of it being questioned in a court of law. For it must be

remembered, that a British soldier is in the difficult position of being under two different and occasionally conflicting laws—the civil law, which says that any one guilty of deliberately causing the death of a fellow-creature without lawful warrant is liable to be hanged, and the military law, which says that a soldier refusing to obey the orders of his military superior is liable to be shot. Happily, the British military code of obedience, strict as it properly is, is not absolute; and it may be safely said that there is no rule in it which condemns to death the man who refuses an *unlawful* military order.

All this may seem, to a Briton or an American, ordinary enough, nurtured as he has been in traditions of freedom. But it might be well that he should realise how rare it is, even among civilised nations. In many Oriental countries, the private civilian is helpless before authority, even in its most subordinate form; and it may be that government in such countries is not possible on "common law" terms. Certainly the British Government has not yet felt itself able completely to recognise the principle in India; and we should be careful not to suppose it to be of universal application. But, even in European States, it is regarded as an impossible ideal; and Continental writers profess gravely to doubt whether government can really be carried on where it prevails. When confronted by the fact that "common law" government in the British Empire and the United States has not been devoid of stability, these writers are apt to shrug their shoulders, and set down the fact as one of the many oddities of the Anglo-Saxon character. By any one who preserves an open mind, it can hardly be dismissed so lightly. Though, or perhaps we should say because, it is the outcome of a long historical struggle, in which the spirit of freedom has successfully fought against tyranny on the one hand and anarchy on the other, it is a contribution to practical politics of which the Anglo-Saxon has every right to be proud, perhaps more proud than of any other of his political achievements. It implies no disrespect for authority, even authority as embodied

in the State; and, as recent events have shown, Anglo-Saxon communities have known how to keep it within bounds, when a crisis has demanded a temporary restriction of it. Only, they have insisted that any such restriction shall be as legal as the liberty which it restrains. It was this important fact which justified the recent restrictions imposed by the Defence of the Realm Acts in England, and the corresponding regulations in other Anglo-Saxon communities; though their enforcement may not have been, in all cases, and in all respects, judicious. For not only were these regulations legal, in the formal sense, but, despite the intemperate protests of a few extremists, they were emphatically approved by public opinion, which is the supreme court of appeal in democratic communities. And the readiness with which they were accepted was one of the great disappointments of aggressive autocracy, which anticipated a fatal reluctance to submit to them.

But, to the believer in political progress, this achievement of Anglo-Saxon communities does not merely indicate the high-water mark of civilised politics. It is full of hope for the future. Not only has it saved the Anglo-Saxon from that blind worship of the State which has led, in some countries, to disaster and ruin. But it also reveals, unconsciously it may be, a spirit which is steadily striving to realise in practice that principle of equality, or equity, which, despite the travesties of it which have disappointed high hopes, is still the ideal basis of human justice. It is an attempt to appeal to the higher nature of mankind, by treating the ordinary man or woman as a reasonable being, not as an unreasonable child or a wilful rebel against authority. It implies a recognition of the truth, that the art of government is not a Machiavellian secret known to the few, to which the many must submit with blind obedience, but an intelligent harmony between rulers and ruled. Thereby it attempts—again, it may be, unconsciously—to bring the Law of Man into harmony with the Law of God.

CHAPTER XVIII

PROPOSALS OF CHANGE

IN this concluding chapter, it is proposed to discuss briefly a few of the more important and fundamental proposals which have recently been put forward for the introduction of changes into the institutions of political life. Most of them have been produced by the tremendous experiences of the Great War; but one or two of them are survivals from the pre-war epoch, though they have been, more or less profoundly, affected by the war. It is hardly possible for any writer to discuss these proposals without some display of personal opinion; all that can be done is, to strive after fairness of presentation. After all, perfect impartiality is perilously near indifference; and indifference is hardly a quality to be desired in matters affecting the welfare of mankind.

Unquestionably, the most important practical proposal put forward by any considerable body of opinion as the result of the war is the proposal for a LEAGUE OF NATIONS. The main object of the proposal is, of course, the prevention of all future wars, or, at least, of as many as possible. But, as will be pointed out, there is no conclusive reason why the proposal, if realised, should not have immense positive, as well as this great negative result.

It is hardly necessary to argue, after recent experiences, that the prevention of war is a desirable object, at least for civilised communities. This conclusion had already been reached, long before 1914, by all communities with any claims to civilisation, save one, in which a long tradition of military rule had been sedulously converted into a powerful war propaganda, by the abuse of one of the greatest modern scientific generalisations. The statement of a great physical law embodied in the phrase "struggle for

existence," was converted into an ethical dogma in no way justified, either by Darwin's own teaching, or by the facts upon which it was based; and it cannot be doubted that some of the champions of that dogma knew this to be the case. Their responsibility is appalling; and no human retribution can mete out to them adequate punishment. The most terrible fate that can be desired for them is, that they may live long to witness the ruin that they have brought upon those whom they deceived. Many of their active supporters were men of limited intelligence, who fell blindly into the commonest of intellectual errors—the confusion between that which is, and that which is desirable. Their error may fitly be compared with another of almost equally tragic importance, which converts the purely economic truth that unrestrained competition tends to produce cheapness, into the ethical maxim that unlimited competition is the economic ideal. And when these illogical thinkers point to the heroic instances of courage, endurance, and self-sacrifice which every war produces (not, alas, in its promoters, but in its victims), we are irresistibly reminded of the eighteenth-century fashion of congratulating the sufferer from gout on his appearance in Bath-chair and bandages.

All proposals for a League of Nations proceed upon the assumption, hardly to be questioned, that nothing less than a powerful international combination can hope to prevent future wars, even among so-called "civilised" communities, within a measurable time. Valuable as is the spiritual contribution towards that great end made by the advocates of individual non-resistance to aggression, it is clear, if experience goes for anything, that civilisation, if not mankind itself, is likely to be destroyed before their hopes are realised; unless some organised attempt is made to realise them through political, which includes forcible, action. Physical force, rightly directed, is essential to the achievement of many ends universally admitted to be desirable; almost the whole of our material civilisation depends upon it, from the laying of a road to the building

of a cathedral. That a universal desire for peace cannot be produced merely by the exercise of physical force, may be admitted; to believe the contrary is to fall into the fatal mistake into which the militarist rulers of Germany fell. But the use of physical force may be necessary to compel the realisation of a desire for peace which is cherished by the great majority of civilised people; and, therefore, it is necessary so to arrange that it shall be forthcoming, in sufficient quantity, if required, at the right time and in the right way.

But again, if we turn to our industrial model, we see that all really great results into the production of which physical force enters, imply the harmonious co-operation of many wielders of force. A pair of scissors may be ground by a single operative working his grindstone; the building of a palace requires the co-operation of an almost countless number of workers of many kinds, each applying physical force, in ordered and harmonious constraint, to a great end. And the Palace of Peace, though a spiritual, rather than a material end, requires the aid of physical force; the main difference being that, whereas for the material building the actual exercise of physical force is necessary, for the spiritual its organised preparation may be sufficient.

But, as our review of history has surely taught us, the pathway to co-operation is long and difficult, full of pitfalls and obstructions. For co-operation requires individual sacrifices, mutual forbearances, patience, and other virtues not easily practised, especially among groups organised on a military basis, such as the governments of States. It is easy for the idealist to say that modern States, whatever may have been their historical origin, are not military organisations. It is true that modern States, even the most "militaristic," are not *merely* military organisations. As we have seen, nearly all modern States have assumed other than military functions. But most States remain true to type; and we may well be in doubt whether the present time, when most of them—some willingly, some, doubtless, unwillingly—have "reverted to type" in the most complete fashion, is a favourable moment to expect of them to engage

in a crusade which, if it is successful, will do much to destroy the chief reason for their existence.

Thus it is impossible to ignore entirely the suggestion which has been put forward in certain quarters, that the most hopeful foundation of a successful League of Nations is not a Congress or association of statesmen, but a Conference of representatives of the arts of peace—of industrialists, men of science, historians, and religious leaders, though, alas! the record of the last-named in the matter of unanimity is none too clear. Unquestionably it would seem, at first sight, that such an assembly would be more likely to arrive at an agreement, than a congress of statesmen, who, from the very nature of the case, would think in terms of nationality, that is, of communities organised as States. Doubtless the divisions in such an assembly would be many; but would they run on national lines? Would they not rather cut across them? And, if these divisions of opinion tended, as they might, to a reorganisation of the world, would not that reorganisation take a form which would render war difficult, if not impossible? Let us assume, for example, that one result of such a conference was to draw chiefly a line of division between capitalists and wage-earners. We know, only too well, that such divisions exist now inside nations; and there is little reason to suppose that the differences which exist between them would be more easy of settlement than those which, in the past, have divided nations. But would they lead to war? For war is still a geographical problem, and is likely to remain so, despite the development of aerial warfare. It is hard to imagine a war the chief object of which is not the acquisition or defence of territory, or in which invasion and conquest of enemy territory is not the sign of victory for the one party and defeat for the other. So long as Man remains of all things (save the soil itself) the most difficult to move, so long as the desecration of his home is, for the average man, the supreme disaster, so long must war, in the military sense, be conducted between territorial units; though it is, no doubt, logically possible to imagine a war

carried on in different countries by one class against another, in nominal alliance with the corresponding classes in other countries.

This is, in fact, the dream of "The International," extended to cover the whole social organisation, save that the class which has hitherto more particularly identified itself with this ideal has always assumed, that its aims could be effectively secured without recourse to arms. Whether this assumption is sound, may well be doubted; for economic quarrels have been known to excite fierce passions, and the prospect of universal civil war is not a possibility which can be wholly ruled out of account. But there is a graver objection to the proposal to entrust the destinies of the world to a non-political Conference.

For it is unquestionable that, if the Palace of Peace is to be well and strongly built, it must rest on the most solid foundations known to humanity. That is to say, it must look for its support to the strongest and most deep-seated feelings of which humanity is capable. And if the Great War has proved anything, it has proved that the strongest of all human feelings is NATIONALITY, that is to say, the instinct of civilised human beings to defend the interests of that association which we call a nation, or a community organised under a government for general, not for specific ends. Under the sway of this instinct, millions of men and women have freely sacrificed all else that they hold dear—wealth, leisure, friends, sons and daughters, even life itself. The day may come when this instinct will give way to another, based on different, it may be wider, interests. But that time is not yet; and the task before the world is immediate.

So then, it would seem, that, in adopting the ideal of a League of Nations, mankind has at least justified its choice of a basis. But what of the building which is to rest upon it?

The term "League" is vague, and, perhaps for that very reason, has commended itself to the advocates of the new cause. But it has unhappy associations. It recalls, inevitably, memories of wars and discredited intrigues. It has a record of failure behind it. It suggests vagueness and

pessimism. It presupposes a minimum of agreement. Doubtless it was wise, in the days when hopes of success in attainment were feeble, not to incur the charge of dreaming. But there are times in which boldness is the truest wisdom, when even the partial realisation of a great aim is better than the complete success of a smaller enterprise. One might even go further, and say that a great aim is sometimes more likely to succeed than a small one. May not this be the case at the present crisis?

For if "Leagues," that is, in substance, associations dealing only with military questions, have a bad record, there is another kind of political experiment which has had a solid history of success. In the preceding chapter (pp. 265-68), we have analysed the nature of a FEDERATION. It is now desirable to point out the extent to which the federal movement has spread in recent history.

The modern movement towards federation began so far back as the end of the thirteenth century, when the three original cantons of the Swiss Republic—Uri, Schwyz, and Unterwalden—formed themselves into a union for mutual defence, under the vaguely defined overlordship of the Holy Roman Empire. The history of their heroic struggle is well known. At last, the union, by then increased to include thirteen cantons, achieved recognition of its independence by the Congress of Westphalia in 1648. Despite many difficulties, it continued to grow in power until the end of the eighteenth century, when, like almost all the Continental Powers, it fell for a time under the all-conquering sway of Bonaparte, and was by him remodelled in drastic fashion. But its eclipse was temporary; and, emerging once more after the downfall of Napoleon, it gradually regained, not only its independence but its native Constitution (finally renewed in 1894), and to-day it stands, not only one of the best-governed States, but, of the neutral Powers in the Great War, perhaps that one which has best preserved, in spite of threatening forces, not merely its independence and unity, but its dignity and its moral worth. It is true that,

since 1815, the Swiss Republic has enjoyed the somewhat precarious benefits of neutralisation; but it can hardly be doubted, in view of well-known facts, that it was to her own preparedness for defence, that Switzerland owed her immunity from invasion in the late war. Assuredly, the Swiss Federation is a hopeful augury for an experiment in federation.

No less hopeful is the record of Holland,[1] the second of the groups to adopt the principle of federation. The story of the heroic struggle by which she achieved her independence from Spanish tyranny has been told in immortal prose by the American historian, Motley. A blaze of prosperity followed, which has since somewhat paled; and internal troubles, no less than external dangers, succeeded to the great Dutch era of the seventeenth century. But the ill-considered inclusion of Brabant and Flanders, forced upon the somewhat reluctant Dutch by the Congress of Vienna, was purged by the separation of Belgium in 1830; and the incident serves mainly to show the weakness of a federation for aggressive absorption—a lesson not without its value in judging of the merits of the system. Certainly the advocates of that system have nothing to be ashamed of in the history of Holland.

Nearly two centuries were to pass before another great experiment on federal lines was made: but, when it came, it was a triumphant success. When the thirteen American colonies of the eastern coast declared their independence of Great Britain in 1776, the wisest of their leaders foresaw the dangers ahead. Doubtless the desire to offer an effective resistance to Britain was the immediate stimulus to union; but it is not to be doubted, that these leaders looked beyond, and earnestly desired to save the new Continent of America from the internecine wars which, for ages, had made Europe a shambles, closed only for brief periods of exhaustion. It is needless to dwell upon

[1] Strictly speaking, "Holland" is an incorrect name for the Kingdom of the Netherlands. But, to Anglo-Saxon readers, the name of the leading province of the union is familiar as the synonym for the whole.

the success of one of the greatest political experiments in the world's history. Once, and once only, has the Union founded by the men of 1787 been in real peril; and the rapidity and the completeness with which the Great Republic recovered from the shock of her Civil War are, perhaps, the most convincing of all testimonies to the soundness of well-considered federal institutions. But there is another, and hardly less relevant, lesson to be drawn from the brilliant expansion of the thirteen original States of the Union into a mighty system, stretching from the Atlantic to the Pacific, and controlling the destinies of a hundred millions of men and women. The superficial critic of American institutions is apt to regard the whole area of the United States as covered by a uniform and somewhat monotonous type of material civilisation. Nothing could be further from the truth. Underlying unity there unquestionably is; and it is precisely of the kind which the opponents of World Federation dread to see disappear, for it consists mainly of the passionate belief in individual freedom. But it would be odd, indeed, if individual freedom were to produce monotony of conduct; and, in fact, it needs little acquaintance with America to realise, that her people differ enormously among themselves in habit and life, in ways of thought and expression, no less than in language and garb, in occupation and ambitions. In no country in the world is the individual man, or the associated group, at more perfect liberty to follow the bent of his or its peculiar genius, than in the country of the American Union. In no country, not even in the British Empire, is public opinion more tolerant of diversity, or even of eccentricity.

We touch, naturally, on difficult ground, when we come to deal with the efforts of the German-speaking communities to realise the federal principle; and it is hard, in view of recent facts, to preserve an impartial attitude in dealing with them. Historically, Germany has an impossible past. She inherited from antiquity an imposing nightmare in the Holy Roman Empire; itself, as we have seen (pp. 142, 158),

an over-ambitious attempt of Charles the Great to revive, in a wholly different world, the pretensions of the ancient Empire of the Cæsars. As we have also seen (p. 164), this travesty of politics was effectively shattered by the Wars of the Reformation; though its formal dissolution was not pronounced until the Napoleonic era. Almost immediately, the necessity for some expression of German unity made itself felt; but from 1815 to 1866, the so-called German Confederation was little more than a military alliance intended to be permanent, while it was gradually undermined by the formation, under the auspices of Prussia, of a Customs Union, or *Zollverein*, to which only the North German States were admitted. The natural result was that, after the long feud between Prussia and Austria had culminated in the war of 1866, it was easy for victorious Prussia to draw together the Northern States into the North German Federation, in which she assumed preponderant authority.

The North German Confederation of 1866 marked a great advance of the federal idea in Germany; for it substituted a real government, with an elected Parliament or Diet, for the merely diplomatic council of royal delegates, which had constituted the confederate authority of 1815. But it sinned deeply against the cardinal principles of federalism, not merely by retaining the old *Bundesrat* or Council of Princes, as an authority equal or superior to the Diet or *Reichstag*, but by retaining the unequal representation of the States in the *Bundesrat*, on the basis of military power, as well as by rendering possible a series of appointments which practically made the Executive of the Empire an extension of Prussian bureaucracy. In liberal federations, while the recognition of material power is expressed by making representation in the popular House depend upon population, the principle of right is recognised by giving equal representation to all the States in the aristocratic House; while the Federal Executive is kept jealously free from the influence of any single State. Yet these radical faults of the German Constitution of

1866 were perpetuated in the amended Constitution adopted in 1871, after the Franco-Prussian War; despite the fact that the North German *Bund* of 1866 had by then become the German Empire, by the inclusion within it of Bavaria and the other South German Powers, which made certain stipulations to secure their own autonomy.

It is, perhaps, hardly to be expected, that German federation will be regarded as a favourable influence towards World Federalism; but we must be careful to distinguish between the good and the evil consequences of German union. So far as the German States themselves were concerned, it is unquestionable, that even the imperfect Confederation of 1815 exercised a wholesome effect; principally by permitting the development of the Customs Union, which gradually converted the North German States from a mass of hostile, or, at least, deeply suspicious units, waging veiled war against one another by a complicated system of tariffs, into an economic whole, favourable to the development of industry. It also put an end to the unedifying spectacle manifested in the Napoleonic wars, when one German State was seen fighting against another in the interests of the foreigner. Even the war of 1866 against Austria, mainly conducted by Prussia, may be justified as necessary to expel from the Union a Power which was largely non-German, and utterly incapable of acting as a leader of the German nation. Even the Constitution of 1866, which was, in substance, adopted in the revision of 1871, indubitably strengthened Germany for defence—in fact, made her almost impregnable in a really defensive war. It is unnecessary to speculate on the ultimate objects of the framers of the Constitution of 1866-70; it is sufficient to have pointed out the radical vices of that Constitution, which enabled unscrupulous politicians of the military type to poison the mind of the whole nation, and plunge it into the *débâcle* of the Great War. The lesson of German federalism is, not that federalism is a bad thing; but that the defects of German federalism must be avoided by the framers of a federal pact intended to produce peace.

The half-century from 1865 onwards produced no less than three federal Constitutions of different types, each of which has already resulted in a striking success. One feature, of a hitherto novel kind, marks the Dominion of Canada, the Commonwealth of Australia, and the Union of South Africa. None of them claims sovereign powers, nor is its Constitution aimed at securing them. On the contrary, the federal movement in each case was actively encouraged by the sovereign Power to which they render willing allegiance; and their value for our immediate purpose is, that they manifest once more, not merely the healing power of federalism, but its adaptability to various conditions. The details of the arrangements adopted in these cases, interesting as they are, there is no space to describe. It must be sufficient to say, that they preserve the essentials of federalism, viz. a scope for strong and united action of the whole group, combined with a respect both for the essential principle of right, which treats all communities as equals in their claim for justice, and of the undeniable fact of the superior strength of a greater, as compared with a smaller, community. This last recognition of stern fact is, however, mitigated, in free communities, by the consideration that, after all, it is based on fundamental individual equality. For, if the equal representation of the federal units, in Senate or Upper House, symbolises the equality of communities, the representation according to population, in House of Representatives or Legislative Assembly, typifies, in democratic countries, the equality of individuals.

It is, however, quite possible, that the greatest experiment of all in modern times in the direction of federalism has failed to obtain recognition as such, owing to the simple fact that it is yet incomplete, and has been called by another name. Yet, to any one who is not misled by mere names, it is clear that the grant of self-government to the great Atlantic and Pacific Dependencies of the British Crown, during the last half of the nineteenth century and the first ten years of the twentieth, is really

an irrevocable step towards the federalising of the British Empire. It is true that, just as the American Republic has her "Territories," which do not enjoy the powers and privileges of federal units, so the British Empire comprises many communities which have not yet reached the status of self-government. It is true also, that the federal machinery of that Empire is lamentably deficient; though changes in the direction of development have recently been made. These defects, however, due, as they are, not to deliberate design, but the accidents of historical growth, have in them nothing of the aggressive selfishness of a plot to enhance the power of a "predominant partner," and have long been regarded rather as a burden than a privilege. They certainly form no obstacle to the ideal of a World Federation; while the movement which has given to the British Empire its self-governing Dominions, is a striking, because largely unconscious, testimony to the wisdom of that ideal.

To sum up. The notion of the merely military League is discredited by the facts of history; the idea of the Federal Union has conquered two great Continents and a substantial part of a third, and is to be found at work in States so diverse in conditions as Switzerland, Germany, the American Republic, Canada, Australia, and South Africa. In one striking instance, it has been found capable of abuse; in almost all other cases, not even excepting the difficult case of South America, it has not only mitigated unquestionable evils, including the danger of domestic war, but it has proved to be the vehicle of progress and internal development. Again, with the one exception of Germany, it may fairly be claimed that, in all modern history, no Federal State has been either an aggressive or an oppressive State —a claim which can certainly not be made on behalf of military Leagues. The difficulties of the necessarily somewhat complicated machinery of federalism have been easily overcome, at any rate where the will to overcome them has been present. It is a system which is extraordinarily adapted to different circumstances. Provided

only that the essentials of strength against attack, power to preserve internal order, ability to decide disputes and to give formal sanction to inevitable changes, are accorded to the federal government, the functions of the latter may be restricted in such a way as to infringe no whit upon the free self-development of the several units within its orbit; while, on the other hand, its capacity to act decisively in great crises has been convincingly illustrated by recent events. Above all, it makes no claims which offend the conscience of mankind; though it may, perhaps, offend some deep-seated prejudices. It is an aim worthy the struggle which its realisation must undoubtedly entail.

Another suggestion of considerable importance in State organisation is, that which proposes to abandon the simple test of the majority vote in electoral contests, in favour of other schemes, alleged to be more satisfactory, for ascertaining the will of the electors. The proposal takes many forms, which may be conveniently classed together under the familiar name of PROPORTIONAL REPRESENTATION, though it is clear that they are not all based on the same principles. Broadly speaking, these schemes have two objects—one, to substitute "interest" for locality, as the electoral unit or constituency, the other to enable a vote cast for candidate A to be transferred to candidate B, in the event of the vote for A being either needless or futile.

The first object may be limited or unlimited, *i.e.* the proposal may be either to increase the area of existing constituencies in such a way as to give every elector a choice among a long list of candidates for a large number of seats, or to throw the whole of the constituencies of the State into one. The rashness of the latter proposal is self-evident; and it has now been practically abandoned. But the former has many advocates of high position and character; and their proposals are, obviously, quite feasible without any great change in electoral machinery.

The second object is, however, regarded by the promoters of the new principle as their cardinal aim; and it

necessarily involves the introduction of great complexity into election proceedings. The method of the simple majority vote is so obvious, that a child can understand it. A, B, C, and D are candidates for two vacant seats. Each elector has two votes. He can give one to each of two candidates, or one to one only.[1] His votes, once given, are unalterable. The two candidates who receive the largest number of votes are elected. In all representative assemblies which had shaken themselves free from the medieval system of "estates," or orders of society, this system prevailed without exception till the middle of the nineteenth century. It is obvious that, mainly owing to inequality of numbers in different constituencies, it does not render it certain that an election will, with mathematical accuracy, enable a majority of the voters in one, or even in all, of the constituencies of a State to be sure of electing a majority of representatives. Take, for example, three neighbouring "single-member" constituencies, one containing 2000, another 3000, and the third 4000 electors. Suppose each of them to be contested by three candidates —A, B, and C. Nothing is easier than to prove, on paper, that (1) the successful candidate in each constituency may only obtain a minority of the total votes, and (2) the three successful candidates, though all of the same party colour, may not obtain a majority of the whole of the electors in the three constituencies. This possibility may be expressed in tabular form.

Constituency.	Total votes.	A's votes.	B's votes.	C's votes.
X	2000	850	500	650
Y	3000	1200	1050	750
Z	4000	1400	1350	1250
	9000	3450	2900	2650

[1] This is known, technically, in England as "plumping." It may have an important influence on the results of an election.

Thus, the three A's, though none of them received the votes of an absolute majority of his constituents, nor did they all three receive an absolute majority of the votes of the three constituencies, gain all three seats. It may even be that, where the contest is extended over many constituencies, the total votes cast for the B's in all constituencies outnumber the total votes cast for the A's, the successful candidates.

This drawback has been so far admitted, that some electoral systems make provision for a "second ballot." In these systems, where there are more candidates than seats, any successful candidate who has not obtained an absolute majority of the votes cast, must, if he wishes to retain his seat, submit to a process whereby the candidates at the bottom of the first poll are withdrawn, and the electors vote again only for the candidates with a fair chance of success. And this result can be virtually achieved in a single ballot, by the process known as the "alternative vote," whereby an elector who gives his vote to a hopelessly unsuccessful or an over-successful candidate, may have it transferred to another named candidate, who may be within reach of a majority.

But the extremer advocates of proportional voting go much further, and propose to allow each elector to draw up a list of the candidates in the order of his preference. Then, on the first count, so soon as a candidate or candidates attain a "quota," *i.e.* the total number of the votes cast divided by the number of vacant seats,[1] all the superfluous votes cast for such candidates are rationed among the unsuccessful candidates in accordance with the preferences expressed by the electors, till more candidates with "quotas" are discovered.[2] If this step does not fill all the

[1] If each of the voters has only a single effective vote, it is quite clear that any candidate who obtains more than the "quota" is bound to be elected.

[2] Of course the whole of the votes have to be thrown again into the count, or the falling of the second choices would depend on the accidental choice of the successful candidates' votes in drawing from the heap.

vacant seats, the candidates at the bottom of the poll on the first count, beginning with the lowest, are deprived of their votes, which are distributed according to the preferences expressed on the ballot papers, till all the seats are filled. Needless to say, the counting of votes on this system is a highly complicated process, which not one in a hundred of the average electors can comprehend. But, if the voters are willing to accept the decision of the counting authority in faith, there is no mechanical reason why the system should not be worked. The objections to it are far more important than those which arise from the complexities of the count. The minor objections may be taken first.

One obvious difficulty in such a scheme will be, the difficulty experienced by a candidate in getting into and keeping touch with his constituents. Even under the present system, and even in a small and easily traversable country, such as England, this difficulty is great enough; and it is likely to be increased by the increase of the electorate. It is already a costly and laborious task for a candidate to cover an agricultural constituency with meetings, to say nothing of the difficulties of canvassing, which are not, perhaps, altogether to be deprecated. It would be far worse if electoral areas were increased five- or six-fold; as they must be, even in the most modest scheme of Proportional Representation. Then, too, there is the danger of "freak" candidatures. There is no need whatever to suppose that a large number of candidates returned by a P.R. system would be of this type; but there would probably be an appreciable handful. Popular sports, such as football and golf, could easily run candidates; so also could interests of a much more sinister type, such as betting and money-lending. At present, the beneficiaries of such interests are scattered all over the country, and cannot seriously affect elections. With the huge constituencies of P.R., they could, by a simple process of postal organisation, elect their delegates It may well be that great and essential interests, such as shipping, engineering, medicine, and the like, should be specially represented in Parliament; though

even that is doubtful. But there is no case for purely sectional representation.

One of the most startling of the claims put forward by the advocates of P.R. is, that it will put an end to what is commonly called "the caucus," *i.e.* the party organisation which provides candidates, and manipulates the party funds. Such a claim almost takes away the breath. As Bagehot, one of the acutest political thinkers of modern times, pointed out in his humorous way, P.R. will simply multiply the opportunities of the wire-puller indefinitely, the more it is applied. Confronted with an ever-lengthening list of candidates, of many of whom he has never heard, the elector will be simply non-plussed by the magnitude of his task. He may have little doubt of his first two or three choices. After that, he will be helpless. Then will come the chance of the great political organisation. Its agents will be on the watch, and will humbly solicit the later choices of the elector, who, having gratified his own preferences, if any, will give away easily his later choices. Doubtless, a certain number of candidates will be successful on the first count; though, the more "independent" the votes of the electors, the less likely is this to be the case. But the clever manipulation of later choices will really decide the election; and this will be in the hands of the caucus, not necessarily, as at present, of the political type, but, quite possibly, some great commercial "ring."

It will, however, hardly be denied by the advocates of P.R., that their chief claim to support is based upon the assertion, that, by the adoption of their scheme, Parliament (or whatever the elected body may be) will become the exact reflection of the mind of the electorate, that is, of the electorate in its unorganised, or, as they would probably prefer to put it, its "natural" condition. That is to say, it will reflect the mass of un-coordinated views on all sorts of subjects which, at the moment of an election, make up "public opinion" on all subjects.

Let us suppose for a moment that this forecast is correct. Is it a result to be desired? An elected legislature or Parlia-

ment is a body which exists for a specific purpose or purposes. The purely legislative body, that is to say, the body whose sole purpose is to enact general rules of law, hardly exists at the present day, at any rate in free countries; but, assuming such a body to exist, will it be likely to be more efficient if elected on the principle of P.R.? Doubtless a body so elected would be full of members bent on legislative projects. The trouble would be, that they would almost all be bent on different legislative projects. But experience shows that, if legislation is to be effective, the process of enacting it must necessarily be slow. In dealing with such an infinitely complex thing as the life of a modern nation, effective legislation must take into account the varied effect of a general rule of conduct on an enormous number of conflicting interests. Even if a legislative body were in perpetual session, the number of well-considered measures which it could pass in a year would be very few. There would be fierce competition for priority and time. The result, in such a legislative body as is contemplated by the advocates of P.R., would either be chaos, or a system of bargaining, by which each little group of interests would bargain with the others for an unobstructed passage for its measures, in return for a similar concession. The result would be, either sterility, or a torrent of ill-considered measures. All the preliminary sifting out, the choice between conflicting claims, which enables a political organisation covering the whole country to concentrate on a few measures, believed by the majority of the electorate to be the most urgent, with a fair chance of success, would be wanting, or would occupy the time of the elected body to such an extent, that there would be no time left for the work of legislation itself.

But, in free communities, the work of the elected Parliament or congress is by no means confined to legislation. It is its business to support or condemn, to a large extent to control, the policy of the Executive, in financial, military, social, and international affairs. Such work can only be done effectively by an organised body, knowing its own

mind, and capable of consistent action. Short of pure obstruction, which would bring government to an end, the attitude of a body of specialists, such as, at its best, a P.R. House of Commons or Representatives would inevitably be, would leave the Executive uncontrolled. Its support would be worthless, its criticism negligeable; because it would have no power to assert itself. Either alternative would be the very opposite of popular government, which is, presumably, the aim of the advocates of P.R.

To sum up. The effective argument of the supporters of P.R. is a claim for the rights of Minorities. But there are Minorities and Minorities. Where a community is really homogeneous, a Minority only represents the views of the smaller number of voters, on a matter upon which there is a difference of opinion. Government cannot be carried on, unless the will of the few gives way to the will of the many. The remedy of the former is, to convince the latter that they are wrong, not to demand that they (the Minority) shall have their way for a time. But where there is a deep-seated cleavage in fundamental matters—religion, race, or mode of life—then it is, no doubt, desirable, that the views of a substantial Minority holding these views should be respected. But this can be done more effectively and safely by allowing such a Minority to create its own independent organisation, and providing that all matters specially affecting it shall require its assent, or shall at least be referred to it for criticism, and, if necessary, formal protest. No Government which rested on public opinion would regard such a protest lightly, or invite it recklessly. But to abandon a principle which has, on the whole, worked with amazing success during the last hundred years, in favour of an untried experiment, or an experiment which, even in the very few cases in which it has been tried, has not met with any conspicuous success, is to run an enormous risk, not justified by any arguments which have hitherto been put forward.

A very different situation awaits the reformer in the industrial world. Admittedly the industrial system, as

described in the chapter on *The State and Industry*, was fast becoming impossible before the war; and the war has demonstrated this truth with convincing clearness. The obvious dependence of the community upon peace within the industrial system in time of external war, brought about vast changes which, though they were intended to be merely temporary, have rendered a return to the old condition of things almost inconceivable. Naturally, the air has been full of proposals of change, which, in concluding this book, we should briefly examine; for they all imply changes in the organisation or, at least, in the attitude, of the State, except one, which proposes to eliminate the State altogether.

The most conservative of these proposals, issued under the auspices of the State itself, is that known as the Whitley Scheme, after the name of the chairman of the Committee which produced it. It has been formally adopted by the British War Cabinet, as part of the official plan of "reconstruction."

Briefly put, the proposal suggests the formation, in every great national industry, of a concentric series of councils, representing the workshop, the district, and the industry as a whole. Each of these councils is to contain representatives of the employers and the employed, elected, so far as possible, by the organisations already or hereafter to be formed by those respective interests, *i.e.* the employers' associations and the Trade Unions, and presided over by a Chairman, either elected by the council, or appointed in manner determined by the council. To each of these councils, meeting regularly, will stand referred the consideration of all matters affecting the industry as a whole, or, in the case of the lower councils, the conduct of the industry within their spheres of operation; particularly about a dozen subjects enumerated in the Report of the Whitley Committee. These subjects include a considerable number of matters concerning the management of industry, especially those in which the views of employers and employed are likely to come into conflict. They do not,

however, contemplate any direct or sweeping change in the relations between employers or employed; the Report, in fact, assumes a continuance of the present system, whereby the economic control, both of production and distribution, is vested in the employing class, while the class of employees, or wage-earners, bargains for a supply of labour as one of the commodities needed by the employers as a means of production and distribution, but takes no direct share in the control of these processes or their results. It is true that the Report [1] proposes to leave open the adoption of such proposals as "profit-sharing," "co-partnership," etc., and even bestows a mild approval on such schemes. But, on the whole, the suggestions of the Report confine themselves to a reformation based on the existing system, and even propose that the power of the State should be employed to make it permanent.[2]

At the other end of the list of proposals which the war has brought into prominence, may be noticed those schemes which are included under the title of "Syndicalism." As the name implies, the chief source of the idea is French; and it would seem, superficially at least, that Syndicalism has not taken much hold outside France. Briefly, it is a proposal to place the entire control of each industry exclusively in the hands of the workers in that industry, organised on a democratic basis. All but the extremists include in the term "workers" those who, by labour of brain or hand, contribute directly to production; and the more thoughtful advocates of Syndicalism admit that, in order to secure the application of highly trained intelligence to the more difficult operations which are essential to the successful conduct of industry, the persons able to supply such intelligence must be rewarded with a correspondingly high standard of living, partly to induce them to apply their gifts, partly to indemnify them for the labour involved in developing them. But all supporters of syndicalist views insist, that the selection of candidates

[1] First Report of the Whitley Committee, par. 24.

[2] Report, par. 21.

to fill such responsible and highly-remunerated positions shall be left to the choice of their fellow-workers, guided, presumably, by a desire to secure merit, and not by the accidents of birth, or inheritance, or personal favouritism. Below these responsible posts, the produce of industry is to be divided, on a more or less equal scale, among the whole of the workers, not as wages, but as a share of the produce; the lowest receiving sufficient to maintain a decent standard of living, and to guarantee him or her, as well as his or her dependants, against the accidents of ill-health or unemployment, and the needs of old age.

It will be observed, that the scheme of Syndicalism aims at doing away with two, at least, of the great factors which at present play an important part in the working of industry, viz. rent and interest. The precise way in which these factors are to be eliminated will vary with the school of Syndicalism whose scheme may be under consideration; but the general principle involves the complete ownership by the workers of the means of production, the total produce of which is to be divided amongst them, leaving no place for the individual landowner or capitalist. Again, the proposals of the various schemes differ as to the way in which the material means of production—land, buildings, machinery, tools, etc.—are to be acquired by the workers. They range from simple expropriation to a moderate indemnity. With regard to "liquid" capital, *i.e.* money, this is to be largely dispensed with by the use of credit, the credit of the entire industry, which will be pledged for the performance of the undertakings of its members.

Midway between the two schemes hitherto noticed, comes the attractive plan known as "National Guilds."[1] This proposes to adopt the Syndicalist claim, that the control of industry should be vested in the workers, and that interest, *i.e.* remuneration for the use of money borrowed from capitalists who contribute nothing to the

[1] At present the classical exposition of this scheme is to be found in *National Guilds*, by S. G. Hobson (ed. A. R. Orage), 1917 (Bell & Sons). But a new and enlarged edition is anticipated.

work of the industry (such as the shareholders of joint-stock companies), shall disappear. But it differs radically from Syndicalism, in proposing to retain rent, *i.e.* the return for the use of land, buildings, and machinery, which are, however, to belong, not to individual owners, but to the State. Moreover, the amount of this rent is not to be a fixed quantity, but will, in effect, be the quota demanded by the State from Industry, as its annual contribution to the cost of the general government; though whether the proportion payable by each industry is to be fixed by the number of its members, or by the value of the land, buildings, and machinery which it employs, seems to be not quite clear.

On the other hand, the scheme of National Guilds proposes a radical departure from the existing industrial system, by totally abolishing the principle of WAGES—*i.e.* the purchase of labour as a commodity at a fixed money value. To the advocates of this scheme, it appears fundamentally wrong, to class human labour as a commodity to be bought and sold, like cattle or sugar. They urge, with great force, that it is useless to expect a workman to take a genuine interest in the product of his labour, if he ceases to have any connection with that product the moment it has left his hands. And they claim, that it is unjust that the workman should be deprived of all share in the value of the finished product, merely because his economic position has compelled him to barter his labour for a fixed price. In other words, they argue, that the whole dividend resulting from the product, less the cost of raw material and rent to the State, should be equitably divided among its producers —not necessarily (as we shall see) in the form of money, but in some form which would enable each producer to realise his due share of the product.

It seems not to be essential to either of these two latter industrial schemes, whether the control of industry shall be national or local; but, as a matter of fact, the advocates of National Guilds urge strongly the massing of industries into a few large National Guilds, with, of course, large provision for local self-government. On the other hand,

Syndicalism, probably on account of its French origin, seems to prefer independent local units, doubtless federated for certain general purposes. Both schemes, however, assume the complete "democratisation" of industry, and the elimination of the purely capitalist class. But, while, as we have seen, Syndicalism aims at the elimination of the State, the advocates of National Guilds propose only to relieve the State of its financial and industrial duties, leaving to it the more purely political duties, such as the preservation of external and internal order, the administration of justice, public hygiene, and other functions which directly concern the interests of the community as a whole. The advocates of National Guilds point out, with great force, that the attempt, on the part of the State, to interfere in industrial problems, even with the best intentions, is not only unlikely to be successful, but that it has a positively bad effect, by introducing into State politics elements and persons unsuited for admission there—that, for example, the influence of the representatives of great industrial interests in legislative bodies has resulted in waste of time which should have been devoted to higher purposes, and has led, in some cases, to positive corruption. They urge, for example, that railway measures would be much more effectively dealt with by a great national Transport Guild, than by a House of Commons, composed mainly of amateurs in railway matters, but swayed by a few deeply interested experts, and that technical education, which is essentially sectarian, should be entrusted to the Guild for whose industry it is a training, leaving the more fundamentally important and difficult questions of humane and liberal education to the State.

There are, of course, quite obvious dangers and difficulties attendant on the working of such a scheme as has been here outlined, to say nothing of the difficulty of bringing it into existence.[1] Every monopoly suggests danger;

[1] National Guildsmen, apparently, believe that a gradual amalgamation of Trade Unions, followed by a final "strike" on a great scale, would bring their scheme to birth. The Syndicalists, whose programme includes "confiscation," do not shrink from sterner measures,

though a monopoly shared by so many persons as a National Guild is likely to contain, is not so likely to prove dangerous as a monopoly controlled by a small Trust or Ring. But a scheme of National Guilds would, almost inevitably, imply a Guild Congress, to which all the Guilds would send delegates for the discussion of common interests; and such a Congress might be trusted to prevent any abuse of a monopoly, which would, in all probability, severely affect the members of all the other Guilds. Much more serious is the amount of regimentation which such a system would involve; though, again, it may well be doubted whether it would amount to much more than the average skilled worker now undergoes through the action of the State, his Trade Union, and his employer, while it would have the redeeming quality of being, at least indirectly, self-imposed. For it is not, apparently, suggested, that industrial enterprises shall be undertaken by a National Guild as a whole; though all enterprises undertaken by the members of a Guild will have to be undertaken on Guild conditions, as to prices, hours of labour, standard of quality, and the like. A troublesome, but, probably, quite manageable problem, would be the "overlapping job," *i.e.* the undertaking which involves the work of two or more Guilds, such as the building of a reservoir, or the construction of a motor omnibus. But it can hardly be supposed that a system which, even in its imperfect form, was capable of producing the matchless and complicated perfection of the medieval cathedral, would, in the light of modern experience, fail to co-ordinate the efforts of different Guilds.

One particularly attractive feature of the scheme of National Guilds is, apparently, its bold application of the principle of mutual insurance. While the Guild, as a whole, would not undertake the carrying out of any enterprise (except that it would, probably, buy raw materials for distribution among its members), it would guarantee the performance of the work of any member, undertaken in accordance with its rules. This action would, it is believed, enormously strengthen the credit of the Guild, and thus,

incidentally, solve the problem of liquid capital; for, despite the discredited "Wages Fund" [1] theory, it is now generally recognised, that work involving outlay and delay is really financed by CREDIT, not by the money apparently expended in wages and material. The necessity for a "gold reserve," *i.e.* a material guarantee behind paper money, arises solely from mistrust; and, as the National Guildsman argues, given complete mutual confidence between the different Guilds, the individual wants of each member might be supplied through the medium of a simple system of paper tokens ("guilders"), showing the amount of work standing to each member's credit in the books of his Guild, and exchangeable for commodities or services with any member of any other Guild.

Finally comes the alternative ideal, which the events of the war have done so much to illustrate, of the State Socialist, *i.e.* the man who advocates the taking over by the State of both the means and the processes of production and distribution, in the interests of the community as a whole. As has been well said,[2] this ideal represents the control of industry by the consumer, instead of by the producer; for all members of the community are consumers, though not all are producers, at any rate producers of all that they consume. And there is, obviously, a good deal to be said for the object of this ideal; for, inasmuch as one of the ends of production is consumption, it would appear obvious, that the consumer should have a voice in directing the processes of production.

But the arguments against State Socialism are overwhelming; even though it may be superior to the pre-war condition of unrestricted competition, with its innumerable opportunities for exploitation and fraud. In the first place, it involves an immensely complicated machinery, including, not merely an elaborately organised supervising staff, but, below that, all the technical industrial staff necessary for

[1] The "Wages Fund" theory taught, that no enterprise of a great kind could be begun without the previous accumulation of a money fund.

[2] Cole, *The World of Labour*, p. 345.

the actual conduct of industrial enterprise. It would, in fact, mean the whole industrial machinery involved in Syndicalism or Guild Socialism, *plus* a machinery evolved for the purpose of inspecting, reporting upon, auditing, and supervising the work of the strictly industrial organisation. If, as would almost inevitably be the case, this State machinery were largely localised—*e.g.* in municipal and county councils—further complexity would arise, in the links required to keep the central government in touch with the local bodies. It is not necessary to speculate upon the type of official who would be produced by such a system; though the precedents are not altogether happy, and the selection and appointment of the enormous number of officials required would afford tempting opportunities for corruption and favouritism. A far graver objection is, the overwhelming power which such a system would inevitably place in the hands of a small number of high officials, compared with which the power wielded by Kings and Parliaments in the past would be but a shadow. And this at a time when it may be safely said, that the experiences of recent years have hardly tended to increase the confidence of communities, with, perhaps, the single exception of America, in their rulers. It is true that, even in some countries where the instinct of personal dignity and freedom is genuine, as, for example, in France, there appears to be a leaning towards a solution of this type. But the instinctive dislike of the English-speaking world for bureaucracy is probably founded on thoroughly solid grounds; and it is almost impossible to believe, that a great nation which has once tasted the freedom of individual initiative, will ever be willing to relinquish it in favour of bureaucratic control.

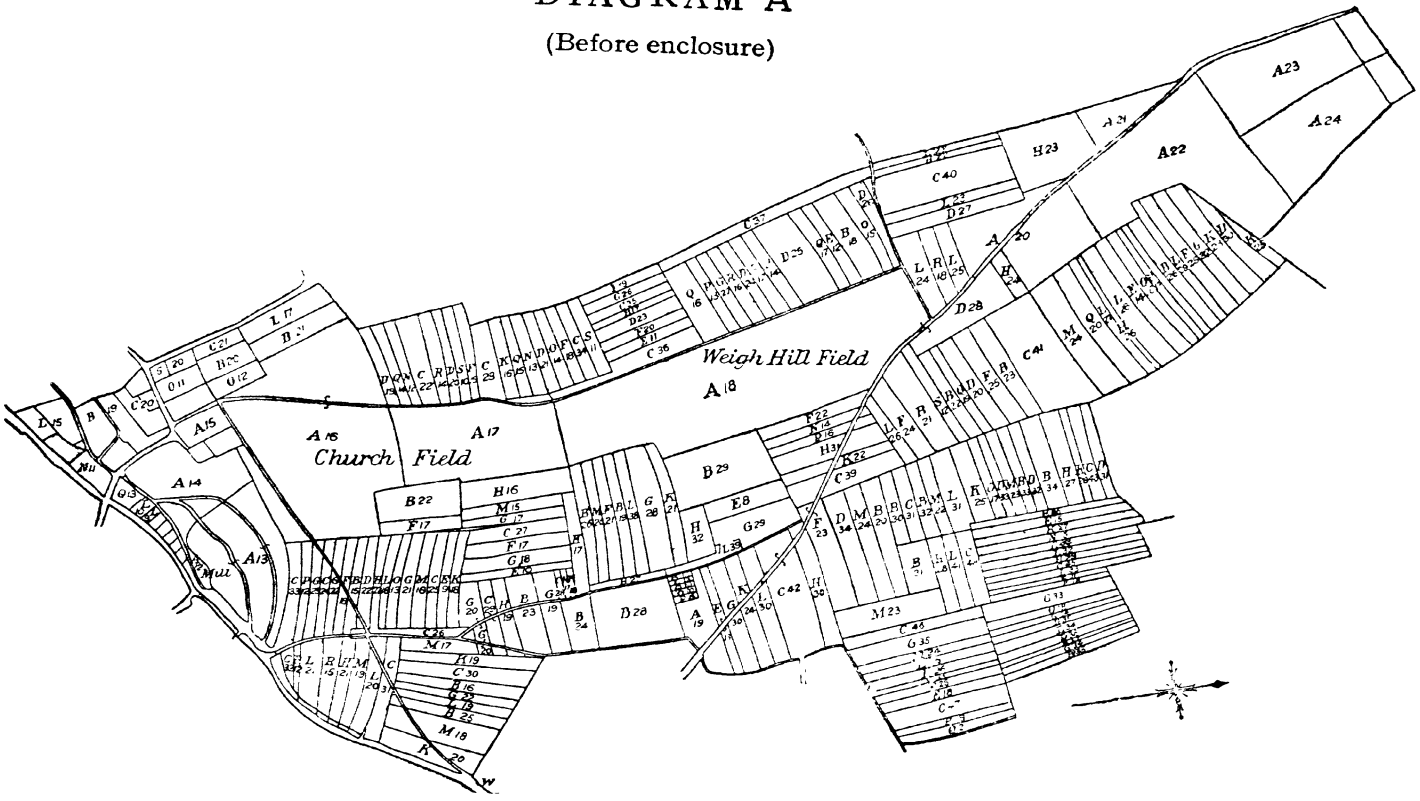
Moreover, the heroic remedy of State Socialism appears to be entirely uncalled-for by the facts of the case. Apart from the unorganised, but immensely powerful, check on possible errors of production which exists, in a mere refusal on the part of the consumer to purchase goods which he does not appreciate, it is possible for a simple organisation of the voluntary type to protect the consumer

against obvious, and what may be called casual, abuses of production; as witness the very real success of so-called Co-operative Distribution. If we can imagine it possible that, imitating the vices of the Trusts and Rings, or of some sections of Labour, in the past, a deliberate attempt should be made by a producing Syndicate or Guild, dealing with one or more of the necessaries of life, to hold the community to ransom, such an attempt would promptly meet with a stern reply from the other Syndicates or Guilds, all of whose members would inevitably be consumers of the necessaries withheld. For it is of the essence of modern industry, with its elaborate specialisation, that every branch, even the most powerful, is dependent for its success on the co-operation of other branches. Thus, for example, if the Agricultural Syndicate or Guild should fix an unreasonable price for milk, it would not be difficult for the Engineering Syndicate or Guild to refuse to produce agricultural machinery. But the obvious place for the settlement of disputes of such a kind would be the Industrial Federation or Congress, in which all the different industries would be represented, and which would be in a far better position to judge of the merits of the case than a State department.

But, in truth, the great safeguard against anti-social action, in a community in which all were actual or potential workers, would be the identity of interests which such a state of things would produce. It may be, as a matter of abstract speculation, impossible to decide between the claims of the producer and the consumer to control the processes of production; for that question involves psychological and ethical problems which are almost insoluble. But, in a community consisting of individuals, nine tenths of whom were both producers and consumers, and from which the purely financial element—the men who, in the old conditions of industrial anarchy, juggled with capital as with counters in a game—was eliminated, there would be at least a fair working chance of settling industrial disputes by a simple application of the Golden Rule: "Do unto others as ye would that they should do unto you."

DIAGRAM A

(Before enclosure)



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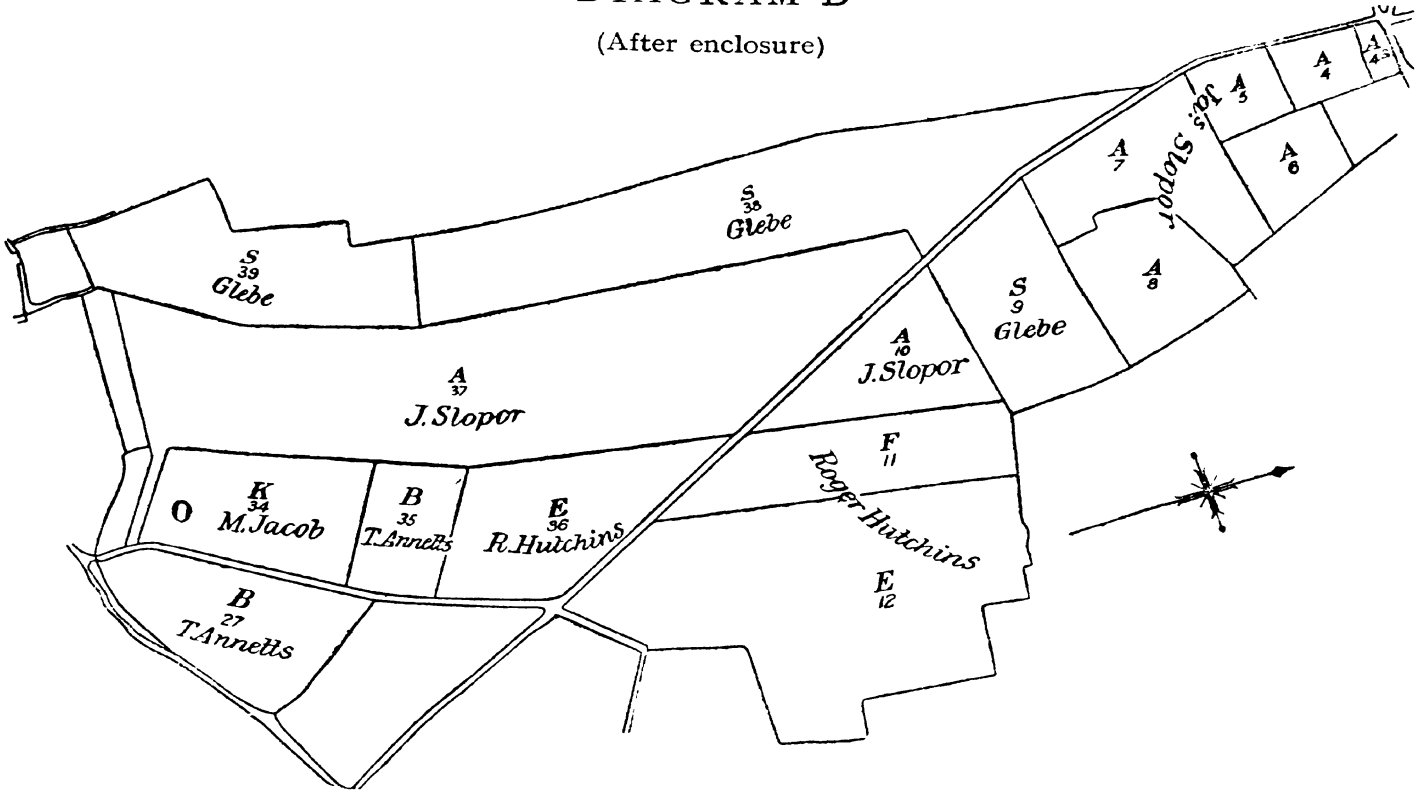

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