Ancient Law
by Henry Maine
1861

Preface

The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought. Much of the inquiry attempted could not have been prosecuted with the slightest hope of a useful result if there had not existed a body of law, like that of the Romans, bearing in its earliest portions the traces of the most remote antiquity and supplying from its later rules the staple of the civil institutions by which modern society is even now controlled. The necessity of taking the Roman law as a typical system has compelled the author to draw from it what may appear a disproportionate number of his illustrations; but it has not been his intention to write a treatise on Roman jurisprudence, and he has as much as possible avoided all discussions which might give that appearance to his work. The space allotted in the third and fourth chapter to certain philosophical theories of the Roman Jurisconsults has been appropriated to them for two reasons. In the first place, those theories appear to the author to have had a wider and more permanent influence on the thought and action of the world than is usually supposed. Secondly, they are believed to be the ultimate source of most of the views which have been prevalent, till quite recently, on the subjects treated of in this volume. It was impossible for the author to proceed far with his undertaking without stating his opinion on the origin, meaning, and value of those speculations.

H.S.M. London, January, 1861.

Chapter 1

Ancient Codes

The most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law. Except in one particular, no institutions anterior to the Twelve Tables were recognised at Rome. The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours. Neither theory corresponded exactly with the facts, but each produced consequences of the utmost importance.

I need hardly say that the publication of the Twelve Tables is not the earliest point at which we can take up the history of law. The ancient Roman code belongs to a class of which almost every civilised nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. They appeared under

exceedingly similar circumstances, and were produced, to our knowledge, by very similar causes. Unquestionably, many jural phenomena lie behind these codes and preceded them in point of time. Not a few documentary records exist which profess to give us information concerning the early phenomena of law; but, until philology has effected a complete analysis of the Sanskrit literature, our best sources of knowledge are undoubtedly the Greek Homeric poems, considered of course not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer. However the fancy of the poet may have exaggerated certain features of the heroic age, the prowess of warrior and the potency of gods, there is no reason to believe that it has tampered with moral or metaphysical conceptions which were not yet the subjects of conscious observation; and in this respect the Homeric literature is far more trustworthy than those relatively later documents which pretend to give an account of times similarly early, but which were compiled under philosophical or theological influences. If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially all the forms in which law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence. The inquiries of the jurist are in truth prosecuted much as inquiry in physic and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.

The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words "Themis" and "Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that Themis is described in the Iliad as the assessor of Zeus. It is now clearly seen by all trustworthy observer of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person; the sun rising, culminating, and setting was a person and a divine person; the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was Themis. The peculiarity of the conception is brought out by the use of the plural. Themistes, Themises, the plural of Themis, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use; but it must be distinctly understood that they are not laws, but judgments. "Zeus, or the human king on earth," says Mr. Grote, in his History of Greece, "is not a lawmaker, but a judge." He is provided with Themistes, but, consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments.

Even in the Homeric poems, we can see that these ideas are transient. Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a Custom, a conception posterior to that of Themistes or judgments. However strongly we, with our modern associations, may be inclined to lay down a priori that the notion of a Custom must precede that of a judicial sentence, and that a judgment must affirm a Custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them. The Homeric word for a custom in the embryo is sometimes "Themis" in the singular-more often "Dike," the meaning of which visibly fluctuates between a "judgment" and a "custom" or "usage." Nomos, a Law, so great and famous a term in the political vocabulary of the later Greek society, does not occur in Homer.

This notion of a divine agency, suggesting the Themistes, and itself impersonated in Themis, must be kept apart from other primitive beliefs with which a superficial inquirer might confound it. The conception of the Deity dictating an entire code or body of law, as in the case of the Hindoo laws of Menu, seems to belong to a range of ideas more recent and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides. A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices; and every now and then the same duty is even more significantly recognised in the purifications and expiations which they perform, and which appear intended to deprecate punishment for involuntary or neglectful disrespect. Everybody acquainted with ordinary classical literature will remember the sacra gentilicia, which exercised so important an influence on the early Roman law of adoption and of wills. And to this hour the Hindoo Customary Law, in which some of the most curious features of primitive society are stereotyped, makes almost all the rights of persons and all the rules of succession hinge on the due solemnisation of fixed ceremonies at the dead man's funeral, that is, at every point where a breach occur in the continuity of the family.

Before we quit this stage of jurisprudence, a caution may be usefully given to the English student. Bentham, in his Fragment on Government, and Austin, in his Province of Jurisprudence Determined, resolve every law into a command of the lawgiver, an obligation imposed thereby on the citizen, and a sanction threatened in the event of disobedience; and it is further predicated of the command, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection; and it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom; it is rather a habit. It is, to use a French phrase, "in the air." The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication. It is of course extremely difficult for us to realise a view so far removed from us in point both of time and of association, but it will become more credible when we dwell more at length on the constitution of ancient Society, in which every man, living during the greater part of his life under the patriarchal despotism, was practically controlled in all his actions by a regimen not of law but of caprice. I may add that an Englishman should be better able than a foreigner to appreciate the historical fact that the "Themistes" preceded any conception of law, because, amid the many inconsistent theories which prevail concerning the character of English jurisprudence, the most popular, or at all events the one which most affects practice, is certainly a theory which assumes that adjudged cases and precedents exist antecedently to rules, principles, and distinctions. The "Themistes" have too, it should be remarked, the characteristic which, in the view of Bentham and Austin, distinguishes single or mere commands from laws. A true law enjoins on all the citizens indifferently a number of acts similar in class or kind; and this is exactly the feature of a law which has most deeply impressed itself on the popular mind, Causing the term "law" to be applied to mere uniformities, successions, and similitudes. A command prescribes only a single act, and it is to commands, therefore, that "Themistes" are more akin than to laws. They are simply adjudications on insulated states of fact, and do not necessarily follow each other in any orderly sequence.

The literature of the heroic age discloses to us law in the germ under the "Themistes" and a little more developed in the conception of "Dike." The next stage which we reach in the history of jurisprudence is strongly marked and surrounded by the utmost interest. Mr. Grote, in the second part and second chapter of his History, has fully described the mode in which society gradually clothed itself with a different character from that delineated by Homer. Heroic kingship depended partly on divinely given prerogative, and partly on the possession of supereminent strength, courage, and wisdom. Gradually, as the impression of the monarch's sacredness became weakened, and feeble members occurred in the series of hereditary kings, the royal power decayed, and at last gave way to the dominion of aristocracies. If language so precise can be used of the revolution, we might say that the office of the king was usurped by that council of chiefs which Homer repeatedly alludes to and depicts. At all events from an epoch of kingly rule we come everywhere in Europe to an era of oligarchies; and even where the name of the monarchical functions does not absolutely disappear, the authority of the king is reduced to a mere shadow. He becomes a mere hereditary general; as in Lacedaemon, a mere functionary, as the King Archon at Athens, or a mere formal hierophant, like the Rex Sacrificulus at Rome. In Greece, Italy, and Asia Minor, the dominant orders seem to have univerally consisted of a number of families united by an assumed relationship in blood, and, though they all appear at first to have laid claim to a quasi-sacred character, their strength does not seem to have resided in their pretended sanctity. Unless they were prematurely overthrown by the popular party, they all ultimately approached very closely to what we should now understand by a political aristocracy. The changes which society underwent in the communities of the further Asia occurred of course at periods long anterior in point of time to these revolutions of the Italian and Hellenic worlds; but their relative place in civilisation appear to have been the same, and they seem to have been exceedingly similar in general character. There is some evidence that the races which were subsequently united under the Persian monarchy, and those which peopled the peninsula of India, had all their heroic age and their era of aristocracies; but a military and a religious oligarchy appear to have grown up separately, nor was the authority of the king generally superseded. Contrary, too, to the course of events in the West, the religious element in the East tended to get the better of the military and political. Military and civil aristocracies disappear, annihilated or crushed into insignificance between the kings and the sacerdotal order; and the ultimate result at which we arrive is, a monarch enjoying great power, but circumscribed by the privileges of a caste of priests. With these differences, however, that in the East aristocracies became religious, in the West civil or political, the proposition that a historical era of aristocracies succeeded a historical era of heroic kings may be considered as true, if not of all mankind, at all events of all branches of the Indo-European family of nations.

The important point for the jurist is that these aristocracies were universally the depositaries and administrators of law. They seem to have succeeded to the prerogatives of the king, with the important difference, however, that they do not appear to have pretended to direct inspiration for each sentence. The connection of ideas which caused the judgments of the patriarchal chieftain to be attributed to superhuman dictation still shows itself here and there in the claim of a divine origin for the entire body of rules, or for certain parts of it, but the progress of thought no longer permits the solution of particular disputes to be explained by supposing an extra-human interposition. What the juristical oligarchy now claims is to monopolise the knowledge of the laws, to have the exclusive possession of the principles by which quarrels are decided. We have in fact arrived at the epoch of Customary Law. Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste. Our authorities leave us no doubt that the trust lodged with the oligarchy was sometimes abused, but it certainly ought not to be regarded as a mere usurpation or engine of tyranny. Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to. Their genuineness was, so far as possible, insured by confiding them to the recollection of a limited portion of the community.

The epoch of Customary Law, and of its custody by a privileged order, is a very remarkable one. The condition of the jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world. English case-law is sometimes spoken of as unwritten, and there are some English theorists who assure us that if a code of English jurisprudence were prepared we should be turning unwritten law into written -- conversion, as they insist, if not of doubtful policy, at all events of the greatest seriousness. Now, it is quite true that there was once a period at which the English common law might reasonably have been termed unwritten. The elder English judges did really pretend to knowledge of rules, principles, and distinctions which were not entirely revealed to the bar and to the lay-public. Whether all the law which they claimed to monopolise was really unwritten, is exceedingly questionable; but at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the Courts at Westminster Hall began to base their judgments on cases recorded, whether in the year books or elsewhere, the law which they administered became written law. At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case-law, and only different from code-law because it is written in a different way.

From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen. In Greece, in Italy, on the Hellenised sea-board of Western Asia, these codes all made their appearance at periods much the same everywhere, not, I mean, at periods identical in point of time, but similar in point of the relative progress of each community. Everywhere, in the countries I have named, laws engraven on tablets and published to the people take the place of usages deposited with the recollection of a privileged oligarchy. It must not for a moment be supposed that the refined considerations now urged in favour of what is called codification had any part or place in the change I have described. The ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing. It is true that the aristocracies seem to have abused their monopoly of legal knowledge; and at all events their exclusive possession of the law was a formidable impediment to the success of those popular movements which began to be universal in the western world. But, though democratic sentiment may have added to their popularity, the codes were certainly in the main a direct result of the invention of writing. Inscribed tablets were seen to be a better depositary of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise.

The Roman code belongs to the class of codes I have been describing. Their value did not consist in any approach to symmetrical classifications, or to terseness and clearness of expression, but in their publicity, and in the knowledge which they furnished to everybody, as to what he was to do, and what not to do. It is, indeed, true that the Twelve Tables of Rome do exhibit some traces of systematic arrangement, but this is probably explained by the tradition that the framers of that body of law called in the assistance of Greeks who enjoyed the later Greek experience in the art of law-making. The fragments of the Attic Code of Solon show, however, that it had but little order, and probably the laws of Draco had even less. Quite enough too remains of these collections, both in the East and in the West, to show that they mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character and this is consistent with all we know of early thought from other sources, the severance of law from morality, and of religion from law, belonging very distinctly to the later stages of mental progress.

But, whatever to a modern eye are the singularities of these Codes, their importance to ancient societies was unspeakable. The question -- and it was one which affected the whole future of each community -- was not so much whether there should be a code at all, for the majority of ancient societies seem to have obtained them sooner or later, and, but for the great interruption in the history of jurisprudence created by feudalism, it is likely that all modern law would be distinctly traceable to one or more of these fountain-heads. But the point on which turned the history of the race was, at what period, at what stage of their social progress, they should have their laws put into writing. In the western world the plebeian or popular element in each state successfully assailed the oligarchical monopoly; and a code was nearly universally obtained early in the history of the Commonwealth. But in the East, as I have before mentioned, the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; while in some instances the physical conformation of Asiatic countries had the effect of making individual communities larger and more numerous than in the West; and it is a known social law that the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality. From whatever cause, the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and wore a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo code, called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law. It is consistent with human nature and with the special motives of their author, that codes like that of Menu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity. Menu, according to Hindoo mythology, is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindoo jurisprudence, a recent production.

Among the chief advantages which the Twelve Tables and similar codes conferred on the societies which obtained them, was the protection which they afforded against the frauds of the privileged oligarchy and also against the spontaneous depravation and debasement of the national institutions. The Roman Code was merely an enunciation in words of the existing customs of the Roman people. Relatively to the progress of the Romans in civilisation, it was a remarkably early code, and it was published at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded. Now a barbarous society practising a body of customs, is exposed to some especial dangers which may be absolutely fatal to its progress in civilisation. The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development which ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that usage which is reasonable generates usage which is unreasonable. Analog, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons, to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it. After one kind of food has interdicted for sanitary reasons, the prohibition is extended to all food resembling it, though the

resemblance occasionally depends on analogies the most fanciful. So, again, a wise provision for insuring general cleanliness dictates in time long routines of ceremonial ablution; and that division into classes which at a particular crisis of social history is necessary for the maintenance of the national existence degenerates into the most disastrous and blighting of all human institutions -- Caste. The fate of the Hindoo law is, in fact, the measure of the value of the Roman code. Ethnology shows us that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code. It was compiled while the usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. We are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but thus much at least is certain, that with their code they were exempt from the very chance of so unhappy a destiny.

CHAPTER 2

Legal Fictions

When primitive law has once been embodied in a Code, there is an end to what may be called its spontaneous development. Henceforward the changes effected in it, if effected at all, are effected deliberately and from without. It is impossible to suppose that the customs of any race or tribe remained unaltered during the whole of the long -- in some instances the immense -- interval between their declaration by a patriarchal monarch and their publication in writing. It would be unsafe too to affirm that no part of the alteration was effected deliberately. But from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change. Such innovations on the earliest usages as disclose themselves appear to have been dictated by feelings and modes of thought which, under our present mental conditions, we are unable to comprehend. A new era begins, however, with the Codes. Wherever, after this epoch, we trace the course of legal modification we are able to attribute it to the conscious desire of improvement, or at all events of compassing objects other than those which were aimed at in the primitive times.

It may seem at first sight that no general propositions worth trusting can be elicited from the history of legal systems subsequent to the codes. The field is too vast. We cannot be sure that we have included a sufficient number of phenomena in our observations, or that we accurately understand those which we have observed. But the undertaking will be seen to be more feasible, if we consider that after the epoch of codes the distinction between stationary and progressive societies begins to make itself felt. It is only with the progressive that we are concerned, and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that the civilisation which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears, and speculations, would be materially affected, if we had vividly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be improved since the moment when external completeness was first given to them by their embodiment in some permanent record. One set of usages has occasionally been violently overthrown and superseded by another; here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of

sacerdotal commentators; but, except in a small section of the world, there has been nothing like the gradual amelioration of a legal system. There has been material civilisation, but, instead of the civilisation expanding the law, the law has limited the civilisation. The study of races in their primitive condition affords us some clue to the point at which the development of certain societies has stopped. We can see that Brahminical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion. The members of such a society consider that the transgression of a religious ordinance should be punished by civil penalties, and that the violation of a civil duty exposes the delinquent to divine correction. In China this point has been passed, but progress seems to have been there arrested, because the civil laws are coextensive with all the ideas of which the race is capable. The difference between the stationary and progressive societies is, however, one of the great secrets which inquiry has yet to penetrate. Among partial explanations of it I venture to place the considerations urged at the end of the last chapter. It may further be remarked that no one is likely to succeed in the investigation who does not clearly realise that the stationary condition of the human race is the rule, the progressive the exception. And another indispensable condition of success is an accurate knowledge of Roman law in all its principal stages. The Roman jurisprudence has the longest known history of any set of human institutions. The character of all the changes which it underwent is tolerably well ascertained. From its commencement to its close, it was progressively modified for the better, or for what the author of the modification conceived to be the better, and the course of improvement was continued through periods at which all the rest of human thought and action materially slackened its pace, and repeatedly threatened to settle down into stagnation.

I confine myself in what follows to the progressive societies. With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted. The early history of one of them, Equity, is universally obscure, and hence it may be thought by some that certain isolated statutes, reformatory of the civil law, are older than any equitable jurisdiction. My own belief is that remedial Equity is everywhere older than remedial Legislation; but, should this be not strictly true, it would only be necessary to limit the proposition respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in trans forming the original law.

I employ the word "fiction" in a sense considerably wider than that in which English lawyer are accustomed to use it, and with a meaning much more extensive than that which belonged to the Roman "fictiones." Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of these "fictiones" was, of course, to give jurisdiction, and they therefore strongly resembled the allegations in the writs of the English Queen's Bench, and Exchequer, by which those Courts contrived to usurp the jurisdiction of the Common Pleas: -- the allegation that the defendant was in custody of the king's marshal, or that the plaintiff was the king's debtor, and could not pay his debt by reason of the defendant's default. But I now employ the expression "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being

modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman Responsa Prudentum as resting on fictions. Both these examples will be examined presently. The fact is in both cases that the law has been wholly changed; the fiction is that it remains what it always was. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first steps towards civilisation. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law. But at the same time it would be equally foolish to agree with those theorists, who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. They have had their day, but it has long since gone by. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. Hence there is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different casts will differ as to the branch of the alternative which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity whether of the Roman Praetors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from Legal Fictions just as Equity differs from them, and it is also distinguished from Equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature and not to that of the principles on which the legislature acted; and thus they differ from rules of Equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at once to the recognition of the courts even without the concurrence of prince or parliamentary assembly. It is the more necessary to note these differences, because a student of Bentham would be apt to

confound Fictions, Equity, and Statute law under the single head of legislation. They all, he would say, involve law-making; they differ only in respect of the machinery by which the new law is produced. That is perfectly true, and we must never forget it; but it furnishes no reason why we should deprive ourselves of so convenient a term as Legislation in the special sense. Legislation and Equity are disjoined in the popular mind and in the minds of most lawyers; and it will never do to neglect the distinction between them, however conventional, when important practical consequences follow from it.

It would be easy to select from almost any regularly developed body of rules examples of legal fictions, which at once betray their true character to the modern observer. In the two instances which I proceed to consider, the nature of the expedient employed is not so readily detected. The first authors of these fictions did not perhaps intend to innovate, certainly did not wish to be suspected of innovating. There are, moreover, and always have been, persons who refuse to see any fiction in the process, and conventional language bear out their refusal. No examples, therefore, can be better calculated to illustrate the wide diffusion of legal fictions, and the efficiency with which they perform their two-fold office of transforming a system of laws and of concealing the transformation.

We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, in nubibus or in gremio magistratuum, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances. The theory was at first much more thoroughly believed in than it is now, and indeed it may have had a better foundation. The judges of the thirteenth century may have really had at their command a mine of law unrevealed to the bar and to the lay-public, for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed so soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence; and now for centuries English practitioner have so expressed themselves as to convey the paradoxical proposition that, except by Equity and Statute law, nothing has been added to the basis since it was first constituted. We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are coextensive with the complicated interests of modern society.

A body of law bearing a very close and very instructive resemblance to our case-law in those particulars which I have noticed, was known to the Romans under the name of the Responsa Prudentum, the "answers of the learned in the law." The form of these Responses varied a good deal at different periods of the Roman jurisprudence, but throughout its whole course they consisted of explanatory glosses on authoritative written documents, and at first they were exclusively collections of opinions interpretative of the Twelve Tables. As with us, all legal language adjusted itself to the assumption that the text of the old Code remained unchanged. There was the express rule. It overrode all glosses and comments, and no one openly admitted that any interpretation of it, however eminent the interpreter, was safe from revision on appeal to the venerable texts. Yet in point of fact, Books of Responses bearing the names of leading jurisconsults obtained an authority at least equal to that of our reported cases, and constantly modified, extended, limited or practically overruled the provisions of the Decemviral law. The authors of the new jurisprudence during the whole progress of its formation professed the most sedulous respect for the letter of the Code. They were merely explaining it, deciphering it, bringing out its full meaning; but then, in the result, by piecing texts together, by adjusting the law to states of fact which actually presented themselves and by speculating on its possible application to others which might occur, by introducing principles of interpretation derived from the exegesis of other written documents which fell under their observation, they educed a vast variety of canons which had never been dreamed of by the compilers of the Twelve Tables and which were in truth rarely or never to be found there. All these treatises of the jurisconsults claimed respect on the ground of their assumed conformity with the Code, but their comparative authority depended on the reputation of the particular jurisconsults who gave them to the world. Any name of universally acknowledged greatness clothed a Book of responses with a binding force hardly less than that which belonged to enactments of the legislature; and such a book in its turn constituted a new foundation on which a further body of jurisprudence might rest. The responses of the early lawyers were not however published, in the modern sense, by their author. They were recorded and edited by his pupils, and were not therefore in all probability arranged according to any scheme of classification. The part of the students in these publications must be carefully noted, because the service they rendered to their teacher seems to have been generally repaid by his sedulous attention to the pupils' education. The educational treatises called Institutes or Commentaries, which are a later fruit of the duty then recognised, are among the most remarkable features of the Roman system. It was apparently in these Institutional works, and not in the books intended for trained lawyers, that the jurisconsults gave to the public their classifications and their proposals for modifying and improving the technical phraseology.

In comparing the Roman Responsa Prudentum with their nearest English counterpart, it must be carefully borne in mind that the authority by which this part of the Roman jurisprudence was expounded was not the bench, but the bar. The decision of a Roman tribunal, though conclusive in the particular case, had no ulterior authority except such as was given by the professional repute of the magistrate who happened to be in office for the time. Properly speaking, there was no institution at Rome during the republic analogous to the English Bench, the Chambers of imperial Germany, or the Parliaments of Monarchical France. There were magistrates indeed, invested with momentous judicial functions in their several departments, but the tenure of the magistracies was but for a single year, so that they are much less aptly compared to a permanent judicature than to a cycle of offices briskly circulating among the leaders of the bar. Much might be said on the origin of a condition of things which looks to us like a startling anomaly, but which was in fact much more congenial than our own system to the spirit of ancient societies, tending, as they always did, to split into distinct orders which, however exclusive themselves, tolerated no professional hierarchy above them.

It is remarkable that this system did not produce certain effects which might on the whole have been expected from it. It did not, for example, popularise the Roman law -- it did not, as in some of the Greek republics, lessen the effort of intellect required for the mastery of the science, although its diffusion and authoritative exposition were opposed by no artificial barriers. On the contrary, if it had not been for the operation of a separate set of causes, there were strong probabilities that the Roman jurisprudence would

have become as minute, technical, and difficult as any system which has since prevailed. Again, a consequence which might still more naturally have been looked for, does not appear at any time to have exhibited itself. The jurisconsults, until the liberties of Rome were overthrown, formed a class which was quite undefined and must have fluctuated greatly in numbers; nevertheless, there does not seem to have existed a doubt as to the particular individuals whose opinion, in their generation, was conclusive on the cases submitted to them. The vivid pictures of a leading jurisconsult's daily practice which abound in Latin literature -- the clients from the country flocking to his antechamber in the early morning, and the students standing round with their note-books to record the great lawyer's replies -- are seldom or never identified at any given period with more than one or two conspicuous names. Owing too to the direct contact of the client and the advocate, the Roman people itself seems to have been always alive to the rise and fall of professional reputation, and there is abundance of proof, more particularly in the well-known oration of Cicero, Pro Muraena, that the reverence of the commons for forensic success was apt to be excessive rather than deficient.

We cannot doubt that the peculiarities which have been noted in the instrumentality by which the development of the Roman law was first effected, were the source of its characteristic excellence, its early wealth in principles. The growth and exuberance of principle was fostered, in part, by the competition among the expositors of the law, an influence wholly unknown where there exists a Bench, the depositaries intrusted by king or commonwealth with the prerogative of justice. But the chief agency, no doubt, was the uncontrolled multiplication of cases for legal decision. The state of facts which caused genuine perplexity to a country client was not a whit more entitled to form the basis of the jurisconsult's Response, or legal decision, than a set of hypothetical circumstances propounded by an ingenious pupil. All combinations of fact were on precisely the same footing, whether they were real or imaginary. It was nothing to the jurisconsult that his opinion was overruled for the moment by the magistrate who adjudicated on his client's case, unless that magistrate happened to rank above him in legal knowledge or the esteem of his profession. I do not, indeed, mean it to be inferred that he would wholly omit to consider his client's advantage, for the client was in earlier times the great lawyer's constituent and at a later period his paymaster, but the main road to the rewards of ambition lay through the good opinion of his order, and it is obvious that under such a system as I have been describing this was much more likely to be secured by viewing each case as an illustration of a great principle, or an exemplification of a broad rule, than by merely shaping it for an insulated forensic triumph. A still more powerful influence must have been exercised by the want of any distinct check on the suggestion or invention of possible questions. Where the data can be multiplied at pleasure, the facilities for evolving a general rule are immensely increased. As the law is administered among ourselves, the judge cannot travel out of the sets of facts exhibited before him or before his predecessors. Accordingly each group of circumstances which is adjudicated upon receives, to employ a Gallicism, a sort of consecration. It acquires certain qualities which distinguish it from every other case genuine or hypothetical. But at Rome, as I have attempted to explain, there was nothing resembling a Bench or Chamber of judges; and therefore no combination of facts possessed any particular value more than another. When a difficulty came for opinion before the jurisconsult, there was nothing to prevent a person endowed with a nice perception of analogy from at once proceeding to adduce and consider an entire class of supposed questions with which a particular feature connected it. Whatever were the practical advice given to the client, the responsum treasured up in the notebooks of listening pupils would doubtless contemplate the circumstances as governed by a great principle, or included in a sweeping rule. Nothing like this has ever been possible among ourselves, and it should be acknowledged that in many criticisms passed on the English law the manner in which it has been enunciated seems to have been lost sight of. The hesitation of our courts in declaring principles may be much more reasonably attributed to the comparative scantiness of our precedents, voluminous as they appear to him who is acquainted with no other system, than to the temper of our judges. It is true that in the wealth of legal principle we are considerably poorer than several modern European nations. But they, it must be remembered, took the Roman jurisprudence for the foundation of their civil institutions. They

built the debris of the Roman law into their walls; but in the materials and workmanship of the residue there is not much which distinguishes it favourably from the structure erected by the English judicature.

The period of Roman freedom was the period during which the stamp of a distinctive character was impressed on the Roman jurisprudence; and through all the earlier part of it, it was by the Responses of the jurisconsults that the development of the law was mainly carried on. But as we approach the fall of the republic there are signs that the Responses are assuming a form which must have been fatal to their farther expansion. They are becoming systematised and reduced into compendia. Q. Mucius Scaevola, the Pontifex, is said to have published a manual of the entire Civil Law, and there are traces in the writings of Cicero of growing disrelish for the old methods, as compared with the more active instruments of legal innovation. Other agencies had in fact by this time been brought to bear on the law. The Edict, or annual proclamation of the Praetor, had risen into credit as the principal engine of law reform, and L. Cornelius Sylla, by causing to be enacted the great group of statutes called the Leges Corneliae, had shown what rapid and speedy improvements can be effected by direct legislation. The final blow to the Responses was dealt by Augustus, who limited to a few leading jurisconsults the right of giving binding opinions on cases submitted to them, a change which, though it brings us nearer the ideas of the modern world, must obviously have altered fundamentally the characteristics of the legal profession and the nature of its influence on Roman law. At a later period another school of jurisconsults arose, the great lights of jurisprudence for all time. But Ulpian and Paulus, Gaius and Papinian, were not authors of Responses. Their works were regular treatises on particular departments of the law, more especially on the Praetor's Edict.

The Equity of the Romans and the Praetorian Edict by which it was worked into their system, will be considered in the next chapter. Of the Statute Law it is only necessary to say that it was scanty during the republic, but became very voluminous under the empire. In the youth and infancy of a nation it is a rare thing for the legislature to be called into action for the general reform of private law. The cry of the people is not for change in the laws, which are usually valued above their real worth, but solely for their pure, complete, and easy administration; and recourse to the legislative body is generally directed to the removal of some great abuse, or the decision of some incurable quarrel between classes and dynasties. There seems in the minds of the Romans to have been some association between the enactment of a large body of statutes and the settlement of society after a great civil commotion. Sylla signalised his reconstitution of the republic by the Leges Corneliae; Julius Caesar contemplated vast additions to the Statute Law. Augustus caused to be passed the all-important group of Leges Juliae; and among later emperors the most active promulgators of constitutions are princes who, like Constantine, have the concerns of the world to readjust. The true period of Roman Statute Law does not begin till the establishment of the empire. The enactments of the emperors, clothed at first in the pretence of popular sanction, but afterwards emanating undisguisedly from the imperial prerogative, extend in increasing massiveness from the consolidation of Augustus's power to the publication of the Code of Justinian. It will be seen that even in the reign of the second emperor a considerable approximation is made to that condition of the law and that mode of administering it with which we are all familiar. A statute law and a limited board of expositors have risen into being; a permanent court of appeal and a collection of approved commentaries will very shortly be added; and thus we are brought close on the ideas of our own day.

CHAPTER 3

Law of Nature and Equity

The theory of a set of legal principles, entitled by their intrinsic superiority to supersede the older law, very early obtained currency both in the Roman state and in England. Such a body of principles, existing in any system, has in the foregoing chapters been denominated Equity, a term which, as will presently be seen, was one (though only one) of the designations by which this agent of legal change was known to the Roman jurisconsults. The jurisprudence of the Court of Chancery, which bears the name of Equity in England, could only be adequately discussed in a separate treatise. It is extremely complex in its texture and derives its materials from several heterogeneous sources. The early ecclesiastical chancellors contributed to it, from the Canon Law, many of the principles which lie deepest in its structure. The Roman law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the Corpus Juris Civilis imbedded, with their terms unaltered, though their origin is never acknowledged. Still more recently, and particularly at the middle and during the latter half of the eighteenth century, the mixed systems of jurisprudence and morals constructed by the publicists of the Low Countries appear to have been much studied by English lawyers, and from the chancellorship of Lord Talbot to the commencement of Lord Eldon's chancellorship these works had considerable effect on the rulings of the Court of Chancery. The system, which obtained its ingredients from these various quarters, was greatly controlled in its growth by the necessity imposed on it of conforming itself to the analogies of the common law, but it has always answered the description of a body of comparatively novel legal principles claiming to override the older jurisprudence of the country on the strength of an intrinsic ethical superiority.

The Equity of Rome was a much simpler structure, and its development from its first appearance can be much more easily traced. Both its character and its history deserve attentive examination. It is the root of several conceptions which have exercised profound influence on human thought, and through human thought have seriously affected the destinies of mankind.

The Romans described their legal system as consisting of two ingredients. "All nations," says the Institutional Treatise published under the authority of the Emperor Justinian, "who are ruled by laws and customs, are governed partly by their own particular laws, and partly by those laws which are common to all mankind. The law which a people enacts is called the Civil Law of that people, but that which natural reason appoints for all mankind is called the Law of Nations, because all nations use it." The part of the law "which natural reason appoints for all mankind" was the element which the Edict of the Praetor was supposed to have worked into Roman jurisprudence. Elsewhere it is styled more simply Jus Naturale, or the Law of Nature; and its ordinances are said to be dictated by Natural Equity (naturalis aequitas) as well as by natural reason. I shall attempt to discover the origin of these famous phrases, Law of Nations, Law of Nature, Equity, and to determine how the conceptions which they indicate are related to one another.

The most superficial student of Roman history must be struck by the extraordinary degree in which the fortunes of the republic were affected by the presence of foreigners, under different names, on her soil. The causes of this immigration are discernible enough at a later period, for we can readily understand why men of all races should flock to the mistress of the world; but the same phenomenon of a large population of foreigners and denizens meets us in the very earliest records of the Roman State. No doubt, the instability of society in ancient Italy, composed as it was in great measure of robber tribes, gave men considerable inducement to locate themselves in the territory of any community strong enough to protect itself and them from external attack, even though protection should be purchased at the cost of heavy taxation, political disfranchisement, and much social humiliation. It is probable, however, that this explanation is imperfect, and that it could only be completed by taking into account those active commercial relations which, though they are little reflected in the military traditions of the republic, Rome appears certainly to have had with Carthage and with the interior of Italy in pre-historic times. Whatever were the circumstances to which it was attributable, the foreign element in the commonwealth

determined the whole course of its history, which, at all its stages, is little more than a narrative of conflicts between a stubborn nationality and an alien population. Nothing like this has been seen in modern times; on the one hand, because modern European communities have seldom or never received any accession of foreign immigrants which was large enough to make itself felt by the bulk of the native citizens, and on the other, because modern states, being held together by allegiance to a king or political superior, absorb considerable bodies of immigrant settlers with a quickness unknown to the ancient world, where the original citizens of a commonwealth always believed themselves to be united by kinship in blood, and resented a claim to equality of privilege as a usurpation of their birthright. In the early Roman republic the principle of the absolute exclusion of foreigners pervaded the Civil Law no less than the Constitution. The alien or denizen could have no share in any institution supposed to be coeval with the State. He could not have the benefit of Quiritarian law. He could not be a party to the nexum which was at once the conveyance and the contract of the primitive Romans. He could not sue by the Sacramental Action, a mode of litigation of which the origin mounts up to the very infancy of civilisation. Still, neither the interest nor the security of Rome permitted him to be quite outlawed. All ancient communities ran the risk of being overthrown by a very slight disturbance of equilibrium, and the mere instinct of self-preservation would force the Romans to devise some method of adjusting the rights and duties of foreigners, who might otherwise-and this was a danger of real importance in the ancient world -- have decided their controversies by armed strife. Moreover, at no period of Roman history was foreign trade entirely neglected. It was therefore probably half as a measure of police and half in furtherance of commerce that jurisdiction was first assumed in disputes to which the parties were either foreigners or a native and a foreigner. The assumption of such a jurisdiction brought with it the immediate necessity of discovering some principles on which the questions to be adjudicated upon could be settled, and the principles applied to this object by the Roman lawyers were eminently characteristic of the time. They refused, as I have said before, to decide the new Cases by pure Roman Civil Law. They refused, no doubt because it seemed to involve some kind of degradation, to apply the law of the particular State from which the foreign litigant came. The expedient to which they resorted was that of selecting the rules of law common to Rome and to the different Italian communities in which the immigrants were born. In other words, they set themselves to form a system answering to the primitive and literal meaning of Jus Gentium, that is, Law common to all Nations. Jus Gentium was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were all the nations whom the Romans had the means of observing, and who sent successive swarms of immigrants to Roman soil. Whenever a particular usage was seen to be practised by a large number of separate races in common it was set down as part of the Law common to all Nations, or Jus Gentium. Thus, although the conveyance of property was certainly accompanied by very different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed was a part of the ceremonial in all of them. It was, for instance, a part, though a subordinate part, in the Mancipation or conveyance peculiar to Rome. Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the jurisconsults had the means of observing, was set down as an institution Juris Gentium, or rule of the Law common to all Nations. A vast number of other observances were scrutinised with the same result. Some common characteristic was discovered in all of them, which had a common object, and this characteristic was classed in the Jus Gentium. The Jus Gentium was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes.

The circumstances of the origin of the Jus Gentium are probably a sufficient safeguard against the mistake of supposing that the Roman lawyers had any special respect for it. It was the fruit in part of their disdain for all foreign law, and in part of their disinclination to give the foreigner the advantage of their own indigenous Jus Civile. It is true that we, at the present day, should probably take a very different view of the Jus Gentium, if we were performing the operation which was effected by the Roman jurisconsults. We should attach some vague superiority or precedence to the element which we had thus discerned underlying and pervading so great a variety of usage. We should have a sort of respect for rules and

principles so universal. Perhaps we should speak of the common ingredient as being of the essence of the transaction into which it entered, and should stigmatise the remaining apparatus of ceremony, which varied in different communities, as adventitious and accidental. Or it may be, we should infer that the races which we were comparing had once obeyed a great system of common institutions of which the Jus Gentium was the reproduction, and that the complicated usages of separate commonwealths were only corruptions and depravations of the simpler ordinances which had once regulated their primitive state. But the results to which modern ideas conduct the observer are, as nearly as possible, the reverse of those which were instinctively brought home to the primitive Roman. What we respect or admire, he disliked or regarded with jealous dread. The parts of jurisprudence which he looked upon with affection were exactly those which a modern theorist leaves out of consideration as accidental and transitory. The solemn gestures of the mancipation; the nicely adjusted questions and answers of the verbal contract; the endless formalities of pleading and procedure. The Jus Gentium was merely a system forced on his attention by a political necessity. He loved it as little as he loved the foreigners from whose institutions it was derived and for whose benefit it was intended. A complete revolution in his ideas was required before it could challenge his respect, but so complete was it when it did occur, that the true reason why our modern estimate of the Jus Gentium differs from that which has just been described, is that both modern jurisprudence and modern philosophy have inherited the matured views of the later jurisconsults on this subject. There did come a time, when from an ignoble appendage of the Jus Civile, the Jus Gentium came to be considered a great though as yet imperfectly developed model to which all law ought as far as possible to conform. This crisis arrived when the Greek theory of a Law of Nature was applied to the practical Roman administration of the Law common to all Nations.

The Jus Naturale, or Law of Nature, is simply the Jus Gentium or Law of Nations seen in the light of a peculiar theory. An unfortunate attempt to discriminate them was made by the jurisconsult Ulpian, with the propensity to distinguish characteristic of a lawyer, but the language of Gaius, a much higher authority, and the passage quoted before from the Institutes leave no room for doubt, that the expressions were practically convertible. The difference between them was entirely historical, and no distinction in essence could ever be established between them. It is almost unnecessary to add that the confusion between Jus Gentium, or Law common to all Nations, and international law is entirely modern. The classical expression for international law is Jus Feciale or the law of negotiation and diplomacy. It is, however, unquestionable that indistinct impressions as to the meaning of Jus Gentium had considerable share in producing the modern theory that the relations of independent states are governed by the Law of Nature.

It becomes necessary to investigate the Greek conceptions of nature and her law. The word *@@@@, which was rendered in the Latin natura and our nature, denoted beyond all doubt originally the material universe, but it was the material universe contemplated under an aspect which -- such is our intellectual distance from those times -- it is not very easy to delineate in modern language. Nature signified the physical world regarded as the result of some primordial element or law. The oldest Greek philosophers had been accustomed to explain the fabric of creation as the manifestation of some single principle which they variously asserted to be movement, force, fire, moisture, or generation. In its simplest and most ancient sense, Nature is precisely the physical universe looked upon in this way as the manifestation of a principle. Afterwards, the later Greek sects, returning to a path from which the greatest intellects of Greece had meanwhile strayed, added the moral to the physical world in the conception of Nature. They extended the term till it embraced not merely the visible creation, but the thoughts, observances, and aspirations of mankind. Still, as before, it was not solely the moral phenomena of human society which they understood by Nature, but these phenomena considered as resolvable into some general and simple laws.

Now, just as the oldest Greek theorists supposed that the sports of chance had changed the material universe from its simple primitive form into its present heterogeneous condition, so their intellectual descendants imagined that but for untoward accident the human race would have conformed itself to simpler rules of conduct and a less tempestuous life. To live according to nature came to be considered as the end for which man was created, and which the best men were bound to compass. To live according to nature was to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe. It is notorious that this proposition -- live according to nature -- was the sum of the tenets of the famous Stoic philosophy. Now on the subjugation of Greece that philosophy made instantaneous progress in Roman society. It possessed natural fascinations for the powerful class who, in theory at least, adhered to the simple habits of the ancient Italian race, and disdained to surrender themselves to the innovations of foreign fashions. Such persons began immediately to affect the Stoic precepts of life according to nature -- an affectation all the more grateful, and, I may add, all the more noble, from its contrast with the unbounded profligacy which was being diffused through the imperial city by the pillage of the world and by the example of its most luxurious races. In the front of the disciples of the new Greek school, we might be sure, even if we did not know it historically, that the Roman lawyers figured. We have abundant proof that, there being substantially but two professions in the Roman republic, the military men were gener

ally identified with the party of movement, but the lawyers were universally at the head of the party of resistance.

The alliance of the lawyers with the Stoic philosophers lasted through many centuries. Some of the earliest names in the series of renowned jurisconsults are associated with Stoicism, and ultimately we have the golden age of Roman jurisprudence fixed by general consent at the era of the Antonine Caesars, the most famous disciples to whom that philosophy has given a rule of life. The long diffusion of these doctrines among the members of a particular profession was sure to affect the art which they practised and influenced. Several positions which we find in the remains of the Roman jurisconsults are scarcely intelligible, unless we use the Stoic tenets as our key; but at the same time it is a serious, though a very common, error to measure the influence of Stoicism on Roman law by counting up the number of legal rules which can be confidently affiliated on Stoical dogmas. It has often been observed that the strength of Stoicism resided not in its canons of conduct, which were often repulsive or ridiculous, but in the great though vague principle which it inculcated of resistance to passion. Just in the same way the influence on jurisprudence of the Greek theories, which had their most distinct expression in Stoicism, consisted not in the number of specific positions which they contributed to Roman law, but in the single fundamental assumption which they lent to it. After nature had become a household word in the mouths of the Romans, the belief gradually prevailed among the Roman lawyers that the old Jus Gentium was in fact the lost code of Nature, and that the Praetor in framing an Edictal jurisprudence on the principles of the Jus Gentium was gradually restoring a type from which law had only departed to deteriorate. The inference from this belief was immediate, that it was the Praetor's duty to supersede the Civil Law as much as possible by the Edict, to revive as far as might be the institutions by which Nature had governed man in the primitive state. Of course, there were many impediments to the amelioration of law by this agency. There may have been prejudices to overcome even in the legal profession itself, and Roman habits were far too tenacious to give way at once to mere philosophical theory. The indirect methods by which the Edict combated certain technical anomalies, show the caution which its authors were compelled to observe, and down to the very days of Justinian there was some part of the old law which had obstinately resisted its influence. But, on the whole, the progress of the Romans in legal improvement was astonishingly rapid as soon as stimulus was applied to it by the theory of Natural Law. The ideas of simplification and generalisation had always been associated with the conception of Nature; simplicity, symmetry, and intelligibility came therefore to be regarded as the characteristics of a good legal system, and the taste for involved language, multiplied ceremonials, and useless difficulties disappeared altogether. The strong will, and unusual opportunities of Justinian were needed to bring the Roman law to

its existing shape, but the ground plan of the system had been sketched long before the imperial reforms were effected.

What was the exact point of contact between the old Jus Gentium and the Law of Nature? I think that they touch and blend through AEquitas, or Equity in its original sense; and here we seem to come to the first appearance in jurisprudence of this famous term, Equity In examining an expression which has so remote an origin and so long a history as this, it is always safest to penetrate, if possible, to the simple metaphor or figure which at first shadowed forth the conception. It has generally been supposed that AEquitas is the equivalent of the Greek @@@@@@, i.e. the principle of equal or proportionate distribution. The equal division of numbers or physical magnitudes is doubtless closely entwined with our perceptions of justice; there are few associations which keep their ground in the mind so stubbornly or are dismissed from it with such difficulty by the deepest thinkers. Yet in tracing the history of this association, it certainly does not seem to have suggested itself to very early thought, but is rather the offspring of a comparatively late philosophy It is remarkable too that the "equality" of laws on which the Greek democracies prided themselves -- that equality which, in the beautiful drinking song of Callistratus, Harmodius and Aristogiton are said to have given to Athens-had little in common with the "equity" of the Romans. The first was an equal administration of civil laws among the citizens, however limited the class of citizens might be; the last implied the applicability of a law, which was not civil law, to a class which did not necessarily consist of citizens. The first excluded a despot. the last included foreigners, and for some purposes slaves. On the whole, I should be disposed to look in another direction for the germ of the Roman "Equity." The Latin word "aequus" carries with it more distinctly than the Greek "@@@@" the sense of levelling. Now its levelling tendency was exactly the characteristic of the Jus Gentium, which would be most striking to a primitive Roman. The pure Quiritarian law recognised a multitude of arbitrary distinctions between classes of men and kinds of property; the Jus Gentium, generalised from a comparison of various customs, neglected the Quiritarian divisions. The old Roman law established, for example, a fundamental difference between "Agnatic" and "Cognatic" relationship, that is, between the Family considered as based upon common subjection to patriarchal authority and the Family considered (in conformity with modern ideas) as united through the mere fact of a common descent. This distinction disappears in the "law common to all nations," as also does the difference between the archaic forms of property, Things "Mancipi" and Things "nec Mancipi." The neglect of demarcations and boundaries seems to me, therefore, the feature of the Jus Gentium which was depicted in AEquitas. I imagine that the word was at first a mere description of that constant levelling or removal of irregularities which went on wherever the praetorian system was applied to the cases of foreign litigants. Probably no colour of ethical meaning belonged at first to the expression; nor is there any reason to believe that the process which it indicated was otherwise than extremely distasteful to the primitive Roman mind.

On the other hand, the feature of the Jus Gentium which was presented to the apprehension of a Roman by the word Equity, was exactly the first and most vividly realised characteristic of the hypothetical state of nature. Nature implied symmetrical order, first in the physical world, and next in the moral, and the earliest notion of order doubtless involved straight lines, even surfaces, and measured distances. The same sort of picture or figure would be unconsciously before the mind's eye, whether it strove to form the outlines of the supposed natural state, or whether it took in at a glance the actual administration of the "law common to all nations"; and all we know of primitive thought would lead us to conclude that this ideal similarity would do much to encourage the belief in an identity of the two conceptions. But then, while the Jus Gentium had little or no antecedent credit at Rome, the theory of a Law of Nature came in surrounded with all the prestige of philosophical authority, and invested with the charms of association with an elder and more blissful condition of the race. It is easy to understand how the difference in the point of view would affect the dignity of the term which at once described the operation of the old principles and the results of the new theory. Even to modern ears it is not at all the same thing to describe a process as one of "levelling" and to call it the "correction of anomalies," though the metaphor is precisely the same. Nor do I doubt that, when once AEquitas was understood to convey an allusion to the

Greek theory, associations which grew out of the Greek notion of @@@@@@ began to cluster round it. The language of Cicero renders it more than likely that this was so, and it was the first stage of a transmutation of the conception of Equity, which almost every ethical system which has appeared since those days has more or less helped to carry on.

Something must be said of the formal instrumentality by which the principles and distinctions associated, first with the Law common to all Nations, and afterwards with the Law of Nature, were gradually incorporated with the Roman law. At the crisis of primitive Roman history which is marked by the expulsion of the Tarquins, a change occurred which has its parallel in the early annals of many ancient states, but which had little in common with those passages of political affairs which we now term revolutions. It may best be described by saying that the monarchy was put into commission. The powers heretofore accumulated in the hands of a single person were parcelled out among a number of elective functionaries, the very name of the kingly office being retained and imposed on a personage known subsequently as the Rex Sacrorum or Rex Sacrificulus. As part of the change, the settled duties of the Supreme judicial office devolved on the Praetor, at the time the first functionary in the commonwealth, and together with these duties was transferred the undefined supremacy over law and legislation which always attached to ancient sovereigns and which is not obscurely related to the patriarchal and heroic authority they had once enjoyed. The circumstances of Rome gave great importance to the more indefinite portion of the functions thus transferred, as with the establishment of the republic began that series of recurrent trials which overtook the state, in the difficulty of dealing with a multitude of persons who, not coming within the technical description of indigenous Romans, were nevertheless permanently located within Roman jurisdiction. Controversies between such persons, or between such persons and native-born citizens, would have remained without the pale of the remedies provided by Roman law, if the Praetor had not undertaken to decide them, and he must soon have addressed himself to the more critical disputes which in the extension of commerce arose between Roman subjects and avowed foreigners. The great increase of such cases in the Roman Courts about the period of the first Punic War is marked by the appointment of a special Praetor, known subsequently as the Praetor Peregrinus, who gave them his undivided attention. Meantime, one precaution of the Roman people against the revival of oppression, had consisted in obliging every magistrate whose duties had any tendency to expand their sphere, to publish, on commencing his year of office, an Edict or proclamation, in which he declared the manner in which he intended to administer his department. The Praetor fell under the rule with other magistrates; but as it was necessarily impossible to construct each year a separate system of principles, he seems to have regularly republished his predecessor's Edict with such additions and changes as the exigency of the moment or his own views of the law compelled him to introduce. The Praetor's proclamation, thus lengthened by a new portion every year, obtained the name of the Edictum Perpetuum, that is, the continuous or unbroken edict. The immense length to which it extended, together perhaps with some distaste for its necessarily disorderly texture, caused the practice of increasing it to be stopped in the year of Salvius Julianus, who occupied the magistracy in the reign of the Emperor Hadrian. The edict of that Praetor embraced therefore the whole body of equity jurisprudence, which it probably disposed in new and symmetrical order, and the perpetual edict is therefore often cited in Roman law merely as the Edict of Julianus.

Perhaps the first inquiry which occurs to an Englishman who considers the peculiar mechanism of the Edict is, what were the limitations by which these extensive powers of the Praetor were restrained? How was authority so little definite reconciled with a settled condition of society and of law? The answer can only be supplied by careful observation of the conditions under which our own English law is administered. The Praetor, it should be recollected, was a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults, and it is probable that every Roman lawyer waited impatiently for the time when he should fill or control the great judicial magistracy. In the interval, his tastes, feelings, prejudices, and degree of enlightenment were inevitably those of his own order, and the qualifications which he ultimately brought to office were those which he had acquired in the practice and study of his profession. An English Chancellor goes through precisely the same training, and carries to the woolsack

the same qualifications. It is certain when he assumes office that he will have, to some extent, modified the law before he leaves it; but until he has quitted his seat, and the series of his decisions in the Law Reports has been completed, we cannot discover how far he has elucidated or added to the principles which his predecessors bequeathed to him. The influence of the Praetor on Roman jurisprudence differed only in respect of the period at which its amount was ascertained. As was before stated, he was in office but for a year, and his decisions rendered during his year, though of course irreversible as regarded the litigants, were of no ulterior value. The most natural moment for declaring the changes he proposed to effect occurred therefore at his entrance on the praetorship, and hence, when commencing his duties, he did openly and avowedly that which in the end his English representative does insensibly and sometimes unconsciously. The checks on this apparent liberty are precisely those imposed on an English judge. Theoretically there seems to be hardly any limit to the powers of either of them, but practically the Roman Praetor, no less than the English Chancellor, was kept within the narrowest bounds by the prepossessions imbibed from early training and by the strong restraints of professional opinion, restraints of which the stringency can only be appreciated by those who have personally experienced them. It may be added that the lines within which movement is permitted, and beyond which there is to be no travelling, were chalked with as much distinctness in the one case as in the other. In England the judge follows the analogies of reported decisions on insulated groups of facts. At Rome, as the intervention of the Praetor was at first dictated by simple concern for the safety of the state, it is likely that in the earliest times it was proportioned to the difficulty which it attempted to get rid of. Afterwards, when the taste for principle had been diffused by the Responses, he no doubt used the Edict as the means of giving a wider application to those fundamental principles, which he and the other practising jurisconsults, his contemporaries, believed themselves to have detected underlying the law. Latterly he acted wholly under the influence of Greek philosophical theories, which at once tempted him to advance and confined him to a particular course of progress.

The nature of the measures attributed to Salvius Julianus has been much disputed. Whatever they were, their effects on the Edict are sufficiently plain. It ceased to be extended by annual additions, and henceforward the equity jurisprudence of Rome was developed by the labours of a succession of great jurisconsults who fill with their writings the interval between the reign of Hadrian and the reign of Alexander Severus. A fragment of the wonderful system which they built up survives in the Pandec

ts of Justinian, and supplies evidence that their works took the form of treatises on all parts of Roman Law, but chiefly that of commentaries on the Edict. Indeed, whatever be the immediate subject of a jurisconsult of this epoch, he may always be called an expositor of Equity. The principles of the Edict had, before the epoch of its cessation, made their way into every part of Roman jurisprudence. The Equity of Rome, it should be understood, even when most distinct from the Civil Law, was always administered by the same tribunals. The Praetor was the chief equity judge as well as the great common law magistrate, and as soon as the Edict had evolved an equitable rule the Praetor's court began to apply it in place of or by the side of the old rule of the Civil Law, which was thus directly or indirectly repealed without any express enactment of the legislature. The result, of course, fell considerably short of a complete fusion of law and equity, which was not carried out till the reforms of Justinian. The technical severance of the two elements of jurisprudence entailed some confusion and some inconvenience, and there were certain of the stubborner doctrines of the Civil Law with which neither the authors nor the expositors of the Edict had ventured to interfere. But at the same time there was no comer of the field of jurisprudence which was not more or less swept over by the influence of Equity. It supplied the jurist with all his materials for generalisation, with all his methods of interpretation, with his elucidations of first principles, and with that great mass of limiting rules which are rarely interfered with by the legislator, but which seriously control the application of every legislative act.

The period of jurists ends with Alexander Severus. From Hadrian to that emperor the improvement of law was carried on, as it is at the present moment in most continental countries, partly by approved commentaries and partly by direct legislation. But in the reign of Alexander Severus the power of growth in Roman Equity seems to be exhausted, and the succession of jurisconsults comes to a close. The remaining history of the Roman law is the history of the imperial constitutions, and, at the last, of attempts to codify what had now become the unwieldy body of Roman jurisprudence. We have the latest and most celebrated experiment of this kind in the Corpus Juris of Justinian.

It would be wearisome to enter on a detailed comparison or contrast of English and Roman Equity but it may be worth while to mention two features which they have in common. The first may be stated as follows. Each of them tended, and all such systems tend, to exactly the same state in which the old common law was when Equity first interfered with it. A time always comes at which the moral principles originally adopted have been carried out to all their legitimate consequences, and then the system founded on them becomes as rigid, as unexpansive, and as liable to fall behind moral progress as the sternest code of rules avowedly legal. Such an epoch was reached at Rome in the reign of Alexander Severus; after which, though the whole Roman world was undergoing a moral revolution, the Equity of Rome ceased to expand. The same point of legal history was attained in England under the chancellorship of Lord Eldon, the first of our equity judges who, instead of enlarging the jurisprudence of his court by indirect legislation, devoted himself through life to explaining and harmonising it. If the philosophy of legal history were better understood in England, Lord Eldon's services would be less exaggerated on the one hand and better appreciated on the other than they appear to be among contemporary lawyers. Other misapprehensions too, which bear some practical fruit, would perhaps be avoided. It is easily seen by English lawyers that English Equity is a system founded on moral rules; but it is forgotten that these rules are the morality of past centuries -- not of the present-that they have received nearly as much application as they are capable of, and that though of course they do not differ largely from the ethical creed of our own day, they are not necessarily on a level with it. The imperfect theories of the subject which are commonly adopted have generated errors of opposite sorts. Many writers of treatises on Equity, struck with the completeness of the system in its present state, commit themselves expressly or implicitly to the paradoxical assertion that the founders of the chancery jurisprudence contemplated its present fixity of form when they were settling its first bases. Others, again, complain and this is a grievance frequently observed upon in forensic arguments -- that the moral rules enforced by the Court of Chancery fall short of the ethical standard of the present day. They would have each Lord Chancellor perform precisely the same office for the jurisprudence which he finds ready to his hand, which was performed for the old common law by the fathers of English equity. But this is to invert the order of the agencies by which the improvement of the law is carried on. Equity has its place and its time; but I have pointed out that another instrumentality is ready to succeed it when its energies are spent.

Another remarkable characteristic of both English and Roman Equity is the falsehood of the assumptions upon which the claim of the equitable to superiority over the legal rule is originally defended. Nothing is more distasteful to men, either as individuals or as masses, than the admission of their moral progress as a substantive reality. This unwillingness shows itself, as regards individuals, in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency. The movement of the collective opinion of a whole society is too palpable to be ignored, and is generally too visible for the better to be decried; but there is the greatest disinclination to accept it as a primary phenomenon, and it is commonly explained as the recovery of a lost perfection -- the gradual return to a state from which the race has lapsed. This tendency to look backward instead of forward for the goal of moral progress produced anciently, as we have seen, on Roman jurisprudence effects the most serious and permanent. The Roman jurisconsults, in order to account for the improvement of their jurisprudence by the Praetor, borrowed from Greece the doctrine of a Natural state of man -- a Natural society -- anterior to the organisation of commonwealths governed by positive laws. In England, on the other hand, a range of ideas especially congenial to Englishmen of that day, explained the claim of Equity to override the common law by supposing a

general right to superintend the administration of justice which was assumed to be vested in the king as a natural result of his paternal authority. The same view appears in a different and a quainter form in the old doctrine that Equity flowed from the king's conscience -- the improvement which had in fact taken place in the moral standard of the community being thus referred to an inherent elevation in the moral sense of the sovereign. The growth of the English constitution rendered such a theory unpalatable after a time; but, as the jurisdiction of the Chancery was then firmly established, it was not worth while to devise any formal substitute for it. The theories found in modern manuals of Equity are very various, but all are alike in their untenability. Most of them are modifications of the Roman doctrine of a natural law, which is indeed adopted in tenour by those writers who begin a discussion of the jurisdiction of the Court of Chancery by laying down a distinction between natural justice and civil.

CHAPTER 4

The Modern History of the Law of Nature

It will be inferred from what has been said that the theory which transformed the Roman jurisprudence had no claim to philosophical precision. It involved, in fact, one of those "mixed modes of thought" which are now acknowledged to have characterised all but the highest minds during the infancy of speculation, and which are far from undiscoverable even in the mental efforts of our own day. The Law of Nature confused the Past and the Present. Logically, it implied a state of Nature which had once been regulated by natural law; yet the jurisconsults do not speak clearly or confidently of the existence of such a state, which indeed is little noticed by the ancients except where it finds a poetical expression in the fancy of a golden age. Natural law, for all practical purposes, was something belonging to the present, something entwined with existing institutions, something which could be distinguished from them by a competent observer. The test which separated the ordinances of Nature from the gross ingredients with which they were mingled was a sense of simplicity and harmony; yet it was not on account of their simplicity and harmony that these finer elements were primarily respected, but on the score of their descent from the aboriginal reign of Nature. This confusion has not been successfully explained away by the modern disciples of the jurisconsults, and in truth modern speculations on the Law of Nature betray much more indistinctness of perception and are vitiated by much more hopeless ambiguity of language than the Roman lawyers can be justly charged with. There are some writers on the subject who attempt to evade the fundamental difficulty by contending that the code of Nature exists in the future and is the goal to which all civil laws are moving, but this is to reverse the assumptions on which the old theory rested, or rather perhaps to mix together two inconsistent theories. The tendency to look not to the past but to the future for types of perfection was brought into the world by Christianity. Ancient literature gives few or no hints of a belief that the progress of society is necessarily from worse to better.

But the importance of this theory to mankind has been very much greater than its philosophical deficiencies would lead us to expect. Indeed, it is not easy to say what turn the history of thought, and therefore, of the human race, would have taken, if the belief in a law natural had not become universal in the ancient world.

There are two special dangers to which law and society which is held together by law, appear to be liable in their infancy. One of them is that law may be too rapidly developed. This occurred with the codes of the more progressive Greek communities, which disembarrassed themselves with astonishing facility from cumbrous forms of procedure and needless terms of art, and soon ceased to attach any superstitious value to rigid rules and prescriptions. It was not for the ultimate advantage of mankind that they did so, though the immediate benefit conferred on their citizens may have been considerable. One of the rarest

qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal. The Greek intellect, with all its nobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula; and, if we may judge them by the popular courts of Athens of whose working we possess accurate knowledge, the Greek tribunals exhibited the strongest tendency to confound law and fact. The remains of the Orators and the forensic commonplaces preserved by Aristotle in his Treatise on Rhetoric, show that questions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges. No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only; if it bequeathed any body of judicial principles to posterity bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such a jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy marked with the imperfections of the civilisation under which it grew up.

Few national societies have had their jurisprudence menaced by this peculiar danger of precocious maturity and untimely disintegration. It is certainly doubtful whether the Romans were ever seriously threatened by it, but at any rate they had adequate protection in their theory of Natural Law. For the Natural Law of the jurisconsults was distinctly conceived by them as a system which ought gradually to absorb civil laws, without superseding them so long as they remained unrepealed. There was no such impression of its sanctity abroad, that an appeal to it would be likely to overpower the mind of a judge who was charged with the superintendence of a particular litigation. The value and serviceableness of the conception arose from its keeping before the mental vision a type of perfect law, and from its inspiring the hope of an indefinite approximation to it, at the same time that it never tempted the practitioner or the citizen to deny the obligation of existing laws which had not yet been adjusted to the theory. It is important too to observe that this model system, unlike many of those which have mocked men's hopes in later days, was not entirely the product of imagination. It was never thought of as founded on quite untested principles. The notion was that it underlay existing law and must be looked for through it. Its functions were in short remedial, not revolutionary or anarchical. And this, unfortunately, is the exact point at which the modern view of a Law of Nature has often ceased to resemble the ancient.

The other liability to which the infancy of society is exposed has prevented or arrested the progress of far the greater part of mankind. The rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form. There were one or two races exempted by a marvellous fate from this calamity, and grafts from these stocks have fertilised a few modern societies, but it is still true that, over the larger part of the world, the perfection of law has always been considered as consisting in adherence to the ground plan supposed to have been marked out by the original legislator. If intellect has in such cases been exercised on jurisprudence, it has uniformly prided itself on the subtle perversity of the conclusions it could build on ancient texts, without discoverable departure from their literal tenour. I know no reason why the law of the Romans should be superior to the laws of the Hindoos, unless the theory of Natural Law had given it a type of excellence different from the usual one. In this one exceptional instance, simplicity and symmetry were kept before the eyes of a society whose influence on mankind was destined to be prodigious from other causes, as the characteristics of an ideal and absolutely perfect law. It is impossible to overrate the importance to a nation or profession of having a distinct object to aim at in the pursuit of improvement. The secret of Bentham's immense influence in England during the past thirty years is his success in placing such an object before the country. He gave us a clear rule of reform. English lawyers of the last century were probably too acute to be blinded by the paradoxical commonplace that English law was the perfection of human reason, but they acted as if they believed it for want of any other principle to proceed

upon. Bentham made the good of the community take precedence of every other object, and thus gave escape to a current which had long been trying to find its way outwards.

It is not an altogether fanciful comparison if we call the assumptions we have been describing the ancient counterpart of Benthamism. The Roman theory guided men's efforts in the same direction as the theory put into shape by the Englishman; its practical results were not widely different from those which would have been attained by a sect of law-reformers who maintained a steady pursuit of the general good of the community. It would be a mistake, however, to suppose it a conscious anticipation of Bentham's principles. The happiness of mankind is, no doubt, sometimes assigned, both in the popular and in the legal literature of the Romans, as the proper object of remedial legislation, but it is very remarkable how few and faint are the testimonies to this principle compared with the tributes which are constantly offered to the overshadowing claims of the Law of Nature. It was not to anything resembling philanthropy, but to their sense of simplicity and harmony -- of what they significantly termed "elegance" -- that the Roman jurisconsults freely surrendered themselves. The coincidence of their labours with those which a more precise philosophy would have counselled has been part of the good fortune of mankind.

Turning to the modern history of the law of nature, we find it easier to convince ourselves of the vastness of its influence than to pronounce confidently whether that influence has been exerted for good or for evil. The doctrines and institutions which may be attributed to it are the material of some of the most violent controversies debated in our time, as will be seen when it is stated that the theory of Natural Law is the source of almost all the special ideas as to law, politics, and society which France during the last hundred years has been the instrument of diffusing over the western world. The part played by jurists in French history, and the sphere of jural conceptions in French thought, have always been remarkably large. It was not indeed in France, but in Italy, that the juridical science of modern Europe took its rise, but of the schools founded by emissaries of the Italian universities in all parts of the continent, and attempted (though vainly) to be set up in our island, that established in France produced the greatest effect on the fortunes of the country. The lawyers of France immediately formed a strict alliance with the kings of the house of Capet, and it was as much through their assertions of royal prerogative, and through their interpretations of the rules of feudal succession, as by the power of the sword, that the French monarchy at last grew together out of the agglomeration of provinces and dependencies. The enormous advantage which their understanding with the lawyers conferred on the French kings in the prosecution of their struggle with the great feudatories, the aristocracy, and the church, can only be appreciated if we take into account the ideas which prevailed in Europe far down into the middle ages. There was, in the first place, a great enthusiasm for generalisation and a curious admiration for all general propositions, and consequently, in the field of law, an involuntary reverence for every general formula which seemed to embrace and sum up a number of the insulated rules which were practised as usages in various localities. Such general formulas it was, of course, not difficult for practitioners familiar with the Corpus Juris or the Glosses to supply in almost any quantity. There was, however, another cause which added yet more considerably to the lawyers' power. At the period of which we are speaking, there was universal vagueness of ideas as to the degree and nature of the authority residing in written texts of law For the most part, the peremptory preface, Ita scriptum est, seems to have been sufficient to silence all objections. Where a mind of our own day would jealously scrutinise the formula which had been quoted, would inquire its source, and would (if necessary) deny that the body of law to which it belonged had any authority to supersede local customs, the elder jurist w ould not probably have ventured to do more than question the applicability of the rule, or at best cite some counter proposition from the Pandects or the Canon Law. It is extremely necessary to bear in mind the uncertainty of men's notions on this most important side of juridical controversies, not only because it helps to explain the weight which the lawyers threw into the monarchical scale, but on account of the light which it sheds on several curious historical problems. The motives of the author of the Forged Decretals and his extraordinary success are rendered more intelligible by it. And, to take a phenomenon of smaller interest, it assists us, though only partially to understand the plagiarisms of Bracton. That an English writer of the time of Henry III should

have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence; but still it is something to lessen our surprise when we comprehend the state of opinion at the period as to the obligatory force of written texts, apart from all consideration of the Source whence they were derived.

When the kings of France had brought their long struggle for supremacy to a successful close, an epoch which may be placed roughly at the accession of the branch of Valois-Angouleme to the throne, the situation of the French jurists was peculiar and continued to be so down to the outbreak of the revolution. On the one hand, they formed the best instructed and nearly the most powerful class in the nation. They had made good their footing as a privileged order by the side of the feudal aristocracy, and they had assured their influence by an organisation which distributed their profession over France in great chartered corporations possessing large defined powers and still larger indefinite claims. In all the qualities of the advocate, the judge, and the legislator, they far excelled their compeers throughout Europe. Their juridical tact, their ease of expression, their fine sense of analogy and harmony, and (if they may be judged by the highest names among them) their passionate devotion to their conceptions of justice, were as remarkable as the singular variety of talent which they included, a variety covering the whole ground between the opposite poles of Cujas and Montesquieu, of D'Aguesseau and Dumoulin. But, on the other hand, the system of laws which they had to administer stood in striking contrast with the habits of mind which they had cultivated. The France which had been in great part constituted by their efforts was smitten with the curse of an anomalous and dissonant jurisprudence beyond every other country in Europe. One great division ran through the country and separated it into Pays du Droit Ecrit and Pays du Droit Coutumier; the first acknowledging the written Roman law as the basis of their jurisprudence, the last admitting it only so far as it supplied general forms of expression, and courses of juridical reasoning which were reconcileable with the local usages. The sections thus formed were again variously subdivided. In the Pays du Droit Coutumier province differed from province, county from county, municipality from municipality, in the nature of its customs. In the Pays du Droit Ecrit the stratum of feudal rules which overlay the Roman law was of the most miscellaneous composition. No such confusion as this ever existed in England. In Germany it did exist, but was too much in harmony with the deep political and religious divisions of the country to be lamented or even felt. It was the special peculiarity of France that an extraordinary diversity of laws continued without sensible alteration while the central authority of the monarchy was constantly strengthening itself, while rapid approaches were being made to complete administrative unity, and while a fervid national spirit had been developed among the people. The contrast was one which fructified in many serious results, and among them we must rank the effect which it produced on the minds of the French lawyer. Their speculative opinions and their intellectual bias were in the strongest opposition to their interests and professional habits. With the keenest sense and the fullest recognition of those perfections of jurisprudence which consist in simplicity and uniformity, they believed, or seemed to believe, that the vices which actually infested French law were ineradicable: and in practice they often resisted the reformation of abuses with an obstinacy which was not shown by many among their less enlightened countrymen. But there was a way to reconcile these contradictions. They became passionate enthusiasts for Natural Law. The Law of Nature overleapt all provincial and municipal boundaries; it disregarded all distinctions between noble and burgess, between burgess and peasant; it gave the most exalted place to lucidity, simplicity and system; but it committed its devotees to no specific improvement, and did not directly threaten any venerable or lucrative technicality. Natural law may be said to have become the common law of France, or, at all events, the admission of its dignity and claims was the one tenet which all French practitioners alike subscribed to. The language of the prae-revolutionary jurists in its eulogy is singularly unqualified, and it is remarkable that the writers on the Customs, who often made it their duty to speak disparagingly of the pure Roman law, speak even more fervidly of Nature and her rules than the civilians who professed an exclusive respect for the Digest and the Code. Dumoulin, the highest of all authorities on old French Customary Law, has some

extravagant passages on the Law of Nature; and his panegyrics have a peculiar rhetorical turn which indicated a considerable departure from the caution of the Roman jurisconsults. The hypothesis of a Natural Law had become not so much a theory guiding practice as an article of speculative faith, and accordingly we shall find that, in the transformation which it more recently underwent, its weakest parts rose to the level of its strongest in the esteem of its supporters.

The eighteenth century was half over when the most critical period in the history of Natural Law was reached. Had the discussion of the theory and of its consequences continued to be exclusively the employment of the legal profession, there would possibly have been an abatement of the respect which it commanded; for by this time the Esprit des Lois had appeared. Bearing in some exaggerations the marks of the excessive violence with which its author's mind had recoiled from assumptions usually suffered to pass without scrutiny, vet showing in some ambiguities the traces of a desire to compromise with existing prejudice, the book of Montesquieu, with all its defects, still proceeded on that Historical Method before which the Law of Nature has never maintained its footing for an instant. Its influence on thought ought to have been as great as its general popularity; but, in fact, it was never allowed time to put it forth, for the counter-hypothesis which it seemed destined to destroy passed suddenly from the forum to the street, and became the key-note of controversies far more exciting than are ever agitated in the courts or the schools. The person who launched it on its new career was that remarkable man who, without learning, with few virtues, and with no strength of character, has nevertheless stamped himself ineffaceably on history by the force of a vivid imagination, and by the help of a genuine and burning love for his fellow-men, for which much will always have to be forgiven him. We have never seen in our own generation -- indeed the world has not seen more than once or twice in all the course of history -- a literature which has exercised such prodigious influence over the minds of men, over every cast and shade of intellect, as that which emanated from Rousseau between 1749 and 1762. It was the first attempt to re-erect the edifice of human belief after the purely iconoclastic efforts commenced by Bayle, and in part by our own Locke, and consummated by Voltaire; and besides the superiority which every constructive effort will always enjoy over one that is merely destructive, it possessed the immense advantage of appearing amid an all but universal scepticism as to the soundness of all foregone knowledge in matters speculative. Now, in all the speculations of Rousseau, the central figure, whether arrayed in an English dress as the signatory of a social compact, or simply stripped naked of all historical qualities, is uniformly Man, in a supposed state of nature. Every law or institution which would misbeseem this imaginary being under these ideal circumstances is to be condemned as having lapsed from an original perfection; every transformation of society which would give it a closer resemblance to the world over which the creature of Nature reigned, is admirable and worthy to be effected at any apparent cost. The theory is still that of the Roman lawyers, for in the phantasmagoria with which the Natural Condition is peopled, every feature and characteristic eludes the mind except the simplicity and harmony which possessed such charms for the jurisconsult; but the theory is, as it were, turned upside down. It is not the Law of Nature, but the State of Nature, which is now the primary subject of contemplation. The Roman had conceived that by careful observation of existing institutions parts of them could be singled out which either exhibited already, or could by judicious purification be made to exhibit, the vestiges of that reign of nature whose reality he faintly affirmed. Rousseau's belief was that a perfect social order could be evolved from the unassisted consideration of the natural state, a social order wholly irrespective of the actual condition of the world and wholly unlike it. The great difference between the views is that one bitterly and broadly condemns the present for its unlikeness to the ideal past; while the other, assuming the present to be as necessary as the past, does not affect to disregard or censure it. It is not worth our while to analyse with any particularity that philosophy of politics, art, education, ethics, and social relation which was constructed on the basis of a state of nature. It still possesses singular fascination for the looser thinkers of every country, and is no doubt the parent, more or less remote, of almost all the prepossessions which impede the employment of the Historical Method of inquiry, but its discredit with the higher minds of our day is deep enough to astonish those who are familiar with the extraordinary vitality of speculative error. Perhaps the question most frequently asked nowadays is not what is the value of these opinions, but what were the causes

which gave them such overshadowing prominence a hundred years ago. The answer is, I conceive, a simple one. The study which in the last century would best have corrected the misapprehensions into which an exclusive attention to legal antiquities is apt to betray was the study of religion. But Greek religion, as then understood, was dissipated in imaginative myths. The Oriental religions, if noticed at all, appeared to be lost in vain cosmogonies. There was but one body of primitive records which was worth studying -- the early history of the Jews. But resort to this was prevented by the prejudices of the time. One of the few characteristics which the school of Rousseau had in common with the school of Voltaire was an utter disdain of all religious antiquities; and, more than all, of those of the Hebrew race. It is well known that it was a point of honour with the reasoners of that day to assume not merely that the institutions called after Moses were not divinely dictated, nor even that they were codified at a later date than that attributed to them, but that they and the entire Pentateuch were a gratuitous forgery, executed after the return from the Captivity. Debarred, therefore, from one chief security against speculative delusion, the philosophers of France, in their eagerness to escape from what they deemed a superstition of the priests, flung themselves headlong into a superstition of the lawyer.

But though the philosophy founded on the hypothesis of a state of nature has fallen low in general esteem, in so far as it is looked upon under its coarser and more palpable aspect, it does not follow that in its subtler disguises it has lost plausibility, popularity, or power. I believe, as I have said, that it is still the great antagonist of the Historical Method; and whenever (religious objections apart) any mind is seen to resist or contemn that mode of investigation, it will generally be found under the influence of a prejudice or vicious bias traceable to a conscious or unconscious reliance on a non-historic, natural, condition of society or the individual. It is chiefly, however, by allying themselves with political and social tendencies that the doctrines of Nature and her law have preserved their energy. Some of these tendencies they have stimulated, other they have actually created, to a great number they have given expression and form. They visibly enter largely into the ideas which constantly radiate from France over the civilised world, and thus become part of the general body of thought by which its civilisation is modified. The value of the influence which they thus exercise over the fortunes of the race is of course one of the points which our age debates most warmly, and it is beside the purpose of this treatise to discuss it. Looking back, however, to the period at which the theory of the state of nature acquired the maximum of political importance, there are few who will deny that it helped most powerfully to bring about the grosser disappointments of which the first French Revolution was fertile. It gave birth, or intense stimulus, to the vices of mental habit all but universal at the time, disdain of positive law, impatience of experience, and the preference of a priori to all other reasoning. In proportion too as this philosophy fixes its grasp on minds which have thought less than others and fortified themselves with smaller observation, its tendency is to become distinctly anarchical. It is surprising to note how many of the Sophismes Anarchiques which Dumont published for Bentham, and which embody Bentham's exposure of errors distinctively French, are derived from the Roman hypothesis in its French transformation, and are unintelligible unless referred to it. On this point too it is a curious exercise to consult the Moniteur during the principal eras of the Revolution. The appeals to the Law and State of Nature become thicker as the times grow darker. They are comparatively rare in the Constituent Assembly; they are much more frequent in the Legislative; in the Convention, amid the din of debate on conspiracy and war, they are perpetual.

There is a single example which very strikingly illustrates the effects of the theory of natural law on modern society, and indicates how very far are those effects from being exhausted. There cannot, I conceive, be any question that to the assumption of a Law Natural we owe the doctrine of the fundamental equality of human beings. That "all men are equal" is one of a large number of legal propositions which, in progress of time, have become political. The Roman jurisconsults of the Antonine era lay down that "omnes homines natura aequales sunt," but in their eyes this is a strictly juridical axiom. They intend to affirm that, under the hypothetical Law of Nature, and in so far as positive law approximates to it, the arbitrary distinctions which the Roman Civil Law maintained between classes of persons cease to have a legal existence. The rule was one of considerable importance to the Roman

practitioner, who required to be reminded that, wherever Roman jurisprudence was assumed to conform itself exactly to the code of Nature, there was no difference in the contemplation of the Roman tribunals between citizen and foreigner, between freeman and slave, between Agnate and Cognate. The jurisconsults who thus expressed themselves most certainly never intended to censure the social arrangements under which civil law fell somewhat short of its speculative type; nor did they apparently believe that the world would ever see human society completely assimilated to the economy of nature. But when the doctrine of human equality makes its appearance in a modern dress it has evidently clothed itself with a new shade of meaning. Where the Roman jurisconsult had written "aequales sunt," meaning exactly what he said, the modern civilian wrote "all men are equal" in the sense of "all men ought to be equal." The peculiar Roman idea that natural law coexisted with civil law and gradually absorbed it, had evidently been lost sight of, or had become unintelligible, and the words which had at most conveyed a theory conceding the origin, composition, and development of human institutions, were beginning to express the sense of a great standing wrong suffered by mankind. As early as the beginning of the fourteenth century, the current language conceding the birthstate of men, though visibly intended to be identical with that of Ulpian and his contemporaries, has assumed an altogether different form and meaning. The preamble to the celebrated ordinance of King Louis Hutin enfranchising the serfs of the royal domains would have sounded strangely to Roman ears. "Whereas, according to natural law, everybody ought to be born free; and by some usages and customs which, from long antiquity, have been introduced and kept until now in our realm, and peradventure by reason of the misdeeds of their predecessors, many persons of our common people have fallen into servitude, therefore, We, etc." This is the enunciation not of a legal rule but of a political dogma; and from this time the equality of men is spoken of by the French lawyers just as if it were a political truth which happened to have been preserved among the archives of their science. Like all other deductions from the hypothesis of a Law Natural, and like the belief itself in a Law of Nature, it was languidly assented to and suffered to have little influence on opinion and practice until it passed out of the possession of the lawyers into that of the literary men of the eighteenth century and of the public which sat at their feet. With them it became the most distinct tenet of their creed, and was even regarded as a summary of all the others. It is probable, however, that the power which it ultimately acquired over the events of 1789 was not entirely owing to its popularity in France, for in the middle of the century it passed over to America. The American lawyers of the time, and particularly those of Virginia, appear to have possessed a stock of knowledge which differed chiefly from that of their English contemporaries in including much which could only have been derived from the legal literature of continental Europe. A very few glances at the writings of Jefferson will show how strongly his mind was affected by the semi-juridical, semipopular opinions which were fashionable in France, and we cannot doubt that it was sympathy with the peculiar ideas of the French jurists which led him and the other colonial lawyers who guided the course of events in America to join the specially French assumption that "all men are born equal" with the

assumption, more familiar to Englishmen, that "all men are born free," in the very first lines of their Declaration of Independence. The passage was one of great importance to the history of the doctrine before us. The American lawyers, in thus prominently and emphatically affirming the fundamental equality of human beings, gave an impulse to political movements in their own country, and in a less degree in Great Britain, which is far from having yet spent itself; but besides this they returned the dogma they had adopted to its home in France, endowed with vastly greater energy and enjoying much greater claims on general reception and respect. Even the more cautious politicians of the first Constituent Assembly repeated Ulpian's proposition as if it at once commended itself to the instincts and intuitions of mankind; and of all the "principles of 1789" it is the one which has been least strenuously assailed, which has most thoroughly leavened modern opinion, and which promises to modify most deeply the constitution of societies and the politics of states.

The grandest function of the Law of Nature was discharged in giving birth to modern International Law and to the modern Law of War, but this part of its effects must here be dismissed with consideration very

unequal to its importance. Among the postulates which form the foundation of International Law, or of so much of it as retains the figure which it received from its original architects, there are two or three of pre-eminent importance. The first of all is expressed in the position that there is a determinable Law of Nature. Grotius and his successor took the assumption directly from the Romans, but they differed widely from the Roman jurisconsults and from each other in their ideas as to the mode of determination. The ambition of almost every Publicist who has flourished since the revival of letters has been to provide new and more manageable definitions of Nature and of her law, and it is indisputable that the conception in passing through the long series of writers on Public Law has gathered round it a large accretion, consisting of fragments of ideas derived from nearly every theory of ethic which has in its turn taken possession of the schools. Yet it is a remarkable proof of the essentially historical character of the conception that, after all the efforts which have been made to evolve the code of nature from the necessary characteristic of the natural state, so much of the result is just what it would have been if men had been satisfied to adopt the dicta of the Roman lawyers without questioning or reviewing them. Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law. Wherever there is a doctrine of the jurisconsult affirmed by them to be in harmony with the Jus Gentium, the publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctively Roman origin. We may observe too that the derivative theories are afflicted with the weakness of the primary notion. In the majority of the Publicists, the mode of thought is still "mixed." In studying these writers, the great difficulty is always to discover whether they are discussing law or morality -- whether the state of international relations they describe is actual or ideal -- whether they lay down that which is, or that which, in their opinion, ought to be.

The assumption that Natural Law is binding on states inter se is the next in rank of those which underlie International Law. A series of assertions or admissions of this principle may be traced up to the very infancy of modern juridical science, and at first sight it seems a direct inference from the teaching of the Romans. The civil condition of society being distinguished from the natural by the fact that in the first there is a distinct author of law, while in the last there is none, it appears as if the moment a number of units were acknowledged to obey no common sovereign or political superior they were thrown back on the ulterior behests of the Law Natural. States are such units; the hypothesis of their independence excludes the notion of a common lawgiver, and draws with it, therefore, according to a certain range of ideas, the notion of subjection to the primeval order of nature. The alternative is to consider independent communities as not related to each other by any law, but this condition of lawlessness is exactly the vacuum which the Nature of the jurisconsults abhorred. There is certainly apparent reason for thinking that if the mind of a Roman lawyer rested on any sphere from which civil law was banished, it would instantly fill the void with the ordinances of Nature. It is never safe, however, to assume that conclusions, however certain and immediate in our own eyes, were actually drawn at any period of history. No passage has ever been adduced from the remains of Roman law which, in my judgment, proves the jurisconsults to have believed natural law to have obligatory force between independent commonwealths; and we cannot but see that to citizens of the Roman empire who regarded their sovereign's dominions as conterminous with civilisation, the equal subjection of states to the Law of Nature, if contemplated at all, must have seemed at most an extreme result of curious speculation. The truth appears to be that modern International Law, undoubted as is its descent from Roman law, is only connected with it by an irregular filiation. The early modern interpreters of the jurisprudence of Rome, misconceiving the meaning of Jus Gentium, assumed without hesitation that the Romans had bequeathed to them a system of rules for the adjustment of international transactions. This "Law of Nations" was at first an authority which had formidable competitors to strive with, and the condition of Europe was long such as to preclude its universal reception. Gradually, however, the western world arranged itself in a form more favourable to the theory of the civilians; circumstances destroyed the credit of rival doctrines; and at last, at a peculiarly felicitous conjuncture, Ayala and Grotius were able to obtain for it the enthusiastic assent of Europe, an assent which has been over and over again renewed in every variety of solemn engagement. The great men to whom its triumph is chiefly owing attempted, it need scarcely be said, to place it on an entirely new basis,

and it is unquestionable that in the course of this displacement they altered much of its structure, though far less of it than is commonly supposed. Having adopted from the Antonine jurisconsults the position that the Jus Gentium and the Jus Naturae were identical, Grotius, with his immediate predecessors and his immediate successors, attributed to the Law of Nature an authority which would never perhaps have been claimed for it, if "Law of Nations" had not in that age been an ambiguous expression. They laid down unreservedly that Natural Law is the code of states, and thus put in operation a process which has continued almost down to our own day, the process of engrafting on the international system rules which are supposed to have been evolved from the unassisted contemplation of the conception of Nature. There is too one consequence of immense practical importance to mankind which, though not unknown during the early modern history of Europe, was never clearly or universally acknowledged till the doctrines of the Grotian school had prevailed. If the society of nations is governed by Natural Law, the atoms which compose it must be absolutely equal. Men under the sceptre of Nature are all equal, and accordingly commonwealths are equal if the international state be one of nature. The proposition that independent communities, however different in size and power, are all equal in the view of the law of nations, has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age. It is a doctrine which probably would never have obtained a secure footing at all if international Law had not been entirely derived from the majestic claims of Nature by the Publicists who wrote after the revival of letters.

On the whole, however, it is astonishing, as I have observed before, how small a proportion the additions made to international Law since Grotius's day bear to the ingredients which have been simply taken from the most ancient stratum of the Roman Jus Gentium. Acquisition of territory has always been the great spur of national ambition, and the rules which govern this acquisition, together with the rules which moderate the wars in which it too frequently results, are merely transcribed from the part of the Roman law which treats of the modes of acquiring property jure gentium. These modes of acquisition were obtained by the elder jurisconsults, as I have attempted to explain, by abstracting a common ingredient from the usages observed to prevail among the various tribes surrounding Rome; and, having been classed on account of their origin in the "law common to all nations," they were thought by the later lawyers to fit in, on the score of their simplicity, with the more recent conception of a Law Natural. They thus made their way into the modern Law of Nations, and the result is that those parts of the international system which refer to dominion, its nature, its limitations, the modes of acquiring and securing it, are pure Roman Property Law -- so much, that is to say, of the Roman Law of Property as the Antonine jurisconsults imagined to exhibit a certain congruity with the natural state. In order that these chapters of International Law may be capable of application, it is necessary that sovereigns should be related to each other like the members of a group of Roman proprietors. This is another of the postulates which lie at the threshold of the International Code, and it is also one which could not possibly have been subscribed to during the first centuries of modern European history.. It is resolvable into the double proposition that "sovereignty is territorial," i.e. that it is always associated with the proprietorship of a limited portion of the earth's surface, and that "sovereigns inter se are to be deemed not paramount, but absolute, owners of the state's territory."

Many contemporary writers on International Law tacitly assume that the doctrines of their system, founded on principles of equity and common sense, were capable of being readily reasoned out in every stage of modern civilisation. But this assumption, while it conceals some real defects of the international theory, is altogether untenable, so far as regards a large part of modern history. It is not true that the authority of the Jus Gentium in the concerns of nations was always uncontradicted; on the contrary, it had to struggle long against the claims of several competing systems. It is again not true that the territorial character of sovereignty was always recognised, for long after the dissolution of the Roman dominion the minds of men were under the empire of ideas irreconcileable with such a conception. An old order of things, and of views founded on it, had to decay -- a new Europe, and an apparatus of new notions

congenial to it, had to spring up before two of the chiefest postulates of International Law could be universally conceded.

It is a consideration well worthy to be kept in view that during a large part of what we usually term modern history no such conception was entertained as that of "territorial sovereignty." Sovereignty was not associated with dominion over a portion or subdivision of the earth. The world had lain for so many centuries under the shadow of Imperial Rome as to have forgotten that distribution of the vast spaces comprised in the empire which had once parcelled them out into a number of independent commonwealths, claiming immunity from extrinsic interference, and pretending to equality of national rights. After the subsidence of the barbarian irruptions, the notion of sovereignty that prevailed seems to have been twofold. On the one hand it assumed the form of what may be called "tribe-sovereignty." The Franks, the Burgundians, the Vandals, the Lombards, and Visigoths were masters, of course, of the territories which they occupied, and to which some of them have given a geographical appellation; but they based no claim of right upon the fact of territorial possession, and indeed attached no importance to it whatever. They appear to have retained the traditions which they brought with them from the forest and the steppe, and to have still been in their own view a patriarchal society a nomad horde, merely encamped for the time upon the soil which afforded them sustenance. Part of Transalpine Gaul, with part of Germany, had now become the country de facto occupied by the Franks -- it was France; but the Merovingian line of chieftains, the descendants of Clovis, were not Kings of France, they were Kings of the Franks. The alternative to this peculiar notion of sovereignty appears to have been -- and this is the important point -- the idea of universal dominion. The moment a monarch departed from the special relation of chief to clansmen, and became solicitous, for purposes of his Own, to invest himself with a novel form of sovereignty, the only precedent which suggested itself for his adoption was the domination of the Emperors of Rome. To parody a common quotation, he became "aut Caesar aut nullus." Either he pretended to the full prerogative of the Byzantine Emperor, or he had no political status whatever. In our own age, when a new dynasty is desirous of obliterating the prescriptive title of a deposed line of sovereigns, it takes its designation from the people, instead of the territory. Thus we have Emperors and Kings of the French, and a King of the Belgians. At the period of which we have been speaking, under similar circumstances a different alternative presented itself. The Chieftain who would no longer call himself King of the tribe must claim to be Emperor of the world. Thus, when the hereditary Mayors of the Palace had ceased to compromise with the monarchs they had long since virtually dethroned, they soon became unwilling to call themselves Kings of the Franks, a title which belonged to the displaced Merovings; but they could not style themselves Kings of France, for such a designation, though apparently not unknown, was not a title of dignity. Accordingly they came forward as aspirants to universal empire. Their motive has been greatly misapprehended. It has been taken for granted by recent French writers that Charlemagne was far before his age, quite as much in the character of his designs as in the energy with which he prosecuted them. Whether it be true or not that anybody is at any time before his age, it is certainly true that Charlemagne, in aiming at an unlimited dominion, was emphatically taking the only course which the characteristic ideas of his age permitted him to follow. Of his intellectual eminence there cannot be a question, but it is proved by his acts and not by his theory.

These singularities of view were not altered on the partition of the inheritance of Charlemagne among his three grandsons. Charles the Bald, Lewis, and Lothair were still theoretically -- if it be proper to use the word -- Emperors of Rome. Just as the Caesars of the Eastern and Western Empires had each been de jure emperor of the whole world, with defacto control over half of it, so the three Carlovingians appear to have considered their power as limited, but their title as unqualified. The same speculative universality of sovereignty continued to be associated with the Imperial throne after the second division on the death of Charles the Fat, and, indeed, was never thoroughly dissociated from it so long as the empire of Germany lasted. Territorial sovereignty -- the view which connects sovereignty with the possession of a limited portion of the earth's surface -- was distinctly an offshoot, though a tardy one, of feudalism. This might have been expected a priori, for it was feudalism which for the first time linked personal duties, and by

consequence personal rights, to the ownership of land. Whatever be the proper view of its origin and legal nature, the best mode of vividly picturing to ourselves the feudal organisation is to begin with the basis, to consider the relation of the tenant to the patch of soil which created and limited his services -- and then to mount up, through narrowing circles of super-feudation, till we approximate to the apex of the system. Where that summit exactly was during the later portion of the dark ages it is not easy to decide. Probably, wherever the conception of tribe sovereignty had really decayed, the topmost point was always assigned to the supposed successor of the Caesars of the West. But before long, when the actual sphere of Imperial authority had immensely contracted, and when the emperors had concentrated the scanty remains of their power upon Germany and North Italy, the highest feudal superiors in all the outlying portions of the former Carlovingian empire found themselves practically without a supreme head. Gradually they habituated themselves to the new situation, and the fact of immunity put at last out of sight the theory of dependence; but there are many symptoms that this change was not quite easily accomplished; and, indeed, to the impression that in the nature of things there must necessarily be a culminating domination somewhere, we may, no doubt, refer the increasing tendency to attribute secular superiority to the See of Rome. The completion of the first stage in the revolution of opinion is marked, of course, by the accession of the Capetian dynasty in France. When the feudal prince of a limited territory surrounding Paris began, from the accident of his uniting an unusual number of suzerainties in his own person, to call himself King of France, he became king in quite a new sense, a sovereign standing in the same relation to the soil of France as the baron to his estate, the tenant to his freehold. The precedent, however, was as influential as it was novel, and the form of the monarchy in France had visible effects in hastening changes which were elsewhere proceeding in the same direction. The kingship of our Anglo-Saxon regal houses was midway between the chieftainship of a tribe and a territorial supremacy,. but the superiority of the Norman monarchs, imitated from that of the King of France, was distinctly a territorial sovereignty. Every subsequent dominion which was established or consolidated was formed on the later model. Spain, Naples, and the principalities founded on the ruins of municipal freedom in Italy, were all under rulers whose sovereignty was territorial. Few things, I may add, are more curious than the gradual lapse of the Venetians from one view to the other. At the commencement of its foreign conquests, the republic regarded itself as an antitype of the Roman commonwealth, governing a number of subject provinces. Move a century onwards, and you find that it wishes to be looked upon as a corporate sovereign, claiming the rights of a feudal suzerain over its possessions in Italy and the Aegean.

During the period through which the popular ideas on the subject of sovereignty were undergoing this remarkable change, the system which stood in the place of what we now call International Law was heterogeneous in form and inconsistent in the principles to which it appealed. Over so much of Europe as was comprised in the Romano-German empire, the connection of the confederate states was regulated by the complex and as yet incomplete mechanism of the Imperial constitution; and, surprising as it may seem to us, it was a favourite notion of German lawyers that the relations of commonwealths, whether inside or outside the empire, ought to be regulated not by the Jus Gentium, but by the pure Roman jurisprudence, of which Caesar was still the centre. This doctrine was less confidently repudiated in the outlying countries than we might have supposed antecedently; but, substantially, through the rest of Europe feudal subordinations furnished a substitute for a public law; and when those were undetermined or ambiguous, there lay behind, in theory at least, a supreme regulating force in the authority of the head of the Church. It is certain, however, that both feudal and ecclesiastical influences were rapidly decaying during the fifteenth, and even the fourteenth century,. and if we closely examine the current pretexts of wars, and the avowed motives of alliances, it will be seen that, step by step with the displacement of the old principles, the views afterwards harmonised and consolidated by Ayala and Grotius were making considerable progress, though it was silent and but slow. Whether the fusion of all the sources of authority would ultimately have evolved a system of international relations, and whether that system would have exhibited material differences from the fabric of Grotius, is not now possible to decide, for as a matter of fact the Reformation annihilated all its potential elements except one. Beginning in Germany it divided the princes of the empire by a gulf too broad to be bridged over by the Imperial supremacy, even if the

Imperial superior had stood neutral. He, however, was forced to take colour with the church against the reformer; the Pope was, as a matter of course, in the same predicament; and thus the two authorities to whom belonged the office of mediation between combatants became themselves the chiefs of one great faction in the schism of the nations. Feudalism, already enfeebled and discredited as a principle of public relations, furnished no bond whatever which was stable enough to countervail the alliances of religion. In a condition, therefore, of public law which was little less than chaotic, those views of a state system to which the Roman jurisconsults were supposed to have given their sanction alone remained standing. The shape, the symmetry and the prominence which they assumed in the hands of Grotius are known to every educated man; but the great marvel of the Treatise "De Jure Belli et Pacis," was its rapid, complete, and universal success. The horrors of the Thirty Years' War, the boundless terror and pity which the unbridled license of the soldiery was exciting, must, no doubt, be taken to explain that success in some measure, but they do not wholly account for it. Very little penetration into the ideas of that age is required to convince one that if the ground plan of the international edifice which was sketched in the great book of Grotius had not appeared to be theoretically perfect, it would have been discarded by jurists and neglected by statesmen and soldiers.

It is obvious that the speculative perfection of the Grotian system is intimately connected with that conception of territorial sovereignty which we have been discussing. The theory of International Law assumes that commonwealths are, relatively to each other, in a state of nature; but the component atoms of a natural society must, by the fundamental assumption, be insulated and independent of each other. If there be a higher power connecting them, however slightly and occasionally by the claim of common supremacy, the very conception of a common superior introduces the notion of positive law, and excludes the idea of a law natural. It follows, therefore, that if the universal suzerainty of an Imperial head had been admitted even in bare theory, the labours of Grotius would have been idle. Nor is this the only point of junction between modern public law and those views of sovereignty of which I have endeavoured to describe the development. I have said that there are entire departments of international jurisprudence which consist of the Roman Law of Property. What then is the inference? It is, that if there had been no such change as I have described in the estimate of sovereignty -- if sovereignty had not been associated with the proprietorship of a limited portion of the earth, had not, in other words, become territorial -- three parts of the Grotian theory would have been incapable of application.