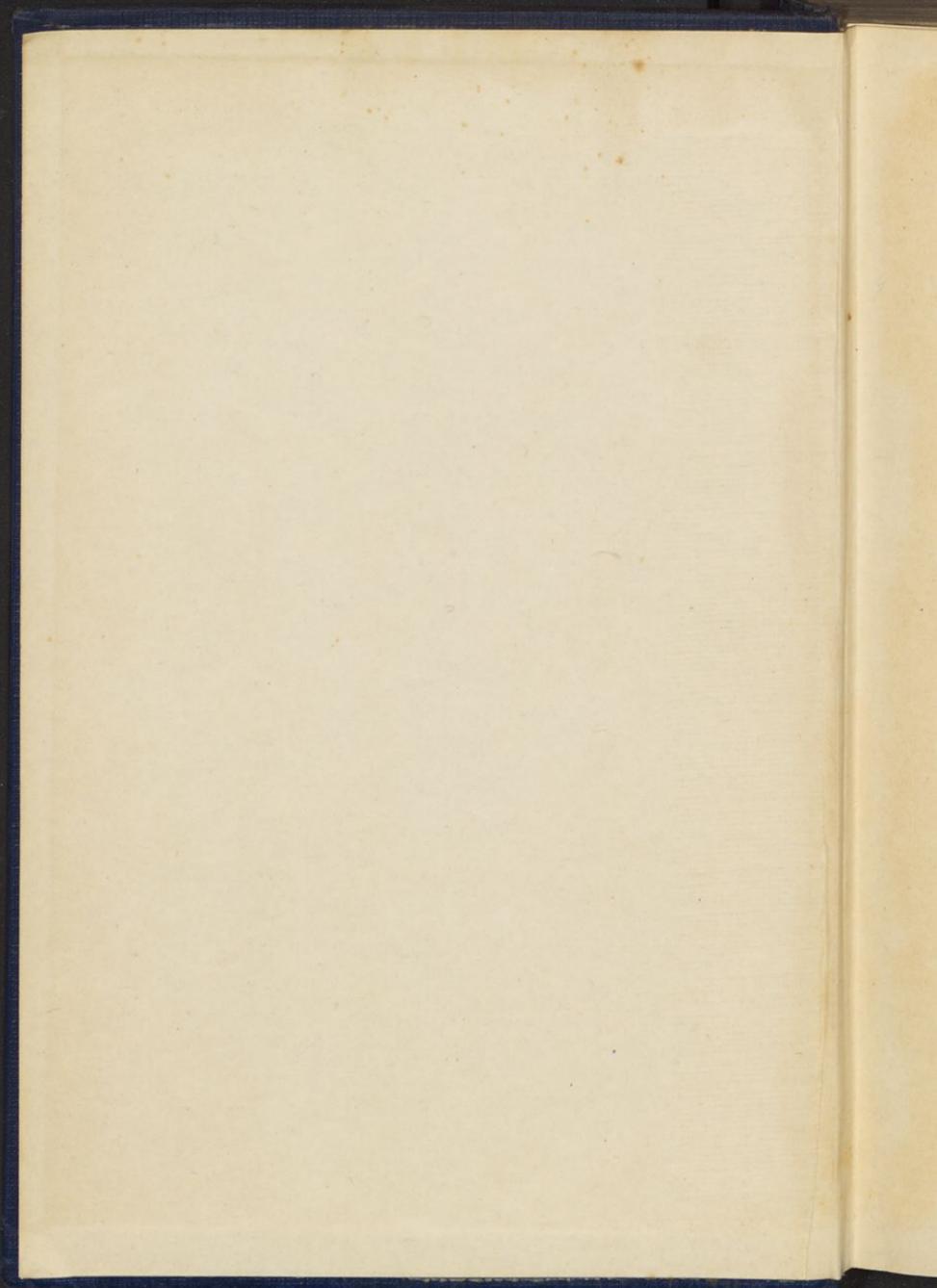


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98952







A TREATISE  
ON  
THE STATE

BY  
LEONIDAS PITAMIC, LL. D.



PUBLISHED BY  
J. H. FURST COMPANY  
BALTIMORE, MARYLAND

1933

78 752

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UPV (7)



PRINTED IN THE UNITED STATES OF AMERICA  
BY J. H. FURST COMPANY, BALTIMORE, MARYLAND

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## PREFACE

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The first edition of this work was published in Slovene in 1927 (by the Society of St. Mohor in Jugoslavia). What the author now presents to the English-speaking public is not merely a translation; it is in many respects a revision of the earlier work, which has thus been brought to completion. Special effort has been made to give a greater clarity to the philosophical explanation of the problem of the state and to make the study of particular state institutions (wherever this has seemed necessary) more thorough-going; and this has been done especially in the case of American institutions. Moreover, the manifold political changes which have occurred in recent years demanded due consideration.

To state the matter briefly, this book is a synthetic treatise on the state, in which the basis of state and law, their interdependence, and the forms and various activities of the state are studied in the light of numerous examples chosen from both past and present; however, in thus illustrating by practical examples, the author has endeavored to utilize his examples chiefly as a means of clarifying the general ideas which underlie them. It was not his aim to solve any political problem, but only to show what the problems are and what solutions have been offered up to now.

The author has avoided, as far as possible, extensive quotation from the great body of literature on this subject, for had he not he would have unduly enlarged the volume without making it more readable; nevertheless it is hardly necessary to stress the fact that his explanations have their basis or at least their root in the works of well-known political thinkers. And with regard to political theory it may be noted that the influence of Professor Kelsen (now in Cologne) and his school is easily discernible. It may also be remarked that this work represents a crystallization of studies which the author has been carrying on for a number of years, especially as a professor of constitutional law in the University of Ljubljana (Yugoslavia) and then as the diplomatic representative of Yugoslavia to the United States.

In this work he has been helped by so many that it is impossible to mention them all. However, he wishes to thank those who have read this English edition, *i. e.*, Dr. R. J. Purcell, Professor of American History at the Catholic University in Washington; Rev. Edmund A. Walsh, S. J., Regent of the Georgetown School of Foreign Service, and Mr.

Hugh Carter, and those who have assisted him in publishing it. But above all his foremost thanks are due to Dr. Edward Cain, of the English Department of the Catholic University of America, who for more than two years has given him most valuable assistance regarding the translation and has spared no effort to improve the diction and style.

A small portion of the present volume was published in 1931 through the courtesy of the Georgetown School of Foreign Service under the title *Some Notions on the State and Its International Phases*, the foreword to which was composed by Professor James Brown Scott.

L. P.

Washington, D. C.  
December 1932.

## PART I. THE NATURE OF THE STATE

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### I. THE NOTION OF THE STATE

The greatest thinkers of all time have speculated upon that special kind of human society which we commonly call "the state." But the result of this mental effort of several thousand years is not a uniform and uncontested understanding of the state; indeed it is almost impossible to survey all the theories concerning the notion of the state, either those professed in times past or those of the present day.

An important reason for this varied comprehension of the state is that, with the changes in the relation between it and other human associations, the state itself, and consequently the notion of it, has changed. Nevertheless, out of the great number of different definitions we can extract the almost uncontested assertion that the state is a species of juridical organization of human beings. This opinion may therefore serve us as a point from which to start to define the object of our reflections.

But how can it be explained that even this common basis, viewed solely as such, independent of all disputed characteristics, has produced utterly opposed and contradictory theories of the state? And this especially in our day of objective science, which assumes the right to exclude any subjective addition to investigated facts on the part of the investigator, and which tries to place science on a solid basis of exact observation? The best explanation of this puzzling state of things may, perhaps, be found, on the one hand, in the composite or synthetic character of the notion "state" and, on the other, in the prevailing analytical manner of investigation to which the exact observers of modern times are inclined.

Analysis, which is only justified where the discovery and comprehension of the particular component parts of an object are in question, does not suffice for the comprehension of the composite object in its totality. The more various elements a complex object contains, the more, to understand it, must analysis be supplemented and completed by synthesis. If it is admitted that the state is a specific association or organization of men, then the notion of it must be composed of various elements; and the understanding of all those elements together in their special synthesis must be approached by a synthetical method.

The prevailing analytical spirit of modern science has probably contributed much to the fact that it seems impossible to arrive at a uniform understanding of social phenomena. The composite character of these phenomena, it is true, is recognized; but, in a strained endeavor to simplify what is not simple, all the stress is laid upon one or another of the parts of the complex so that the equally great importance of the other parts is neglected.

To argue against the results of so one-sided a treatment of composite objects is not always easy; for its results are not entirely wrong. There is some truth in them, but not the whole truth, as far as it is accessible to us. The absence of that balance, harmony and proportion, which a sense for synthesis presupposes, is a sign of our times, and manifests itself in theory as well as in practice. What is said of the object is equally applicable to the notion of it. Each element of a composite notion displays its real significance only when considered in conjunction with the other elements. The particular elements can not be isolated or studied independently; they must always be viewed with reference to the logical synthesis which makes of them the notion. Not only is each element important for the understanding of the other elements, but all the elements of a composite notion are equally important for the comprehension of the whole. Since, therefore, in a correct definition of a notion, all words are equally important, we must, then, consider them all with equal attention. To lay stress only upon one word or another is permissible only if we want to make evident the difference between two different notions. If, *e. g.*, the difference between the state and a religious society is in question (both of them being organizations), it is fitting and even necessary to lay stress upon the element "juridical" in the notion of the state, because a religious society need not be a juridical organization. If, however, we want to comprehend rightly the definition of the state or, in general, the definition of a composite notion, without making a comparison with another similar notion, then we are not allowed to emphasize one word more than another; for all the elements of the defined notion are equally important, just as all the causes of an effect are equally important, in spite of the fact that one person may regard one cause and another person another cause as "more important" or "more efficient." To emphasize (in an exclusive, or even only in a predominant way) one or a number of elements of a notion but not all; to dissect the definition into particular words; to inquire into their meaning isolated from other words—all this is an offense against scientific objectivity, which

demands of us the same attention in considering each of the elements of a notion.

Many wrong ideas regarding the nature of the state can be traced to a mistake of this kind, because an unequal emphasis of the acknowledged elements of the state as a "juridical" "organization" of "men," is bound to lead to different theories of polity, which we shall now try to expound in their principal characteristics.

### A

As a consequence of the fact that the juridical organization in question pertains to men or people, there are a number of theories in whose definitions of the state all stress is laid on this human element. In view of this these theories differ among themselves according to the sort of people who are taken into consideration as being connected (either actively or passively or both) with the organization in a major way.

i. There is first the opinion which identifies the state with those men who, in different ways and especially by means of force, attend to the maintenance of a definite state organization. Thus the state would be the same as the governing class or the governing man. This opinion, which found its classical expression in the oft-quoted utterance of the French king Louis XIV, "L'Etat c'est moi," is similar to the identification of the state with force or domination; but in the theory in question stress is laid not upon force but upon the fact that certain men employ the force. Regardless of the arguments by which we shall later censure the theory of force, we can not adhere to the doctrine in question because we are unable to explain by means of it the identity and the continuity of the state, which remains the same in spite of men being born or dying, coming into the state or leaving it. We shall see, it is true, that the continuity of the state is nothing absolute or infinite and that it is limited by mere facts, which are not of a regulative character. Nevertheless within the boundaries imposed by these limitations the continuity of the state can be understood only from the viewpoint of a system of norms.

ii. There is second the opinion according to which the state is identified with those people who are appointed by law to carry out and interpret the juridical rules, namely, the state organs. Yet, just as there can be no law without organs to carry it out and to exercise the use of juridical sanctions, so also there can be no organs without the law; for persons who are organs differ from other persons only in so far as they are qualified by law. The organs are nothing independent; therefore they can not be in themselves that entity which alone constitutes the state.

iii. According to still a third theory the inhabitants of the state territory are considered to be the state. The group so considered is, however, sometimes restricted, so that it numbers only those persons who have special rights and duties, in particular those who enjoy so-called political rights, *e. g.*, the franchise, and who are called (active) citizens.

In this form the theory in question agrees almost entirely with the conception that the state is the totality of state organs; for, in performing political duties or in exercising political rights, the citizens can be considered as state organs, at least in a broader sense of this word. But with the conception "nation," taking it as comprising the unorganized mass of people of the same race, tongue, civilization, etc., and extending beyond the boundaries of a state we can not, of course, explain that particular organization which manifests itself as a state. No theory which identifies the state only with people (whether these people be organs or not), can account for the fact of the identity of the state, which remains the same in spite of the change of men.

## B

A striking example of what one-sided emphasizing of a single element in the composite notion of the state can produce is found in what is called the organic theory of the state. Even the ancient philosophers, *e. g.*, Plato compared the state to a human being; but such comparisons appear to be mere figures and analogies. Nevertheless, there developed in the 19th century (especially in Germany), a theory, based on the metaphysical ideas of certain philosophers, which conceives the state as a living organism, as a being which has its own will like man. Some even say that the state has its soul and a body which is not visible in the same way as the human body, but which manifests itself in its organs. If the state were really a being living of itself, then it would not seem illogical to attribute to it a purpose of its own, possibly divergent from human interests.

This theory also, then, with its sometimes tragical, sometimes comical excrescences, can be understood as a result of unduly exaggerating one element of the state to the detriment of the others—namely, the element "union" or "organization." The significance of this one element is so much emphasized that what is only a "union" becomes at last a self-existent body and soul, and what is an "organization" becomes an organism! They forget that the state is essentially only a juridical union of men which can not become a living being endowed with a particular life of its own.

## C

The theories which lay all stress upon the state as a *juridical* organization are summed up in the following:

- i. There is first the opinion which emphasizes in the notion of law (understanding as law any juridical rule) the element execution by force; it disregards the composite nature of law, which itself comprises "enforcement" only in connection with "the rule."

Now it is true that the difference between the law and other rules of human behavior (*e. g.*, moral, religious, social) is that juridical rules, as a whole, can be made effective in the end by force. Yet this difference is not to be discerned in the contents of the rules themselves, for moral rules are often at the same time juridical prescriptions. It happens that a religious society lays down the same prescriptions as a state; yet we can not hold both identical. There are records of state organizations which have their origin in religious motives, such as certain medieval states founded by orders of chivalry, or the Papal State. Yet we do not refer to such organizations as religious societies, but as states. Very frequently the state organization differs from other organizations in the content of its rules; but it always differs by the fact that compulsory means are at its disposal. If this element in the juridical rules disappears, then also the distinction between states and other societies vanishes.

Thus a sharp line between states and other societies can not always be drawn. The greater the authority of a society to employ means of physical force and the more it clings to this right, the more it takes on of the character of a state. A well-organized state can not, therefore, tolerate such societies without supervision. On the other hand, the more the idea of physical enforcement diminishes in the state laws, the more the state resembles societies which have sanctions other than those of physical force for securing obedience to their norms (*e. g.*, spiritual punishments, diminution of social honor, exclusion, etc.).

On this account, it has often been difficult in times of stress to attribute to one amongst a number of rival organizations the character of a state. It was not until the regulations of one of these organizations could be considered as guaranteed in a lasting and secure way by compulsory means, that the idea of the state was realized, and this is clearly proved by the history of the notion of sovereignty. It is therefore justified and necessary to emphasize the element "forcible means" when we compare the law with other rules; but if we speak about law in general, then the element "rule" is equally important. To those who consider enforcement the most important element in the notion of the law and consequently in the notion of the state, the state is, of course, predominantly or exclusively the same as force or domination.

This exaggeration of one of the elements in the notion of the state has bred certain evils, so that it is all the more necessary that "execution by force" be put in its right place in the notion of the law. The force is simply a guarantee of the juridical rules; but it is by no means necessary that this guarantee always be turned into an actual use of force. When the laws conform to the habits of the people, the use of force will be less necessary than when they do not. Nevertheless we can not speak of a state until "enforcement" not only is provided for but also is really employed in case of disobedience.

The relation between force and law is rightly expressed in an inscription on the southern gate of the Palace of Justice in Paris: "*Gladius legis custos.*" For here it becomes clear that the sword is merely the guardian of the law, and not the law itself; and this implies also that force must not be employed contrary to law. Force may be employed only within the limits traced by law; and herein lies the distinction between lawful and unlawful force.

However, it is to be noticed that there are some rules which we consider juridical, but which are not performable by force; such are certain rules

assigning certain duties to the supreme state organs. Nevertheless we must consider these rules as juridical because they are, of necessity, connected with, and form one system with the juridical prescriptions performable by force, upon which they often bestow a particular significance.

ii. There is second the opinion, opposite to that with which we have just dealt, which emphasizes the term "rule," without indicating the importance of the operation of the law, which is ultimately guaranteed by force. The imperfectness of such a conception is readily discernible; for, if the juridical rules could not be made operative even by force, they would be without that mark which distinguishes them from other rules, *i. e.*, their connection with force, which is provided for in the rule and which secures its effectiveness.

Yet, the so-called "normative" school, in its most radical doctrine (which, however, was later on modified by its champion, Professor Kelsen himself) identified the state with the totality of those juridical rules which form one system and which therefore can not contain within themselves any contradiction. For, did such a contradiction exist, and were there no legal means to remove it, then there would no longer be one legal unity, one state, which, according to this theory, is only another term for the unity of the law.

Represented in this extreme form, the normative theory took no account of the fact that the sheer existence of rules, *i. e.*, the existence only within the mind of one or of more or even of all men, does not suffice to constitute the conception of the state, which does not exist until men are really united or organized by juridical rules. The organization must be real, the people must be organized actually so that the juridical rules, at least in most cases, are (as we say) in effect, and thus can, if the necessity arises, be forcibly carried out.

This connection between the law as a mere statement and its actualization lies at the bottom of the notion of positive law; so we must consider as positive law also unwritten rules, which have gained guarantee of force, but which have evolved from custom and tradition, *i. e.*, from repeated actual performance. In England, that country which is renowned for its guarantees of personal rights, just such unwritten law constitutes a large portion of the whole body of the law.<sup>1</sup>

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<sup>1</sup> In order to avoid a possible misunderstanding, it may be stated that positive law in this sense (*i. e.*, as being in some necessary connection with its guarantee by forcible means) is considered apart from its moral value, which rests upon other standards, *e. g.*, on the Divine or natural law, social justice, etc.; the relation between moral rules and positive law is a problem which will be studied later on. "Positiveness" is also entirely different from the logical and technical perfection of a system of rules. Thus, *e. g.*, the "Codex iuris Canonici" of the Catholic Church is, in its contents and in its form, an admirable system of rules, regardless of the question of its positiveness in the aforesaid sense. In connection with the positiveness of rules, it must be said that their effectiveness may be present even when the rules are of comparatively brief duration, as is frequently the case with state rules, in contradistinction to religious prescriptions, moral norms, etc., which later, though lacking guarantees of physical force, often maintain their authority through long periods of time.

It is true that universal and perfect conformity between juridical rules and their actual performance will never be attained. But if many of the rules are not operative and can not be executed even by force, then the positive character of the entire legal system is shaken. Willful disobedience of the supreme juridical rules of a state means, in a certain sense, revolution directed against it; but,—unless this disobedience is an expression of anarchistic ideas—it does not imply a negation of the idea of law or state in general; for the revolutionary rules themselves become legal rules when their lasting performance is secured by forcible means. Positive law and state therefore must be more than mere systems of ideas; they must stand in such a relation to the world of natural causes and effects that the most important, especially the supreme organizatory rules (which are the basis for the creation and the development of laws), are actually executed, and so that one reckons in advance with their performance. We therefore do not entirely understand the nature of the state if we see in it nothing but a mere system of rules.

A "rule" or a "norm" is the statement of a duty; it is not the issue of natural causes, but of behavioristic principles. These principles may be conceived as absolute, unconditioned, unchanging, as is the case with religious norms; thus, for the believers, the religious norm has validity, pure and simple, without any condition save that which is set up by the norm itself. State laws do not share this absolute, unchanging character. But in order to insure them greater stability they are often linked with purely moral, especially religious, norms by means of an oath, *i. e.*, a promise under religious sanctions. For persons bound by oath to abide by a certain rule (*e. g.*, state officers and citizens under oath to abide by the constitution and the laws enacted thereunder), these rules assume an absolute character. Hence, as long as this moral or religious bond is presumed to exist, the state is, for these persons, simply the embodiment of its rules, *i. e.*, the conception of their synthesis, and is therefore of a purely regulative (normative) character. But since the said bond is limited to certain persons and hinges upon their belief, we may say that this character is regulative only subjectively and not objectively.

The meaning of this becomes clearer if we consider the case when, by revolt or in some other way, the constitution has been virtually overthrown. Considering only the obligations assumed under oath and disregarding all others, we must logically admit that the subverted constitution retains its binding character in spite of the fact that it is no longer in effect, and that all, or a majority, of the people have accommodated themselves to the new situation. It appears, then, that these people, balancing their obligation of adherence to a certain rule against obligations inconsistent with that rule, found the former outweighed. If we refuse to acknowledge that such facts may attend the origin of particular states, we can not describe any modern government as legitimate, or justify the existence of any modern state; for its history will reveal that its origin, either immediately or remotely, is connected with revolutionary upheaval.

But, since we are dealing primarily with the question of the regulative character of the state, we must emphasize the fact that, for the strict legitimists, the old organization, or the abolished constitution, still exists, and, for them, the new situation amounts to lawlessness; for though the old rule is no longer

in effect, nevertheless, its absolute regulative character is still a reality in their minds. By this it is also proved that such a regulative conception of the state is not sufficient to explain scientifically the changes to which states have been subject.

If we want to understand the problem of the state, not from a subjective, but from an objective point of view, *i. e.*, looking empirically at the problem of the state, an institution which comes into existence, changes and vanishes, then we must take into account also the effectiveness of its rules. The detached observer is not bound to a definite constitution as the unchangeable starting-point of the law. He will abandon this source if he finds that rules emanating from this source are no longer operative and that courts and administrative authorities employ other norms. In determining the original rules giving authority to law, thus making it positive, we must take actual conditions into consideration.

It is true that unity and continuity, being essential attributes of the state, can not be understood by mere facts; they must be understood by means of norms which connect certain facts according to a regulative view. And yet state laws are dependent also upon facts and have therefore a relative, conditioned value; they can not claim the absolute, eternal value of religious norms. Even in dealing with the question of the unity and continuity of the state we must take into account the effectiveness of that rule which establishes unity and continuity. For the rest, the normative theory itself, remaining in the sphere of relative norms, can not be consistent to the end, for it must take as the basis of law a fundamental rule, and can not by a normative method again justify a fundamental rule, which would thus become derivative and would therefore cease to be fundamental or original.

In order to justify a legal system from the purely normative point of view we must assume that every rule is derived from a higher one, and thus we must necessarily proceed to infinity; with this method we can not stop at any finite rule as the ultimate source. But if we do wish to stop at some finite rule as an original source (as the leading modern normative theory does), then we have to cut the chain at a point where there are other grounds for justification than purely juridical ones, such as religious or moral prescriptions (which are considered absolute, and from which for example the oath derives its binding force). Supreme juridical rules, furnished with such a guarantee as the oath, are often the correct point of departure for positive law; but, as we have just seen, such supreme rules often lose this qualification, when, deprived of effectiveness, they themselves have turned into historical law. Still other grounds for severing the chain of legal derivation present themselves in the form of events in the world of causes and effects, *viz.*, certain political and social phenomena which determine for us what supreme juridical rules, on the whole, are actually operative. A recognizable degree of enforcibility is one of the characteristics of a "system of positive law" as distinguished from historical law, personal desires, theoretical opinions, or mere moral obligations. A constitution which is operative at least in its essential prescriptions, comprises indeed the immediate bases of positive law. But these fundamental laws were in many instances introduced by abolishing

the old constitution in a manner contrary to the prescription of that instrument. The new constitution as the basis of the law, therefore, is not backed by a rule of the antecedent constitution; thus it is proved that in dealing with the problem of the state we must take into consideration not only norms but also facts happening in the world of causes and effects.

Yet there is a norm which under certain conditions legalizes, as a means for the creation of states, phenomena which lie outside of the sphere of state law. According to a customary rule of international law a state exists when there is established, in whatever way, either in accordance with the existing laws of the country concerned or contrary to them, a supreme juridical organization which asserts itself successfully, gains stability, and is dependent only on international law. Consequently also revolutionary conditions, which in their very beginning certainly are illegal, must eventually be recognized as legal if they become settled and if they present sufficient guarantees of their further maintenance. The state assumes indeed an objectively regulative character the moment we look upon it as not of the highest order, a higher order being, for instance, international law. But the question of possible relation between juridical rules and facts in the world of causes and effects is thus merely transferred from the province of state law (the constitution) to that of international law. Here the problem arises again. For international law itself, like other law, if it is to be positive, must finally be backed by forces which guarantee to it a certain degree of effectiveness; otherwise international law could not be distinguished from international morals. Even when we assume that the state organization is justified or authorized by international law, we must refer to a working rule of this law.

Now, according to international law, every actual power which has asserted itself, in whatever way, as the supreme juridical organization of a country, must be acknowledged as a legal power, and therefore as the legitimate authority of that country. Hence international law is interested only in the effectiveness of the basis of the organization in question, and not in what it contains. Therefore international law, when dealing with the question of the identity of a state, takes no account of what the state laws contain or how they were made; consequently the continuity of this law, *i. e.*, its consistent dependence upon the same source, is not the factor by which the identity of the state is determined. From an international viewpoint a state retains its identity even after a revolutionary upheaval, if: (1) the new power has settled, maintains itself, has become regular, *i. e.*, expresses itself by a set of explicit (written) or implicit (customary) rules; (2) if it comprises more or less the same territory, and (3) if it is considered as the supreme power, *i. e.*, as independent of all other juridical organization save international law.

International law contains, it is true, still many other prescriptions for the state, for which the latter is responsible and even liable to punishment if it infringes upon them; but the consequence of such infringement is not the loss of its character as a state; hence conformity to these prescriptions on the part of a state is not an essential condition for the existence of a state; such conditions are only those which we have expounded above. All of this is proof that international law also permits us to consider as a state only such

a juridical organization as is not merely an ideal system of rules, but is at the same time to a certain degree in accordance with actual facts and conditions.

There is still the question of what degree of effectiveness is necessary to make law positive and a state an entity. For it is uncontested that there are some juridical norms which are not in all cases performed or executed by state officials, and still continue to be positive. As a rule, a juridical norm retains its positive character until it is superseded by another explicit rule. This is true, however, only under the condition that the higher and ultimately the fundamental rules, on which the others are dependent, have maintained their effectiveness. For, the positive character of the fundamental rules is always conditioned by their effectiveness, and even international law considers them juridically valid only if they are operative. We thereby confirm the truism that the rules which are most important for the maintenance of a positive legal system must themselves be firmly guaranteed. The rules that constitute the highest sphere of positive law, subject directly to international law, are, in their fullest meaning, *i. e.*, as comprising both the territorial sphere of their jurisdiction and their effectiveness as well, nothing else than the state itself. It appears that Aristotle long ago identified the state with the rules concerning the supreme organization of a country.<sup>2</sup> It is justifiable also from this viewpoint to distinguish between the positive law in its totality and the state, which is nothing more than the supreme (real and effective) field of the juridical organization of a country. There are many historical instances showing that in spite of fundamental changes in state life a great deal of positive law has remained materially almost unchanged.

But what are the rules that constitute the supreme juridical organization in a country? Generally speaking, those rules which determine the supreme agents or organs, *i. e.*, the persons who are authorized to issue laws and especially to change the constitution itself. Indeed, we even distinguish according to these rules different forms of the state such as monarchies, republics, parliamentary states, unitary and federal states, etc.

Yet for the carrying out of the supreme organization of a state the rules which invest certain organs with the competence to interpret definitely the supreme rules themselves, especially the constitution, are equally important. For, the right to interpret, with binding force, the supreme laws of a country is sometimes still more determinative than the constituent power itself, which is able to frame or alter a constitution. A very good example thereof is the significance of the judiciary in the United States of America. If rules conferring such a right of interpretation change, then also the form of the state may thereby be modified.

iii. To the theory which considers the state as the totality of juridical rules, is much akin the opinion that the state is only a juridical relationship or a plurality of such relations. In every society there are social relations among its members, *i. e.*, between each other, and between each one and the whole community. So also the state is conceived as the totality of juridical relations.

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<sup>2</sup> *Politics*, Book III, 1278, b, 9, 10.

But out of this theory there arise the same questions which we have just now discussed concerning the juridical rules, because juridical relations logically can not come into existence without juridical rules. As this theory is entirely dependent on the notion we have of the law, there is no need to add to our inquiry into this problem.

#### D

We have already discussed under caption A the errors which are due to a one-sided emphasis of the words "men" or "human beings" in the definition of the state. Yet we must not forget that this term has, like all other terms, its proper significance in the definition; it accounts for all the variations and changes in states due to social, political, religious, and economic conditions, etc. It thus becomes the element which explains the diversity of states, past and present. But amidst all this variety there is an unchanging element: the question is always one of an association of human beings (we believe the problem of the animal state, such as that of the bee or ant, may well be omitted in this treatise). Therefore the organization must be somehow "human."

We have said that the rules of the state must be backed, at least to some degree, by force as a guarantee of their performance. But they must also be backed, or better to say, inspired by such ideas as will make living in common, *i. e.*, the community itself, possible. If, by the laws and the state organs, the life of the citizens is not protected, or is jeopardized, so that living in common is gravely menaced, then, as history proves, the existence of such a state organization is imperiled; and the state breaks down if this menace exceeds a certain limit. Besides life, there are certain other human interests which are considered (in proportion to the ethical and cultural development of the population) to be of similar value to life, and are therefore called "vital." A neglect or a violation of such interests, if considerable in degree and kind, is, according to historical experience, fatal to the state.

For the present it may be sufficient to state that it is essential for the idea of the state that it provide for those conditions which are indispensable for community life. A great scholar in political science, Professor Jellinek, of Heidelberg, has said that the law is an "ethical minimum." We should like to understand this in the sense that the totality of the laws of a state, or at least its fundamental and most important laws, must yield a "moral minimum." This does not mean that there

can be no state when some of its laws are immoral; it means only that, when the moral complexion of the laws in the main falls below a certain minimum of morality, that state is weakened at its very foundation and, as history repeatedly attests, subsequently breaks down.

But laws do not only impart rights; they also impose duties. The aspect of life in a community called the state, which concerns duties, is conditioned by some sense of duty on the part of the citizens, and this sense is rationally backed by moral principles. The right of one is always the duty of another; and duty means always some sacrifice—at least the sacrifice of not exercising full liberty of action. Viewed either from the side of rights or from the side of duties the state is subject to certain moral laws and thus has in this view a regulative character.

This statement would perhaps suffice for our inquiry, if there were no attempts to explain the form of life in community called the state, by mere solidarity of human interests. For, this explanation is not a final one, since all depends upon the character of the solidarity. If solidarity of interests means a sort of mutual and reciprocal insurance somehow concluded in a utilitarian way in order to get benefits for sacrifices, or at least security, then it falls short of being an ultimate, unique, and exhaustive explanation of the problem of common life in such a universal community as is the state. Of course solidarity is, to a certain extent, the basis of the laws and of the state. But solidarity itself must be regulated in order to determine which interests are to be taken into account and which not. It presupposes therefore some regulative principles. If selfish motives alone—and they are the essence of the utilitarian view—compel men to abide by the laws, then it is logical for them not to obey laws whenever laws are not in accordance with selfish motives (*e. g.*, when some physically or mentally powerful person thinks that he can, without risk, dispense with paying the "price" for the "insurance"). But some may say that human nature is not so brutally selfish; that it has also noble feelings of sacrifice without personal interest. It is true that human nature is also inclined to sacrifice, but not in a general way; the natural inclination tends to sacrifices only for the benefit of certain persons such as members of the family and friends. Further, this natural sentiment is not the same in all persons. But even were it strong and did it extend to a large number of people, even to all members of the community called the state, it would still be only a sentiment—subject to all the changeability of this psychic phenomenon. If, thus, the commands of the

laws may be contrary to human nature, depending upon the person or the case, and if they pretend as they do, to regulate relations between men in an objective way, independently of naturally changing human feelings, then their rational justification can not lie solely in the sphere of natural sentiments of men nor can it rest upon solidarity based only upon such natural sentiments. This will appear evident if we consider with an unbiased mind one of the real aspects of the state, modern or ancient; even if by principle it admits the equality of all before the law, it demands also for the sake of the very existence of the state and also for what we call the "common good" equal readiness of all for unequal sacrifices. Sacrifices for the "common good" mean ultimately giving up for others without an equivalent recompense. But how can this "readiness" for unequal sacrifices as an essentially unselfish ethical idea be explained by a materialistic, utilitarian principle of mutual insurance, by a mere "solidarity of interests?" But even a purely selfishly conceived solidarity, implying a reciprocal give-and-take, presupposes an ethical disposition to keep and to discharge an obligation. So we see that human society, especially in that form which we are accustomed to call the state, implies in its very essence some higher regulative principles. We do not say that the people concerned are always conscious of this idea, or if conscious, they approve of it; on the contrary, some are even opposed to it, and it is only under compulsion or fear of punishment that they abstain from the indulgence of selfish and anti-social inclinations. Nor do we say that founders or builders of states, or thinkers and state philosophers, or legislators are always aware of all their work presupposes or demands. We only say simply that if we go logically from the very positive state laws to their rational principles, the idea of the state as a universal society of men, with all their clashing interests, is rationally based on principles which conflict with the nature of the human ego and therefore appertain to a higher and a supernatural order. Rousseau himself, whose "social covenant" is, as it seems to us in the final analysis, only the juridical form of solidarity of interests, drew the conclusion in the last chapter of his famous book, *Du contrat social, ou principes du droit politique*, that without a "civil religion" (which he seems to have conceived in a somewhat artificial way as a support only of the state organization), it is impossible to be a good citizen or a faithful subject. Positivism itself, in the theory of law and state, leads us necessarily to certain principles which were known in past centuries as the "law of nature," of which the source was rightly sought in the supernatural

world. It appears that we must inevitably return to this idea, which in modern times, under the spell of a superficial positivism, has been wrongly discredited. In this light, the state assumes, it is true, a regulative character. But whereas the famous champion of the modern "normative" school (see above), in a relativistic and purely formal way, considers the regulative principle for each state to be a hypothetical primary norm, drawn from the contents of its constitution, we hold that this principle is derived substantially and materially from the higher sphere of moral principles to which man-made law and state and human society in general are subject.

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As language is the mirror of human thought, it might be of interest to cast a glance upon the etymological side of the problem of the state. The word or the expression for the state in the idioms of those nations which have developed the modern theory of the state, has been used also, according to a repeated change in its sense, to denote the different elements of the present day notion of the state. This is the case with the languages of the Teutonic and Romanic nations which, in more recent times, use in defining the state—significantly enough—words implying a common origin; the source word is the Latin *status*. At first this word was used to refer to the legal conditions of a country, its organization, constitution, etc.; today we still find the same sense in the word "statute." The expression "status" was further employed for the "estates," meaning those social classes or ruling orders which really administered the state ("status terrae," in Holland called "Generalstaaten," in France "Etats généraux"). In the fifteenth century the word "stato" was applied to those Italian states which had shaken off the supremacy of the German Emperor (*civitates superiorem non recognoscetes*, *i. e.*, the states not recognizing a master). Yet Machiavelli employs in his book *Il Principe*, published 1532, the expression "stato" for all states without distinction, whereas in former times the states were called differently: *politeia*, *polis*, *res publica*, *civitas*, *imperium*, *regnum*, etc. In this general sense, we can say, the word is now used by the French (*Etat*), the Germans (*Staat*), and the English (*State*). However, in the seventeenth century it acquired another sense; the law disappeared in the notion of the state, which became more and more absolute. The opinion gained ground that in the interest of the state, namely, of *such* an absolute state, on account of the "raison d'Etat" illegal acts were allowable. It is not difficult to recognize in this opinion the theory that the state is the same as a cer-

tain force or domination which is in no necessary connection with or even in opposition to the juridical rules. Only more liberal periods and modern political science have again acknowledged the necessary connection between state and law in the theory of the legal (lawful) state (*Rechtsstaat* in German) thereby reviving the meaning of the word "status" or "state" as a legal (juridical) organization. But even today this word has more than one meaning; the French expression "Etat," *e. g.*, is also employed for the state budget, which is only one, *i. e.*, the financial, aspect of the state. It is worth noticing that the English word estate means "a class or order of persons," then "condition or state," and then also "property"; and it is interesting that the word "drzava" in the Slovenian language likewise means state, but also "stability," "sphere of power" and "landed property."

So we can easily see that even in the various meanings of a single word some of the state theories which we have outlined are discernible.

## II. THE TERRITORY OF THE STATE

Law, organization and people are, as we saw, essential elements in the notion of the state. Is territory also an element of this notion?

Wherever people are, they can be organized under juridical rules. If they have no definite habitation but are nomadic, then the rules of their organization will be applied in whatever place the people happen for the time to be. In such cases the territory over which the rules are applied is changing. Of course, everything which happens must happen somewhere; but the question at issue is whether permanence, determinateness, or demarcation of territory is essential to the notion of the state. People can be juridically organized even in those times when they are migrating; there is nothing to prevent us from considering such organizations as states, *i. e.*, states not having set territory. But when the majority of the members of a tribe have permanently settled, then the laws of this society are applied always over the same territory, *i. e.*, the settled territory, which, thus linked with the state, is called state territory.

With the localization of nations previously organized by laws, there arose the possibility of fixing the territorial sphere of these laws. This extent of space or territory became thus an essential element of the modern state. This, however, did not take place suddenly, but took several centuries of slow evolution. Long after nations were settled, the idea that laws are independent of territory was retained. This idea of course did not apply to the entire nation, which as a whole did not

continue to wander from place to place any longer, but it applied to its particular members, *i. e.*, to those citizens who went abroad. Wherever they were, they were always subject to the laws of their country. This is called the principle of personal law, which means that the law is bound up with persons and not with territories. The idea that the law of a nation that has settled on a definite territory is applicable to *all* people within this territory, not only to natives, but also to aliens, has only slowly come to realization. This is the principle of territorial law, which, however, has not even at this time found universal application, in as far as for many legal situations the principle of personal law still holds. But the rule for most cases is the principle that all people in a definite territory are subject to one and the same system of law, *i. e.*, the law of the nation settled there.

Thus the territory gets its particular significance in the conception of the state, for the legal rules apply not only to certain especially qualified people, but to all the people, as far as the jurisdiction or the territorial sway of these rules extends. Now, we may say, metaphorically, that the law is valid for a certain territory, or that this territory is under a certain regime. All this is confirmed by the fact that execution by force is carried out, even in those cases in which foreign law is employed, after the manner of, and by such agents as are determined by, the law of that state on whose territory the execution takes place. It is clear that by reason of the ever increasing interstate traffic in goods and persons the territorial element is becoming more and more important. But for the same reason the strictness of the territorial principle is relieved sometimes by paying deference also to the personal principle, especially in the province of laws concerning sea, river, and air traffic.

But the execution of foreign law is, as a rule, conditioned upon the consent of the state where it is to be executed, and thus finally bound to its law; the execution by force is, as a rule, carried out by state organs only on the territory of the state whose organs they are.

With the exception of some cases (*e. g.*, those concerning state of war, countries with unfixed boundaries, the high seas, diplomatic competence, war vessels) we can say that the law of a state has in its fullness (*viz.*, as a norm comprising also its sanction, which derives from the same juridical system) complete authority only on the territory of this state. A delimited territory, or more exactly, a definite space, comprising not only one dimension, but three (*i. e.*, depth, height and width, and so including not only earth surface, but also water, air, and

subterranean regions) must be considered in our time and in civilized countries as an essential element of the state; the state ceases to exist if it has no territory at all, although it has the right to transfer its territory partly or entirely. It is perhaps due to the competition which persists even today between the principle of territorial and that of personal jurisdiction of the law that the element "territory" in modern theories is not the object of as much exaggeration as is the case with other elements. Nevertheless, popular opinion (which in general is grossly materialistic) is inclined to think of the state in terms of its most material, visible aspect, *i. e.*, its territory. The old "patrimonial" theory, however, even went so far as to place the territory, as the property of the monarch, in the front rank of the elements of the state, especially before the element "people" or "nation."

### III. SOVEREIGNTY

Positive Law is the element that distinguishes the state as conceived by us from other organizations of men. Churches, religious societies, ethnical groups are based upon another common basis than positive (human) law. But there are many juridical organizations besides the state, *e. g.*, provinces, communities, commercial companies and various other societies, which have their particular juridical rules. What is the difference between them and the state? The usual answer is: The state is the supreme juridical society; it is sovereign; whereas other juridical organizations are not. Before discussing the notion of sovereignty, it would perhaps be best to dwell for a moment upon the history of this notion, both for the sake of a better understanding of the notion itself and because many political theories are reflected in this history.

#### (a) *Political Theories*

The ancient Greeks had no conception of sovereignty as indicating the complete legal independence of the state. According to their opinion the purpose of the state was to provide for the happiness and moral welfare of its citizens. A juridical unity established for another purpose, founded with warlike aims or simply for the security of its citizens or of traffic and commerce, was not yet a state (Aristotle). For them a state existed if it was, of itself, capable of achieving its essential purpose, *i. e.*, of providing for an economically and morally satisfactory, thus for a happy, life of its citizens. The characteristic of the state is

not legal independence, but self-sufficiency (*autarkeia*) in the indicated sense. Nor did the ancient Romans, as far as we know, have need of a theory of sovereignty in the sense of legal independence of the state. In the time of the Roman monarchy, however, there arose the question, "To whom does the supreme power in the state belong?" The point at issue was the justification of the supreme power of the monarch and the recognition of his power as a right. It was stated that the supreme authority was vested in the Roman people, which, however, by a special law (*lex regia*) transferred this authority to a certain person. Thus, the Roman jurists said, the people has transferred all its authority (*imperium et potestatem*) to the monarch. Later, the idea of transference was abandoned; it was then granted that the emperor possessed the supreme power simply because he was emperor; for this reason all had to obey him.

With the disintegration of the Roman Empire the absolute power of one ruler vanished. Instead of that, there arose in the medieval feudal state numberless higher and lower, and therefore relative, authorities, which were possessed as rights by different lords and which were bound and guaranteed by treaties. Thus, the undivided power of the Roman Emperor was split and divided amongst a great number of men—amongst various feudal lords, kings, dukes, the higher nobility, the clergy, and the towns; further, between the Pope and the German Emperor, this Emperor considering himself the successor of the Roman Emperor (the Roman Empire of German nationality). The authority of dukes and kings in some countries therefore diminished in considerable degree.

Foremost among those who struggled for concentration of the entire state authority in one hand were the French kings. In this endeavor they were helped by various theories formulated by their jurists. These jurists revived the notion of the *imperium* as the supreme power which ought to belong to the king as property; and as property was, according to Roman law, an absolute right, so the supreme power in the country ought to be an unlimited right of the French king. The supreme power being conceived like private ownership, it was assumed that it could also be transferred and inherited like private property. This is the patrimonial conception of the state.

The French kings succeeded in obtaining independence from the feudal lords, from the German emperor and from the Pope. And so it happened that, towards the end of the sixteenth century, French jurists gave to the supreme power centralized in the person of the king the

name "sovereignty." The French word "souverain" is derived from the Latin word "superanus," which means "superior." This appellation was given to those feudal lords whose authority was not derived from other feudal lords. But in the sixteenth century this word came to be used only for the king's authority; at the same time its meaning changed from "superior" to "supreme." At first, the term "sovereignty" implied a negative idea, namely, that there was no authority higher than the sovereign power. Jean Bodin, however, in his epoch-making book, *Les six livres de la République*, 1576, added to this term a positive meaning, enumerating six sovereign rights or *iura maiestatis*. He attributed this authority to the French king, but at the same time he also stated that one can not speak of a state if there is no sovereign power in it. Thus, sovereignty, which was at first considered to be a quality of the supreme state organ, was transferred to the state itself: a juridical organization that is not sovereign is not a state. Bodin is, as we see, the founder of that theory of state sovereignty which rules even at the present time.

Notwithstanding the fact that sovereignty became thus an element in the notion of the state, the struggle continued concerning the question to whom sovereignty must be attributed within the state—to the king or to the people. This struggle is one of the most important factors in the history of the modern state. As to the king's sovereignty, which was defended for the French state by Bodin, this theory had also been demonstrated as early as the thirteenth century by the "legists," *i. e.*, by the jurists of Roman Law who, in their endeavor to strengthen the unity of the state, placed the king's authority so high that nobody might have any doubts about it: according to their doctrine the king has his authority directly from God. After Bodin the theory of divine right was defended by well-known French writers, such as Loyseau and Bossuet; at the same time, of course, this theory was championed by the kings themselves: in France by the Bourbons, in England by the Stuarts.

In the fourteenth and fifteenth centuries the "estates" in France assumed a resolute attitude against the theory of the king's sovereignty. Also the Catholic theologians of the Middle Ages defended the sovereignty of the nation or of the people. According to their opinion God is, of course, the primary source of every power; but the immediate source is the people: *Omnis potestas a Deo per populum*. The sovereignty of the people was also defended by the "monarchomachs," as various Catholic and Protestant writers were called, amongst whom

were Althusius, Junius Brutus, Hotomannus, Mariana and others; they spread, mostly in the second half of the sixteenth century, the doctrine that the body of the people, by contract, transfers to the king only the use of the supreme power and that it may depose him if he abuses this right. In the beginning of the seventeenth century Suarez, a Jesuit, in his treatise "Tractatus de legibus ac Deo legislatore," based the sovereignty of the people on arguments which we find employed later on by other writers also. Suarez says that among men living in a "natural state," which was their first situation, a common, vested authority was lacking; nobody had title to such an authority. Authority, *i. e.*, legal power can not, according to him, originate except by contract between men. With this theory of social contract, Suarez was a predecessor of Locke, Hobbes and Rousseau.

In this struggle between the two theories, the theory of the sovereignty of the king was at first victorious; there adhered to it also some of the writers who had started with the theory of the people, *e. g.*, the English philosopher Hobbes; he developed the idea that, in monarchies, the people has renounced its sovereignty by transferring it to the king, because the citizens have made an agreement among themselves by which they have submitted to the king entirely. Others held that the primary sovereign right of the people became invalid by prescription, so that the king, at first merely the user of sovereignty, became at last its owner.

In the seventeenth century the school of natural law developed the theory of Suarez. To this school belonged famous savants: Grotius, the Dutchman; Pufendorf, the German; and John Locke, the Englishman. Many principles proclaimed later on by the French revolutionists (1789-1791) were advocated by writers of this school, especially by John Locke; among those principles were the "rights of man" and, in connection with them, the people's sovereignty, which in the second half of the eighteenth century overthrew the idea of the sovereignty of the king and the doctrine of the patrimonial state.

Nothing in the notion of sovereignty was changed at that time; it was only its holder that shifted; sovereignty was removed from the person of the king and given to the body of the people as a particular person. The idea of the people's sovereignty asserted itself victoriously and became the historical basis of the political principles which rule modern democracies. Later on certain writers, it is true, endeavored to revive the patrimonial state and the sovereignty of the monarchs, but they were unsuccessful.

The realization of the theory of the people's sovereignty was effected largely through the influence of J. J. Rousseau, and especially through his book on "the social contract" (*Du Contrat Social*, 1762). His expositions in this respect may perhaps be summed up thus: By the social contract everybody delivers himself and all he has to the community. Through this act of uniting the community acquires its unity, its particular life, and a will of its own; this will, it is true, results from the wills of all; nevertheless, after the act of union, it differs from the wills of all, because it has then become the will of the union itself. So the society became a person, separated from and above all its members; all are entirely subject to it; this person is the state which, as the expression of the general will (*volonté générale*), is sovereign. Accordingly, the state is the people or the nation which has organized itself by the social contract. Only the will of the entire people, organized, is sovereign. Sovereignty can not be transferred because it is impossible to transfer a will; it can not be divided, because, if divided, it would cease to be general.

Obviously under the spell of these principles the French constitution of 1791 stated: "Sovereignty is single, indivisible, untransferable, imprescriptible, and belongs to the people." Rousseau inferred from the supposition that sovereignty is untransferable, that the general will which expresses itself in the law can not be actualized by delegates, but finally only by the people directly. Hence Rousseau did not fancy an elected body, representative of the nation (*parliament*), and supported the idea of small states, because such a representation proved to be inevitable in greater democratic states. This of course could not be accepted by the French revolutionists as applicable in the case of the great French state. They admitted that sovereignty could not be transferred, but they held that it could be delegated; the delegates, however, were to be responsible to the people for their exercise of the supreme power. The constitution of 1791 goes so far as to make delegation obligatory: the nation, which is the source of all powers, can execute them only by delegation.

In Rousseau's explanation we perceive no line of difference drawn between the organized nation and the state. In a great part of the later French literature, however, the nation as a person is distinguished from the state. First is the nation and then the state, which comes into existence when the nation has designated those persons whose duty it is to create the nation's will. These delegates are responsible to the nation, because the nation is and remains the owner of sovereignty.

In this respect the opinion of the majority of German writers is different; they say that sovereignty does not appertain to the nation (people), but to the state as a person which consists of three essential elements: territory, people, and authority. Sovereignty is a quality of the state authority (Jellinek); those who execute this authority (also the monarch) are merely organs of the state, and not representatives of the people.

(b) *Criticism of the Psychological Conception of Sovereignty*

All these theories seem to attribute sovereignty to a will, be it the will of the king or of the people or of the state; everybody is bound to obey that will. Such a conception of sovereignty was successfully opposed in recent times by Duguit, a Frenchman, and Kelsen, an Austrian. Wills, considered merely as psychic phenomena, can not be different as to their value, since we can not conceive how, as a natural phenomenon, one will should have greater value than another. It is also impossible to decide in advance which amongst the wills, which are interdependent, will finally prevail. An absolute monarch, for example, whose will is considered to be sovereign, has his counselors who, bound by duty, are even obliged to advise him, and thus necessarily to influence his will. The psychological conception of the will can not be brought into conformity with that conception of sovereignty which exalts the value of one will over another will. So it is easy to understand why those who defended the sovereignty of a certain person attributed to his will a supernatural source; they were well aware that in no other way could the superiority of this will be demonstrated. This leap into the supernatural world was taken to bolster up the king's sovereignty: the will of the king is the highest one, because he obtains his authority directly from God. That is the principle of the theocratic state. Others who attributed sovereignty to the people, transformed a plurality of men into one person, investing that person with a particular will; then it was not so difficult to concede the superiority of such an artificially created will, which did not exist in the natural world, over the wills of particular men. Still others who endeavored to justify the sovereignty of the state, considered it, in a similar way, as a supreme person, as an absolute or (*e. g.*, Hegel) as an almost divine being which, of course, has, in relation to men, a sovereign will.

The assertion that the "will" of a person or of a group of persons is sovereign, means, in reality, that what they declare to be the rule has definitive value as a binding norm and, consequently, that others have

the duty to comply with these declarations. But whence does the declaratory act of the supreme state organs, *e. g.*, the vote of parliament and the sanction of the head of the state, draw its value as a binding rule? This value can derive only from a still higher rule which states that the declaration of the organs mentioned has binding force (or value) as a law. For, as we have seen, in the natural sphere of psychic phenomena there is no superiority and inferiority, higher value and lower value ("superordination" and "subordination"); there the natural law of cause and effect (or of functional interdependence) rules. Yet we do find such a gradation of higher and lower phenomena in the sphere of ideas, in the region of moral and juridical rules. Why, *e. g.*, is an ordinance subordinated to the law? Only because a still higher rule, the constitution, ordains that an ordinance is valid only when it is in accordance with the law; this means that the law has a higher value than the ordinance. Thus we must finally arrive at a supreme juridical rule, the validity of which can not be drawn from any other juridical rule; such a rule we may call "sovereign." Sovereignty therefore means the supremacy of a juridical rule or of a group of such rules over all the other juridical rules. This idea can also be expressed thus: The sovereign rule is not subordinate to any other rule. The ingenious Rousseau was quite near to such a conception of sovereignty; he attributed sovereignty, it is true, to the organized nation; but we must not forget that he conceded sovereignty to this body only in so far as it is the creator of the general will which expresses itself in general laws.

#### IV. THE STATE AND INTERNATIONAL LAW

If the juridical rules of an organization are not subordinated to any other juridical rule, we may say that this organization is sovereign. This would apply to a state which is legally isolated, *e. g.*, to primitive states which are in no juridical connection with other states. But this situation is altered when the states recognize each other and when political, commercial, and traffic relations develop between them. But what is the character of these relations? Which law regulates them? The consistency of these relations can be legally guaranteed only if their existence is independent of the law of the states involved. For, if such a dependence exists, each of the states concerned could simply by changing its own law dissolve international relations and thus disengage itself from its duties. The juridical solidity of international rela-

tions inevitably demands independent international, and that means supra-national rules. Have these rules a juridical character? Is not all that is called international law only a sort of moral code which binds the leading personalities of particular states only in a moral way? The answer to this question depends upon whether international rules possess that specific sanction which is essential for positive law (according to our conception), namely, the guarantee of force. Now, history and practice show that force is really connected with international relations, *e. g.*, reprisals and wars undertaken to enforce an international rule or to punish its violation. There is, it is true, a great difference between the employment of force in the interior of the modern state and the use of force between modern states. In a modern state special organs (*e. g.*, judges) are appointed to determine conclusively the meaning of the law and to use force in its execution. In international relations, however, very often the state which suffered wrong through the violation of an international rule by another state, was judge in its own case. But not only did it render judgment concerning the wrong done by another state; it was, in addition, the power which executed its own judgment, if necessary, by force. In more recent times, however, there happen to be an ever-increasing number of independent international organs (courts of arbitration, international commissions, etc.), established in order to settle by awards or decisions conflicts arising between states. In the organization of the League of Nations initiatory steps were taken for the use of force as a kind of organized international enforcement and punishment. For all this, we can not say that there was no international law in former times. But this law, consisting of generally acknowledged rules, was in many cases made effective only by self-help. In times past, the enforcement of the law within the state organization itself was largely dependent on just such inferior means; and so, it is even today in certain poorly organized states (blood-feud). He whose right has been violated, made his own equity with the wrongdoer, thereby defending his rights and the law. It is not necessary to explain the danger to which the protection of rights was exposed when this protection was secured by self-help, which often was mere self-will, *i. e.*, arbitrariness divorced from legal norms. The history of law shows by what a protracted process the authoritative definition and the enforcement of law passed from the individual (or from his family) to certain qualified and responsible people who were appointed to define and to enforce the law and whom we call state organs. The same evolution has begun and is still going on in the

sphere of international law where, however, it meets even greater difficulties and obstacles, and demands still more strenuous efforts.

So we see that there is a law which is above the states, though it was created by the states themselves, *viz.*, by their organs (the law within the state is also created by men who are themselves subject to it). Thus, the legal rules of a state are not the highest ones, for, above them, there are the norms of international law. If we consider sovereignty to mean the supreme authority of certain juridical rules, then we can not say that any modern state is sovereign. For the sovereignty of that juridical organization which we call the state is inconsistent with the existence of international law. With every improvement of international law the exactness of this statement becomes more and more evident.

But how can we draw a line between juridical organizations, such as communities, provinces, etc., and the state if we do not recognize the latter as sovereign? The difference is discernible in the juridical relation of those organizations to international law on the one side and to the state law on the other. The state is a union of men which is subject to international law directly, whereas all other juridical organizations (except international ones) are subject to the state, and through it, and thus indirectly, to international law. The state has authority over such subordinate organizations; and we can say that it is sovereign for them. So, the word "sovereignty," as qualifying the state, has regained its original meaning, namely, "higher" instead of "supreme," a comparative instead of a superlative meaning. Therefore, sovereignty of the state in this sense does not coincide with the notion "competence over competence" (this is the expression of a widespread theory), which means that the state is competent to establish all competences; for the competence of international organs is outside the jurisdiction of particular states.

The notion of the sovereignty of the state as meaning supreme, absolute, legal competence was possible in times when international law was not yet known. But for our time the sovereignty of the state means something relative; it coincides with the idea of direct subordination of the state to international law.

Up to this time the term "sovereignty" has not taken on a fixed and universally accepted meaning. It seems to have been the subject of even a greater variety of interpretation in modern times than it has in the past; and this diversity of meaning persists not only in the language of the layman, but even in scientific literature. It is used, to

cite only a few cases, to designate the supreme power established in a certain territory, which power has again been divided into an "exterior" and an "interior" sovereignty; it is used in referring to the totality of the state competences, and also to indicate the supreme state organ in monarchies, namely, "the sovereign"; and it is likewise used to qualify that sentence of a court, from which there is no appeal, the court giving judgment "sovereignly." To add another example, the Swiss constitution states that the "cantons" are sovereign in so far as their sovereignty is not limited by the federal constitution—and thus certainly does not use the word sovereignty to mean something absolute. It would perhaps be wise to drop entirely a word which is so often abused or, at least, to employ it with caution.

*Conclusions to be drawn from the fact that states are directly subordinated to international law:*

From our opinion that the state is a juridical organization subjected directly to international law, it follows that, among themselves (*inter se*), states are coördinate and equal. Every state is legally independent of every other state. Moreover, from this coördination we can, *vice versa*, infer the superiority of international law, *viz.*, that it is placed above the state; for the conception of states as coördinated, each of them having authority only over a limited territory, is inconsistent with their individual sovereignty and necessarily presupposes a set of rules which would define the delimitation of states and which would therefore be higher than the law of any particular state. The obligations that one state has towards another are derived either from the general international law or they are especially stipulated in treaties between states. But the states as a rule remain independent in spite of the obligations they have contracted because above all the contracting parties there is the treaty, which is invested with the character of international law and, as such, binds each state equally and directly. The independence, coördination, and legal equality of the states always manifest themselves in the act of concluding a treaty, but not always in the contents of the treaty. For these contents are sometimes such that they actually do affect independence; *e. g.*, if a state in exchange for getting the protection of another state obligates itself to arrange its legislation according to the will of this other state alone, or to concede to it the right of diplomatic representation, or of making treaties. In such an instance, when a state, by treaty, has parted with its competence to do acts which are subject directly to the cognizance of international

law, we speak of a protectorate. If this relation is irrevocable so that it can not be dissolved by a unilateral act of the protected state then this state has lost its state character; on the other hand, if it can do so it must, in spite of the treaty in question, be considered as a state, because it can, by denouncing the treaty, do something that is directly subject to the cognizance of international law.

The state likewise loses its character of state if it irrevocably transfers to another state the right of appointing state organs, because in this case also its organization is no longer subject directly and solely to the international community but partly at least to a foreign state; this, in addition, affects necessarily its full liberty in concluding treaties. Thus, the coördination with other states has ceased. If, however, a part of its state competences has been transferred to an international organ, the state has lost nothing of its state character, because it remains subject directly to the international community. The Austrian Republic remained a state even after a Commissioner was appointed by the League of Nations in order to control the Austrian finances as an international organ.

From all our inquiries about the nature of the state we can now extract the following definition of the modern state: *The state is a juridical organization of men which is (1) established on a certain territory, which is (2) subject directly to international law, but which has (3) authority over all juridical organizations on its territory save those which depend directly upon international law.*

It might now be well in order to illustrate the relationship between the state and international law to consider briefly the sources from which international treaties derive their binding force.

The contents of these treaties depend upon the will of the contracting states or, strictly speaking, upon that of their organs. However, the binding force of a treaty, *i. e.*, the legal duty to fulfill it, can not derive from its contents, for the contents of treaties are based upon the general supposition that agreements are binding;—just as the binding character of a contract between private persons does not derive from the contract itself, but from the law which states that the obligation is a consequence of the fact that a contract has been concluded. Nor can that which determines the binding force of international treaties in general, be another treaty or contract, for there would immediately arise the question, “what is the source of the legal validity of this other contract?” If we keep within the limits of the legal system and do not push the investigation as far as

to the religious or moral source of the rule which determines the binding force of contracts, we see that it is simply a customary rule which states that contracts do oblige: *pacta sunt servanda*. Thus, the source of the validity of international treaties must be independent of the will of the individual states which is expressed in the contents of the treaty; but it also must be independent of every state norm, even the highest (the constitution); otherwise the law of any state would be above international law, and no state could be bound to keep its promises towards another state, for every state would be able to change its international obligations by changing its own law. Such a notion of a contract or treaty which is not obligatory, would be of no value.

It may be mentioned that the question of how international treaties are definitively concluded (exchange or deposition of ratifications, or the special form of "adherence") is likewise regulated by international customary law; and it is to be observed that even the very controversial question of how and by what law state authorities are empowered to conclude treaties validly is, according to one opinion, directly, and according to another opinion, indirectly (through delegation to state law) regulated by international law.

But, if as we have shown, the state is really subject to international law, how can we explain the fact that international law is not carried out when the provisions of state law are opposed to it, whereas in such cases these provisions ought to be invalid and void? This paradox can only be understood if we consider that the state is a juridical organization which has juridical rules of various degrees and values and which has organs of various authorities, higher and lower. And what we are able to ascertain with respect to the body of state law, namely that not all organs are entitled, indiscriminately, to interpret and to carry out all the law (but that a definite set of organs is restricted in its jurisdiction to a definite grade of law which it must carry out without having authority to pass upon its conformity to higher grades of rules) applies likewise when the state organization comes in contact with international law. If certain state organs, *e. g.*, administrative officials, have no right to control laws and ordinances as to their conformity to the constitution, they have so much the less the right to bring laws and ordinances to the test of international law, *e. g.*, of treaties (unless this right is expressly given to them by the state law). They are, further, not empowered to carry out these

treaties before the latter are moulded into the form of state rules such as alone provide the proper sphere of activity for the organs in question. For this reason international treaties are usually carried out by each state in the form of a law or of an ordinance. A treaty which is approved by parliament has also authority equal to that of a law, though, as is the case in certain states with certain treaties, it may not be issued in exactly the same form as laws are. If, however, according to the constitution of a particular state, international treaties are valid as law without being thus recast, they must nevertheless be published in the manner prescribed for the publication of obligatory state rules. The situation of a state organ with regard to international treaties which he must carry out is similar to that of an executing officer who is not allowed to carry out a sentence when he happens to get unofficial knowledge of it, but who must wait for the writ of execution issued by the judge and who has no power to determine the legality of the judge's decision or sentence. As a rule, only certain state organs have the duty of carrying out international law directly, *i. e.*, of seeing that it is observed and that, for this purpose, it is brought into such form that it binds other organs also; these organs are, *e. g.*, for international treaties, those who concluded them or who are responsible for their conclusion, *viz.*, the head of the state and the ministers. If they do not comply with this duty, they may become liable according to international law. International responsibility may extend to persons who, according to state law, are not responsible. It is also possible for this international responsibility to fall not upon him (or him alone) who has disregarded an important international obligation, but upon someone else also, and even upon an indefinite number of citizens, as is the case when reparations are to be paid or when international enforcement is carried out by means of war. This is one of the numerous examples of liability for another's guilt (the whole nation is liable for the wrong of its government) and, essentially, does not differ from the liability of all the members of a company for the acts of the organs of that company.

Just as in the state every rule ought to be invalid which is in contradiction to the constitution, so also every state rule or act ought to be void which is contradictory to international law. Yet not every organ is empowered to determine whether such contradictions exist. Until the organ endowed with proper jurisdiction to decide upon such contradictions has pronounced his judgment, state law which is contradictory to international law is carried out, just as an unconstitutional

law is carried out until the organ who has authority to examine into it, declares its unconstitutionality. And if he declares that the law in question *is* in accordance with the constitution, it must be carried out, even though, in reality, it is unconstitutional.

Recent developments in international law, it is true, constitute a great step forward in the creation of international organs for the application, the interpretation, and even the enforcement of this law; we mention as relevant to this the various organizations established within the system of the Covenant of the League of Nations and provided for in other treaties also. But we admit that the international organization is not yet as strong as the national organizations; and therefore the guarantees for conformity of state law to international law are weaker than those for accordance between the various classes of law within the state. The problem, however, is the same. As we are able to recognize the unity of state law in spite of the possibility of contradictions, which arise from the fact that different organs are limited in their actions by different degrees of the law, so also we can recognize the same phenomenon in the relation of state law to international law; both, however, in spite of the possibility of discrepancies in their execution, make up only one legal system, for superiority and inferiority are conceivable only in one and the same system.

So we see that law as a system of rules has unity as its universal characteristic; but that the logical possibility of contradictions in its substance, arises from its being carried out on different levels of the whole juridical organization.

## V. THE ORIGIN OF THE STATE

The question of the origin of the state may be understood to comprise two questions: 1) How did the first states in human history originate? 2) How do new states rise out of existing states?

Let us start with the second question. A new state is to be considered as existing if there appears on a part of the territory of a state a new juridical organization which succeeded in claiming its independence of the old organization and which is itself subject directly to international law; this may be effected either by a treaty (as for example between the Irish Free State and Great Britain in 1921) or by revolution (*e. g.*, the Czechoslovak Republic against Austria in 1927). In order that the new organization be directly subject to international law, it is not

essential that it be recognized by other states; it is only necessary that this organization itself recognize the authority of international law, and that means that it subordinates itself to this law. A similar case is the union of two or more states. If the union does not involve "incorporation," that is, the extension of the jurisdiction of one of the states concerned over all of them, but if, by the act of union, all the state organizations in question are abolished and if, for all the territories now united, a new supreme organization is established, then we must hold, that a new state has come into existence; for if a new state were not now in existence, we should have to determine which of the old, but now united, states had retained its identity as a political organization; this, however is impossible, as it would be contrary to the character of the act of union.

As every real state is directly subject to international law, the character of the new union would have to be decided according to international law (by means of international treaties); it is very desirable that these treaties make clear whether a "new" state, comprised of all the old states, had arisen or whether one of the "old" states had continued its existence in an expanded form. It would be highly important to have this decision made especially because of questions which might arise in the future concerning the validity of international treaties and also of other obligations and rights which were valid before the union was formed.

At the same time that we give our definition of the state we give also an answer to the question: When does a state cease to exist? Its existence ends when, for any reason whatsoever, it ceases to be directly subordinate to international law.

A definite and general answer, however, cannot, it appears, be given to the question propounded at the beginning of this chapter; the main reason for our doubts is that the origin of the first states involves facts with which we are unfamiliar, at least in the great majority of cases, for they came to pass in prehistoric times. Nevertheless, many theories regarding the first realization of the idea of the state have been advanced. These theories can, in general, be summed up in two opinions: 1) That the family is the source and the prototype of the state; 2) that the state owes its existence to a contract among individuals.

The first opinion places the origin of the state in a society whose authority was derived from nature itself, namely the family; it was such a society which, according to them, then extended its own organi-

zation to other families, clans, tribes, etc., even using force (war) when necessary; it is because force has been employed for this purpose that one speaks of the "origin of states through wars of conquest." The second opinion tries to explain the origin of the state on the basis of individual self-determination and personal liberty without taking into consideration any authoritative natural society: The contract which creates the society (social contract), creates the state also. The first opinion, starting with the natural fact of men living in common in a traditional society, the family, has a rather conservative tint; whereas the second opinion, starting with the individual human being, isolated, unbound and free, offers support to new ideas, revolutionary movements, reforms and abandonment of traditions.

No wonder that both opinions—having their source in two contrary tendencies of human nature—are as old as theoretical political thinking. According to Aristotle the first society of men which was necessary for the very continuance of life and therefore natural, was the family. "But the society of many families, which was first instituted for their lasting, mutual advantage, is called a village, and a village is most naturally composed of the descendants of one family . . . And when many villages so entirely join themselves together as in every respect to form but one society, that society is a city, and contains in itself, if I may so speak, the end and perfection of government: first founded that we might live, but continued that we may live happily. For which reason every city"—in our time we should say "state"—"must be allowed to be the work of nature, if we admit that the original society between male and female is; . . . Hence it is evident that a city is a natural production, and that man is naturally a political animal, and that whosoever is naturally and not accidentally unfit for society, must be either inferior or superior to man . . . but he that is incapable of society, or so complete in himself as not to want it, makes no part of a city, as a beast or a god."<sup>3</sup>

We can discover, on the other hand, the idea of a social contract in a very ancient doctrine advocated, as Plato relates, by the great Greek philosopher Protagoras and, after him, by the sophists. According to this doctrine men by nature do not live in society; it is only experience, showing that each alone is too weak, that has induced them to unite. But in the first union it was the natural force of the individual, and so the right of the stronger, that ruled. But this condition has become intolerable. Men therefore contract to respect the

<sup>3</sup> Aristotle, *Politics*, Book I, Chapter II, translated by William Ellis.

rights (and that means the interests) of each other; thus they unite once more by law. This is the essence of the theory of Protagoras and, in general, of the idea of men uniting by a contract; this idea appears in the thoughts of many political philosophers of antiquity, the middle ages and modern times. Especially in the middle ages and in modern times up to the nineteenth century did this theory prevail; it appears in the writings of St. Augustine, Nicholas de Cusa, Hugo Grotius, Pufendorf, Thomas Hobbes, John Locke and many others, and finally in the work of J. J. Rousseau. Arguments in support of this theory served not only to defend the rights of men, which are prior to those of the state, the liberty of the citizen and the sovereignty of the people, but also to defend the absolute rule and the sovereignty of the king. The theory in question has been expressed in various juridical constructions and combinations of one, two and even three "contracts." We can still find traces of this doctrine in the modern theory of "acceptance," according to which the law is not valid before its acceptance by the people who are subject to it. Be this acceptance believed to be the consent of each particular individual or of the majority, or be it conceived as an approval given in advance to all the acts of the state authority,—we can always see in this demand for a concordance of wills a similarity to or even an identity with the theory of the social contract. This theory was championed in the most brilliant way by J. J. Rousseau in his book *Du Contrat Social*. Owing to its convincing explanation of ideas, most of which were known earlier, this book became the theoretical basis for the great French Revolution, just as John Locke, the great predecessor of Rousseau, had, a century earlier, given in his writings a theoretical justification of the English Revolution. Rousseau says that men have put an end to the state of nature in which each one had no other resource than his personal force, by entering upon a social contract. Though the terms of this contract may never have been declared expressly, they, nevertheless, are tacitly recognized; they are the same everywhere. If this contract is violated, everybody regains his natural liberty. The conditions of this contract can be reduced to this one term: everybody surrenders himself with all his rights to the community. So the situation of all is the same, and the union is complete. Each member of the society gains over every other member the same right that he concedes to this member over himself; thus everybody gains the equivalent of what he yields but, besides that, also a greater power to keep what he possesses. Such an act of union creates that collective unit which we call the state.

But what Rousseau avers, *viz.*, that the terms of the social contract are accepted at least tacitly (and this is also the essence of the modern theory of approval) does not agree with the facts. With regard to his statement that to settle on the territory of a state indicates a willingness to be a member of that state,<sup>4</sup> it must be remarked that this is true only in certain cases. The mere act of settling on a territory need not indicate more than the mere will of the settler to dwell on it. By this act he is subjected to the laws of the state in question regardless of his own wishes. Moreover it is possible that he may not even know to what state the territory, on which he has settled, belongs; this might happen within certain sparsely populated states in America and Africa. The weakness of the opinion in question becomes even more evident if we study those cases in which a territory has passed from the hands of one state into those of another. This happens often without consideration of and sometimes even against the wishes of the inhabitants of this territory. Perhaps the flaw in this doctrine is due to an undervaluation of an essential element in the notion of the state, namely the element which qualifies the state as a juridical organization of men, which means that the rules of this organization are protected by force and that they can be enforced even without the consent or against the will of people dwelling on the state territory. Rousseau himself very prudently added to his assertion the remark that it applies only to a free state.

It has been urged against Rousseau that there is a logical mistake in his explanation of the state through a social contract. For whence does the original contract draw its binding force? If this contract is a legally binding act, where is the legal rule that gives a binding character to an agreement of wills? Such a rule cannot exist at the moment when the contract is concluded, because the contract alone is supposed to be the source of the state and of all law. Rousseau, in the opinion of his critics, is running a vicious circle: the law (*viz.*, the contract) creates the state, and the state creates the law. As before mentioned, it seems impossible to construe a general theory of the origin of the state; such of these theories as exist usually contain an ethical or political justification of some state ideal; so it was with Rousseau: behind his social contract there is hidden his own first political doctrine of equality and liberty. But such doctrines do not explain the crea-

<sup>4</sup> "le consentement est dans la résidence" *Contrat Social*, Book IV, Chapter II.

tion of the state; they deal only with the problem why and for what purpose it is to be established. Regarding this question, concerning the principal aims and purposes for which state organization is intended the following may be set forth in broad terms:

States rise, change and vanish because of human aims, religious, national, economic, etc., which are not all constant and permanent. The nature of the material and spiritual goods for which legal protection is desired changes; along with it the substance and often also the territorial reach of this protection, *viz.*, of the legal rules, changes. In times past religious ideas were often a great influence in shaping states. But these have, for our times, largely given place to expanding nationalistic ideas as now more effective instrumentalities of political change. However, it must be remembered that the material side of human life, which expresses itself in terms of economic interests, has always been a major consideration in this respect. There are some who desire that the state organization be only a means of protecting the free sway of the economic interests of the individual which, in their opinion, are sufficiently served when the state takes care of order, peace, security, and liberty for the individual (liberalism)—there are others who desire the state to participate actively in economic life, or even to regulate the production and distribution of goods so that economic concerns may enter, as far as possible, into the competence of the state (socialism). There is the further demand that the state also take care of cultural aims, of education (and that according to a certain view), of religious life, of the moral conduct of its inhabitants (*e. g.*, the ethical ideal applied to state life advocated by several Greek philosophers); if the interference of the state has no fixed limits, then we speak of a "police-state." All these ideas have been actualized often in various combinations. It ought to be stated furthermore that powerful personalities have at times actuated the establishment of states, sometimes merely by personal desire for power and glory, and so were also contributory factors in the complicated process of moulding states. One purpose, however, is after all inherent in every state idea: to render possible human life in common, and as we saw in Chapter I, this aim can be achieved only if the state organization is based upon a certain "ethical minimum." Anarchism, on the other hand, invoking full liberty and thus rejecting every existing form of state organization (*viz.*, organization guaranteed by force) has not, up to now, been able to take actual shape.

## VI. THE UNITY OF THE STATE

The continuity and identity of the state can be understood—as it has already been demonstrated—only from a regulative viewpoint, that is, as a quality inherent in rules considered as valid; this same view must be taken if we want to understand the unity of the state.

The element "men" in the notion of the state is not that which constitutes the unity. The population of a state is composed of various unities, national, religious, professional, etc., which often extend beyond the boundaries of one or even of several states; moreover we can not assume that there exists a unity of wills of men living in the state, meaning thereby a general accord as to the aims and the form of the state organization or even of its validity; political events in every state prove that there is no such unity. Neither is the state territory that element which explains the unity of the state. For why do we consider this territory as a unit? The territory as such is but a notion of natural science; the nature of the territory itself, considered from the geographical, geological or any other standpoint of natural science, bears no relationship to the unity of the state, for it exhibits in one and the same state a multiplicity of forms; land, air and water may be divided into natural units, but as such they have nothing to do with the notion of the state.

Thus, there remains for our consideration in this respect only the element "juridical organization." In fact, this is the only element that allows us to consider the state territory, as well as its inhabitants, a unit. The state territory is that region where the rules of one and the same juridical organization have full sway; these rules join the people of this region together into a juridical community or unity (conf. p. 15 et seq.). The truth of this is not contradicted either by the fact that there are a great number of juridical rules in force in any state or by the fact that the vast majority of the rules in force in one part of a state may differ from those in force in another part of the same state. For all these rules, as different as they may be, form a unity because they all are dependent on a group of supreme rules above which there is immediately international law. The unity of the state therefore means the unity of the law; by which we mean the common dependence of all juridical rules on a group of rules above them, which have authority over the entire state territory, which are subordinate to international

law directly, and which we call "the constitution," because they are the basis upon which all the other juridical rules are established or constituted.

But within the frame of state unity there are organizations subordinate to it, and therefore lower, which have for at least a part of their competences special rules; if these rules are executed independently and—under the condition of legality—conclusively by persons who are appointed according to the rules of this special, and not of the general state organization,—then we have to deal with a special juridical unit. Though they are subordinate to the higher state unit, they appear as individual juridical units, for they can execute their own rules through their own organs, and can, if necessary, do this by means of force. Thus, these organizations administer themselves; they exercise self-government or autonomy; this, however, is in no way incompatible with their being united under the general state unit.

Law (constitutional or international), which, as a set of norms, is independent of the mere lapse of time, joins generations of men in a juridical unit that lasts sometimes centuries and centuries; it is therefore through the law that we conceive the identity, the continuity and the unity of the state.

On account of these qualities and because rights and duties are attributed to the state, we usually consider it to be an "artificial" or "juristic" person; or vice versa: being such a person the state has the mentioned qualities. A juristic person is generally speaking, a group of human beings or a group of things (*e. g.*, funds in trust or objects endowed for public use), or even a group of human beings and of things, which constitutes a juridical unit and to which is ascribed, similarly as to an individual, the capacity of having rights and duties. A distinction is made, according to theory, between those legal persons, on the one hand, which are called corporations and those, on the other, which are called institutions or foundations. This distinction is based upon the fact that, in the case of the corporation, the individuals of the group in whose interests the common administration exists, participate in this administration either directly, *i. e.*, personally, or indirectly, *i. e.*, by means of chosen representatives; whereas, in the case of the institution, the individuals do not participate in the administration either directly or indirectly. This being the case, the state, as a juristic person, must be classed rather as an institution. For it is not highly probable that the first organization of a state is established by a joint resolution of all the people subject to its organization (not even Rousseau claimed

this) and, further, there are even in a modern state comparatively few people who are active members, in the sense that members of a corporation are; nevertheless it is true that the number of active members increased steadily from the times of the absolute monarchy up to the modern democracy. All the people living within the territory of a state are subject to its organization; so also are foreigners, who cannot take active part in the development of the state organization, though, as to other rights, their condition is gradually improving. The development of constitutional law in affording citizens increasing opportunities for participating in the state organization itself, is constantly giving the state a closer resemblance to a corporation; but modern international law is moulding the state into an institution with a large autonomous organization, which functions in the interest not only of its own citizens, but also of aliens and, in general, in the interest of international intercourse, legal aid, cultural solidarity, etc.

As to the question, How can the state, as a "juristic" person have rights and duties? we shall now try to explain what it means to attribute rights and duties to the state as a "person" (without entering into the very intricate theories of "juristic persons"). These rights and duties are:

1. Those which are founded on international law; *e. g.*, by virtue of an international treaty state A claims as a right that state B treat the citizens of state A just as it would treat its own citizens. It is evident that a juridical unit, even if we attribute to it "personality," cannot "claim" or "treat" because only a living being, *e. g.*, a man, can do that. If we say that a "juristic" person does "claim" or "act" then we are using either those two verbs or the term "person" in a figurative sense. The right of state A to "claim" and the duty of state B to "act" in a certain manner, as in the cited example, really means this: Men appointed and authorized according to the rules of the state organization A may apply to men duly authorized by the state organization B with the request that this organization fulfill its aforementioned duty. This duty again is the duty of men, duly authorized according to the norms of the state organization B, to treat the citizens of state A in the same way as the citizens of state B. The independence of the states A and B appears in the fact that the men who, on the one hand, claim the mentioned rights, and the men who, on the other hand, fulfill the mentioned duties, draw the power to act from their own organization, according to which they have been appointed, and not from a

foreign one. As it is thus left to every independent state (or better to say, to its supreme organs) to determine who will execute international rights and duties as a state organ, and as all the members of the state are very often, in a greater or lesser degree, liable for the exercise of these rights and duties,—it would be not only a long-winded and complicated task, but also an unnecessary and sometimes even impossible one, to enumerate all the organs who carry through these “rights” and “duties,” or to mention all the people who are liable in case they are not carried through. Therefore it is for the sake of brevity and convenience that one speaks of the “state” as having rights and duties, because only by the state organization is it determined by whom and how these rights and duties will be executed; so the state is personified as a human being who is obliged or entitled to act according to legal rules. But this we can do only in a figurative sense and for brevity of expression; we cannot understand the real relationship between state law and international law unless we are conscious of “actions of the state” being only “actions of the state organs.”

2. As is generally held, the state also has certain rights and duties by virtue of its own law; according to the so-called “public law” it has the right to demand obedience of its organs, its citizens, and also of other persons within its territory. It is not difficult to see that this obedience is due not to a fictitious “juristic person” standing behind the law, but to the law itself, and that this obedience is completely discharged when they fulfill the juridical prescriptions (which are in reality always commands issued by duly appointed and legally acting organs). As to the duties which the state is supposed to have according to “public law” we must say that these duties are discharged by punctual fulfillment of the duties of state organs towards other people, *e. g.*, by payment of legally fixed sums from an appropriated fund. The rights, on the other hand, which are supposed to be conferred upon individuals by “public law” are simply legal titles for them to demand in a manner determined by law and involving set legal consequences, that state organs execute certain duties defined for them in the law.

3. Finally, the state is spoken of as a civil law person. This touches the pecuniary side of the state organization, for it concerns the state as an enterpriser who builds and runs railways, factories, etc., and buys and sells on the basis of civil law contracts.

In such cases (which, however, do not always come under the cognizance of civil law only, but also under that of public law, for instance

questions of taxes, salaries of officials, etc.) the state is considered as a mass of property, known also as "fisc," which like any other property, enjoys the protection of the law. This mass is furthermore the only fund out of which certain obligations are to be paid.

Taking it for granted that all property must be owned by some person and at the same time understanding that state property is not owned by anybody, the theory deemed it necessary to consider this property itself as a "person," which has property rights and duties. This person is imagined to be only one side of the complete state personality or it is considered, as apart from this personality and also sometimes even as being opposed to it, as a special institution. The juridical idea of ownership, however, does not entirely apply to the case of state property, because the essence of ownership, from the juridical point of view, is that property must serve the interests of a definite person and that this person be able to use it or dispose of it as he pleases. Now, it is characteristic of state property that it does not serve the interests of definite persons who can dispose of it arbitrarily; state property can be disposed of or administered only as provided in certain rules. Private property is legally protected so that free disposal on the part of the owner is insured; state property is, it is true, protected by the same legal means, in order that nobody outside the state administration may appropriate this property, but, in addition to this, it is protected by other legal means also, which prohibit state organs from appropriating it to themselves. Thus, in the case of state property no property right exists at all, because the rule which is the determining factor for property rights, *i. e.*, free disposal on the part of the disposer in his interest or in the interest of another person represented by him, does not apply to it; at the same time the special purpose of state property is protected; this purpose is plainly indicated by the existence of a special administration which differs from the free exercise of property rights. Private property is a term indicating the purpose of a thing as being entirely at the disposal of the arbitrary will of a person (even including the right of destruction). State "property," however is not ruled by any arbitrary will, but by fixed norms which imply a definite kind of administration, so that the legal purpose of the object becomes evident only through its administration. If, *e. g.*, a state organ brings a suit in order to have a piece of ground acknowledged as state property, the claim means that the right of any person to private property thereon is to be denied and that, with regard to the legal management of this ground only such rules are to

be applied as would apply to a special state administration (as state forests and mines); the demand of a private suitor, who claims as his a piece of property heretofore administered by the state, has precisely the opposite aim. If a person sues the state for a sum of money his claim (or the decision of a tribunal rendered in favour of his claim) means that a certain sum is to be taken out of the state treasure or the "fisc" (this being a mass of pecuniary objects administered by special rules) and handed over to the suitor entirely and freely at his disposal, that is as his private property.

Not only state property but any property (*e. g.*, of a church or of a community) that serves a specified and permanent purpose and whose administration is for this reason prearranged has such a character as we have just described. The theory, it is true, has invented a new term, "public property," for application in such cases; but it would perhaps be better to avoid the term "property" altogether whenever there is a question concerning objects whose free disposal in the interest of definite persons is forbidden. It must also be remembered that objects which are under state administration do not form a homogeneous group, but are divided into various groups each of which is administered according to different rules; one set of rules regulates the forests, another the railways, another the mines etc. The "person" of the state is thus subject, at once, to several sets of rules; so, each of these various state administrations, which often are only in loose connection with each other, can be considered as a separate juristic person; and it actually happens that these administrations come into conflict and resort to the courts for decisions. So there might be in some country a state treasury administration which is authorized and even obliged to contest before a tribunal acts of other state administrations which are illegal or prejudicial to the pecuniary interests of the state. Thus one state administration, which has a juristic personality of its own, would be suing another state administration, which has also a juristic personality of its own. So we see how the state splits into several persons under the influence of just that theory by which it was attempted to explain the unity of the state, namely the doctrine of the "juristic person." Therefore it is justifiable to doubt whether it is always necessary and practical to think of the totality of the state organization or of one or more of its parts as "persons" when there is the question of their representation or of their legal defence. To "defend legally" means to ask that a definite kind of administration be acknowledged or be set up. The state organ, by acting so, does not represent a "person"

behind this administration but that administration itself. If for example the state treasury authority sues another state authority before the court, which (*i. e.*, the court) is a state authority too, there are not two different "persons" represented in conflict and there is not a third person, the court, which decides the issue; but there are men, authorized by the law itself, who defend different opinions, different views concerning the correct administration of a certain object; the opinion of the court finally prevails.

The unity of all the branches of state administration appears however in the single state budget and further in the fact that the administrators of all the state administrations are appointed, directly or indirectly, by the supreme state organs and that they are responsible to them. But if a legally existing administration extends its authority even into these quarters, then it has to be considered as an autonomous unit which though subject to the state, nevertheless is distinct from it.

It is not absolutely necessary to make use of the term "juristic person" if we want to understand the unity of the state; but if we do use it we must keep in mind that this is only an abbreviation employed to avoid the cumbersome mental processes implied by the extensive complexities of certain juridical relations; we ought not to allow a mere figure to make obscure to us the real character of these relations.

## PART II. FORMS OF THE STATE

### GENERAL REMARKS

The form of the state, which is, as we know, the supreme juridical organization subject directly to international law, can be determined by a study of the supreme juridical rules which are in force on the state territory. These rules are contained in the constitution, which may be written or unwritten. Amongst these rules we must count, first, those which determine how the constitution can be changed; for thus we determine what is legally the highest power in the country, namely the power which makes the constitution. But in order to understand the form of a state well, we must consider not only the constitution-making power, which is exercised extraordinarily and not regularly, but also those other powers which are determined in the constitution and which are exercised regularly, especially the legislative power which is very similar to the constitution-making power, if it is not identical with it, as in England. The form of a modern state is further determined by the powers of those state organs which settle upon the manner in which the constitution and the laws are to be executed, which develop these norms by issuing other rules pursuant to them, and which give the supreme law a binding interpretation. Finally we must assign also to the head of the modern state and his legally appointed assistants (ministers, state-secretaries) the qualities of supreme organs; for they not only participate in what is concerned with the constitution or the laws issued thereunder, but their powers extend also to the province of international law.

All these powers, taken together, make up what is with greater or lesser exactitude, commonly called "the supreme power"; this power, however, has not always been divided amongst several organs, but was, especially in earlier times, centralized in one organ, which was sometimes a single person and sometimes an assembly of persons who decided by voting. Thus it became customary in very early times to determine the form of the state as monarchy, aristocracy, democracy,—according to the number of persons who exercise the totality of the supreme power. Aristotle says in his *Politics*, Book III, Chapter VII: "It is evident that every form of government . . . must contain a supreme power over the whole state, and this supreme power must necessarily be in the hands of one person, or a few, or many . . .

We usually call a state which is governed by one person for the common good, a kingdom; one that is governed by more than one, but by a few only, an aristocracy . . . When the citizens at large govern for the public good, we speak of a *politeia*." By the word *politeia* Aristotle meant what we today call a democracy; he did not use the term democracy in the same sense as we do, but employed it in referring to a distorted notion of the *politeia* in which the common people rule to the special advantage only of the poorer classes. Similarly, he called a government in which a monarch rules to his special advantage a tyranny; and an aristocracy which has degenerated into a government of a few for the special benefit of the rich an oligarchy. This division of state forms has, in general, been preserved through two thousand years in spite of the fact that some, like Machiavelli, reduced the number of state forms to two, namely monarchy and republic, and that others, like Montesquieu, increased that number to four, namely democracy, aristocracy (the two forms of republican government), monarchy and despotic government. But it seems that Aristotle himself did not consider his division an absolute one, because he says in one passage of his book that we "commonly" call the domination of one person a monarchy, and in another passage that in a democracy the people are the "monarch." It is also noteworthy that there were two kings at the head of Sparta, the Old Greek state. We can find similar cases among the old Germans.

The classification of states according to the number of ruling persons suffices, if at all, only for absolute states, that is, for those forms of government where the "supreme power" is concentrated in one organ, be this a monarch or an assembly of citizens enjoying political rights. In more recent times, however, the opinion has prevailed, that the supreme state powers, in particular the power of making the constitution and the laws, ought not to be exercised by one organ solely, but by several organs acting concordantly which are appointed as representing the opinions of various groups, and that the interpretation of the laws with binding force ought to be made by independent tribunals. The form of the state depends now not only upon the method by which the supreme organs are appointed but also upon the way in which an agreement between them in making the constitution, in issuing laws and partly at least, in directing the state administration, is to be reached. For just these reasons the essential differences amongst modern states remain no more clearly apparent in the light of the generally adopted classification of states into monarchies and republics;

nevertheless there is no objection to keeping the term "monarchy" and the term "republic" as attributes of state forms, which, however, are characterized by still other and more significant elements; these terms serve to explain how the supreme organ, in the sense of the supreme representative of the state, is created.

The manner in which the supreme organs are appointed and in which they coöperate is also the deciding factor in the classification of a state as a unitary state or as a composed state. When these organs are appointed without consideration of the particular divisions of the state territory, then we speak of a "unitary state." We speak, on the other hand, of a "composed state" when the supreme organs are, at least partly, composed of or delegated or appointed by autonomous organizations which are subject to the common state organization. These lower organizations may be formed by people of a certain class, or a certain profession, or a certain descent, as was the case in the medieval feudal state; yet even today there is a growing tendency to let some of the supreme organs be composed not of delegates of the nation in general, but of delegates of particular professions. Such a state would then be composed of, or federated by professions with or without regard to any divisions of the state territory (professional representation; see the chapter on the "corporate state"). It is, however, true that the idea of a composed state has in recent times been carried out mainly only in connection with the principle of territorial autonomy; that means this: The supreme state powers, particularly the power of making and revising the constitution and the legislative power, can be exercised only with the coöperation of the organs (or even of the people themselves endowed with political rights) of autonomous territorial organizations. This happens to be the case especially in those states which came into existence through a union of previously independent states or in which the conditions of their component parts differ considerably from those of each other part. As to the extent to which these autonomous organs coöperate in exercising the supreme powers, there are indeed many differences, ranging from one extreme, the unitary state, through the federal state, to the other, the confederation, a structure which represents a union of independent states and not a single state.

## I. THE STATE WITH A SOLE SUPREME ORGAN WHICH IS NOT BOUND BY ANY LEGAL PROCEDURE (DESPOTISM)

The state organization is despotic when the supreme power is lodged, without constitutional limitation, in the hands of a single organ. However, the mere fact that such a powerful supreme organ exists does not necessarily mean that the lesser powers, which are subordinate to the supreme power, cannot be separate and distinct from each other; that, for example, in such a state the judiciary cannot be, partially at least separate from the administration. If the supreme power is, thus, entirely unlimited, we can hardly speak of the existence of laws or of a constitution. For unlimited power of the supreme organ means: 1) that there is no other organ whose coöperation is necessary in order to execute the supreme power; 2) that the supreme organ is not limited or bound even by his own previous acts, which he can change whenever and howsoever he desires. This means further, that there is no form prescribed according to which the supreme organ creates the supreme rules; he therefore can interfere in or overrule the acts of all other state powers. The only rule, which is at once the constitution and the law, is this: The will of the despot, whenever and in whatever form expressed, is valid as law.

This was the state form of several monarchies in earlier times. But it would be inexact to say that this form can exist only in monarchies. Despotism exists whenever one organ possesses the supreme power to an unlimited extent, whether or not that power be hereditary as is the monarchical power; for instance the president of a republic or a cabinet minister who becomes a dictator can be a despot. Likewise a parliament can acquire despotic power; and as an example we mention the French Convention which existed from 1792 to 1795. And finally even the people themselves or rather one class of the people can become despotic; in such cases we speak of a military dictatorship or of a dictatorship of the proletariat, which is, according to some, a preparation for the socialistic state. The supreme power in a despotic government is, although without limits vested in the despotic organ, so far organized that it is at least known who exercises this power. For this reason we must consider the despotic government, since it is not an anarchy, as being within the scope of a classification of state forms. There is, it is true, no legal security in a despotic state; therefore Montesquieu says that the principle of despotism is fear.

## II. THE STATE WITH A SOLE SUPREME ORGAN WHICH IS BOUND BY LEGAL PROCEDURE

### 1. THE ABSOLUTE MONARCHY

In such a state the monarch alone holds the supreme power and his will is the supreme law; but before it can be regarded as law, this will must be expressed according to a definite form. It follows from this that the monarch is not allowed to change in whatever way he pleases the laws which he has given; he can change them only by following a set procedure. This procedure might be, for example, that he must, before giving a law, hear the advice of ministers or even of an elected body, and further, that his commands must be published in some prescribed manner before they can have the force of law, etc. The stability of the law in the absolute monarchy is, to a certain degree, secured by these forms alone. One is forced to admit here that the absolute monarchy in some of the most civilized European countries, as in England, France and Germany, has created a good administrative organization which has been adopted not only by later monarchies but also by republics which were established on the same territory. The absolute monarchy has besides left a precious heritage in the form of excellent codifications like those of the "Code Civil" of Napoleon and the Austrian code of civil law.

There is, however, one great danger in the absolute monarchy; for the legal rules therein are ultimately dependent on the monarch himself, who is bound, if at all, only to hear the advice of other organs; and though he may be bound to observe certain forms in doing so, he himself has nevertheless the power to change the rules. The monarch also can influence without restraint the work of all state organs, each of whom is subject to him; a similar effect can be obtained through his power of interpreting the laws and of thus changing the meaning of them without changing the text,—every organ being obliged to act according to the monarch's interpretation. One of these possibilities has proved in its realization particularly fatal; this is the case of "cabinet justice," *i. e.*, a judiciary which was not conducted independently, but according to the direction of the monarch. On "caesaristic monarchy," see p. 121.

## 2. THE ABSOLUTE REPUBLIC (DEMOCRATIC AND ARISTOCRATIC)

In this state form all we have just said about the monarch can be applied to the people. We speak of an "aristocracy" when the ruling group of people is small in number and when its members are qualified by wealth or by birth or by profession (*e. g.*, ecclesiastical or military persons of a high rank); and of a "democracy" when this ruling group is numerous and not so qualified.

The will of the people (*viz.*, of the ruling group) is the supreme law; and the consent of no other state organs is necessary. The assembly of the people convoked in an established manner decides all important questions and exercises the supreme power alone and directly by voting. In the assembly everybody has equal rights; the idea of representation of the people is entirely absent. Officials, as far as they are needed, are appointed in a way that insures the perfect equality of all citizens. Therefore the only means of appointing them are by lot or by "each one taking his turn"; that means that it is left to chance who will exercise official duties or that these duties are performed by everyone in turn. All are considered as equally capable. The officials are not elected; for the idea of elections means that the best are chosen out of several and this involves the idea that all are not equally capable. Election recognizes, in contrast to complete democratic equality, the existence of some aristocratic principle. Aristotle says in his *Politics*, book IV, chapter 9: "It seems that appointment of officials by lot is in conformity with democracy, and appointment by election, with aristocracy."

Some ancient Greek states were absolute or direct democracies, *e. g.*, Athens during the time of Pericles; this was also the case with Rome in earlier times. But even in these states equality was accorded only to fully qualified citizens and not to all inhabitants. Serfs and aliens, as well as women and children, were excluded from participation in government. Only the adult male citizen participated in government. Equality in the sense of the right of participating and voting in the people's assembly and of exercising duties as an official was thus limited to a comparatively small group of the entire population; therefore, from the viewpoint of modern democracy, which does not recognize slavery and which accords political rights, at least in part, to women, we would consider the ancient democracy rather as an absolute aristocracy.

This form of state did not last long. At the end of the ancient era there was none and during the middle ages there were only a few

examples of direct democracies and aristocracies (some Swiss cantons and some towns).

In recent times, however, Rousseau advocated the direct government of the people. This was in consequence of his theory of the supreme power of the general will which cannot be either transferred or delegated. In his opinion, the elected deputies can prepare laws but they cannot finally make laws. Rousseau's opinion was perhaps influenced by the organization of some cantons in his Swiss country. These were the cantons *Uri*, *Glarus*, *Unterwalden* and *Appenzell*, where the people's assembly, the so-called "Landsgemeinde" performs the highest governmental acts insofar as such acts enter into the power of the canton which is a part of the Swiss federal state. But even without taking into consideration this restriction the small Swiss republics referred to are not in the same degree absolute and direct democracies as were the ancient ones; for their officials are elected and there are, besides the supreme organ, *i. e.*, the people's assembly, still other bodies (Landrat, Kantonsrat, Grosser Rat) with important powers.

The direct democracy does not fulfill modern needs. The assembly of the people would be too large, too unwieldy and thus unequal to the task of solving complicated problems. Direct legislation and government by the people could not, in its pure form, be maintained even in the mentioned Swiss cantons in spite of their smallness.

The absolute organ, unable of course to effect all the business of the supreme power, must appoint agents to substitute for him. Substitution or delegation is not in itself opposed to the idea of absolute government carried out by one organ, provided that the delegated organs are bound to obey the orders of that organ by whom they are appointed and for whom they substitute. Such was the situation of the officials in the real type of absolute monarchy. Their status of officials of the monarch changed only slowly to the status of state organs who were subservient to the law; this change took place first in the status of judges. We notice in the absolute aristocratic republic also the institution of substituting deputies with a so-called "imperative mandate." Under such a system the organ which gives orders and delegates power remains absolute, because his substitute is responsible to him and obliged to obey his orders. The logical consequence of this situation is that he can recall his substitute. The voters in some Swiss cantons can indeed recall the whole legislature, and, in some cantons, even the whole executive body elected by the people (the governing council). In some of the North-American states the voters have the right to re-

call all elected organs, legislative (the individual representatives), administrative, and judicial.

But there is another remaining phase of the absolute democracy which in a considerable number of modern states is of still greater importance: the "referendum," *i. e.*, the direct coöperation of the people in legislation. This coöperation, however, is commonly exercised only in connection with the legislative procedure of elected parliaments and only in the form of people directly voting on projects of law; there is no common deliberation as there is in the direct democracy.

But before we deal with this remaining phase of absolute democracy we must remark that the state form described as an "aristocratic republic" has not vanished entirely. If, as we shall demonstrate later, we consider as a republic any state whose head is elected, then we had best classify a state whose head is elected by a small group of men (who, however, do not hold their power through election) as a kind of aristocratic republic—and that even in the case when the elected head, through his election, is endowed for life with an absolute power; such a state, though still a republic, is on the verge of being an absolute monarchy. A state of this kind has only recently been created, *viz.*, the State of the Vatican City, established in 1929 (see the last chapter). For the head of this state is for the time being the Pope of Rome, who is elected. Though as the head of the Roman Catholic Church he wields the spiritual power during his life-time, and, in consequence of it, also the supreme temporal power in the State of the Vatican City during the same time (Art. 1 of the fundamental law of June 7th 1929 stating: "The sovereign Pontiff, sovereign of the State of the Vatican City, has the plenitude of the legislative, executive and judicial power"), we hold this state to be an "aristocratic ecclesiastical republic" and not a monarchy, for its head comes into office not by way of heredity or appointment by its predecessor, but through election by high ecclesiastical dignitaries (cardinals); and during a vacancy in the Holy See, according to the article quoted, the power of government in the State of the Vatican City belongs to the "Sacred College" (*i. e.*, the college of cardinals, which also elects the Pope); but it can legislate only in cases of emergency and for the period of the vacancy, such legislation of the sacred college retaining its effectiveness only for that time; however, if confirmed by the next Pope elected, it continues to be in force.

But this classification of the Vatican State and of its head as the

wielder of temporal power is not meant to extend to the spiritual power of the Pope as the head of the Roman Catholic Church, which power he possesses not *jure humano* but *jure divino*.

### 3. THE REFERENDUM (A LINK BETWEEN THE DIRECT AND THE INDIRECT DEMOCRACY)

"Referendum" in the sphere of constitutional law means the direct coöperation of the people in deciding important questions, especially such as concern the exercise of the supreme power (revision of the constitution). Referendum literally means: to be reported. This term is also used to indicate the report by which an inferior organ requests of a superior instructions for settling cases that he can not settle by himself.

The idea of the referendum is connected with the idea of the social contract, which is that the fundamental law of the state organization must be fixed by agreement of the entire nation. Thus we can understand that Rousseau, the champion of the direct and absolute democracy, advocated the principle of the referendum: "Sovereignty cannot be represented for the same reason that it cannot be transferred. The essence of sovereignty is the general will; will, however cannot be represented; it is itself or it is something else! There is no middle way. The delegates of the people therefore cannot be its representatives; they are merely its commissioners; they cannot settle any question definitely. Any law that is not ratified by the body of the people is no law at all. The English nation thinks that it is free, but it is wrong. It is free only when electing the members of parliament; when they have been elected, the people are slaves, they are nothing."<sup>1</sup> The first French Constitution of the year 1791 did not, in this respect, adopt the teaching of Rousseau, but that of Montesquieu, who pleaded for the principle of representation; the Constitution of 1793, however, was submitted to a vote of the people.

In the United States the referendum is adopted for the revision of the constitutions of the particular states, members of the Union. If a total revision is proposed by the ordinary legislature then in most of the states the people must be asked to decide whether a revision is to be made or not; if the answer is affirmative a special convention is elected and at this a draft of the new constitution is drawn up; this draft must be again submitted to the people for final approval. In

<sup>1</sup> *Contrat Social*, Book III, Chap. 15.

the case of an amendment (*i. e.*, change only of one part or another of the constitution) there is no convention, but the acceptance of the amendment by the legislature is often subjected to certain restrictions or conditions such as a qualified majority or a vote of two consecutive legislatures; such an amendment must also have the final approval of the people (except in the state of Delaware).

However, in the federal constitution of the United States, no referendum is provided for. Art. V reads as follows: "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided . . . that no State, without its consent, shall be deprived of its equal suffrage in the Senate." Thus, a revision of the Constitution is made very difficult and complicated, but no vote of the people is required.

Besides the referendum obligatory for revision of the constitution (constitutional referendum) some American states have also a referendum for laws (statutory referendum) of a special kind, especially for those laws which lay financial charges upon the citizens or which engage the credit of the state (financial referendum).

The referendum is very widespread in Switzerland. One of the features of this institution sprang from an old custom in the Swiss "cantons," that the people should be asked to express their opinion on serious questions. Another feature can be traced to a procedure followed by the old union of the Swiss cantons: Every canton sent its delegates to the session of the union with binding instructions; if, however, those delegates deemed it necessary to act in a way which was not provided for in the instructions, they first had to return to their canton and there report; then they went back with their new instructions to the session of the union where the final decision was made. A similar practice obtained in some cantons at the gathering of the representatives of the communities. The ideas of Rousseau and of the French revolutionists gave nurture to these old customs which had grown up in Switzerland itself; in fact, the Swiss Constitution of 1802 was submitted to the vote of the people.

The referendum is called compulsory (obligatory) when it is pre-

scribed by the constitution for certain matters; such a referendum is now required in Switzerland for revisions of the constitution of the Union and of the cantons; in some cantons also it is required for ordinary laws. The referendum which is not prescribed is called facultative, because it is optional; this must be discerned from the consultative "referendum" by which the people upon request of the legislature, express their opinion, which, however does not bind the legislature. Usually we speak of a facultative referendum only when the people are entitled to ask for it, but sometimes also if it is evoked by the parliament. The facultative referendum in the first instance places the right of exercising the veto in the hands of the people, if the majority of the people (*i. e.*, of the really choosing electors) vote against the proposed law. Such is the procedure in Switzerland: The law accepted in parliament is published; but a certain number of voters have the right to ask within a certain length of time that the law be submitted to a vote of the people. When the time has elapsed and no such demand has been made then the law comes into force. If, however, a referendum is required, then it depends upon the result of the vote whether the proposed legislation will become law or not. The official registration does not take place before the people's agreement. According to the Swiss Constitution of 1874, now in force, a referendum has to be held on federal laws or federal resolutions which are not urgent, whenever 30,000 voters or eight cantons desire it. In the year 1921 this provision of the Constitution was extended to apply also to international treaties, which are to be in effect for an indefinite time or for more than 15 years.

Another kind of direct coöperation by the people in legislation is called "the people's initiative." That means that a definite number of citizens have the right to ask that the parliament make a law on a certain subject; or that those citizens themselves can submit such a law. Thus, a definite number of citizens have the right of initiative, which, under the representative system is vested only in the government and in the members of parliament. In many states of the United States of America the initiative is adopted for amendments of the constitution as well as for ordinary legislation; this initiative may be either "indirect," *i. e.*, that the legislature must act on it first, or "direct," *i. e.*, that the popular vote is taken directly upon the initiative. Popular initiative and referendum exist also in many municipalities of the United States of America. In the Swiss cantons the "people's initiative exists and is employed in amending cantonal constitutions and also, to some extent, in ordinary

legislation; but in the Swiss federation it is employed only when an amendment of the federal constitution is in question. In 1891 the referendum was combined with the people's initiative in the following way: A total revision of the federal constitution can be made by the federal legislature, if both its houses, namely the national council and the state's council, agree.

But when only one chamber (and not both) agrees to a revision of the constitution, the question of revision or no revision must then be brought before the people. This also holds when a minimum of 50,000 Swiss citizen-voters demand a total revision (and thus exercise the right of initiative). If the majority of voting citizens cast their vote for a total revision, then both chambers have to be elected anew in order to draft a new constitution. But in no case can any revision come into force until it is accepted by a majority of the cantons and of voting citizens. A partial "revision" (amendment) can either be made by the federal legislature or brought about by the people's initiative, *i. e.*, on the demand of 50,000 citizen-voters that certain articles be changed or new articles inserted; the form of the initiative is either a general suggestion or an elaborate draft. If only a general suggestion is made, then the legislature must work out a draft in accordance with the suggestion, provided, however, that both chambers accept the suggestion. If they do not do so, then the people must be consulted; then if the people vote in favor of the amendment, it must be worked out by the federal parliament according to the people's opinion.

The partial "revision" also becomes effective only when it is finally accepted by a majority of voting citizens and by a majority of the cantons; this rule applies likewise when the initiative has been made in the form of an elaborate draft and when the federal parliament has accepted it; if, however, this body does not approve the draft, it may, when it submits the draft to the vote of the people and of the cantons, propose that they reject it, and it may even at the same time submit a new proposal; but in any event the aforementioned majorities decide the question finally.

The German Constitution of 1919 also adopted the referendum and the people's initiative as methods of legislation. There are two legislative chambers: the "national assembly" (Reichstag) and the "state council" (Reichsrat), the former being representative of the entire German people and the latter of the particular German "countries." The rôle played by the referendum in case of a disagreement between

both chambers will be explained in the chapter dealing with the federal state (p. 99). The President has power to submit to the people's vote any bill passed in the "Reichstag" if he does so within one month. But a resolution of the "Reichstag" can be annulled through a referendum only if the majority of those who have the right to vote take part in the referendum. A bill, whose publication has been postponed upon the proposal of at least one third of the "Reichstag" (for two months), must be submitted to the people's referendum if one twentieth of those who are entitled to vote express such a desire. If a bill proposed by one-tenth of those entitled to vote (initiative) is not passed by the "Reichstag" without change, the whole question must be decided by a referendum. However, the President alone may call for a referendum on certain bills of a financial character. The constitution may be altered: 1) By the legislature; but, a two-thirds majority is required, and, in the "Reichstag," in addition, a quorum of two-thirds. 2) By means of a referendum which must be held upon the initiative of the people, duly expressed; but, to amend the constitution, a majority vote of all those who are entitled to vote, is necessary. A referendum, moreover, must be held if the "Reichsrat" objects to an amendment of the constitution passed in the "Reichstag" and if it asks for a referendum within two weeks. Referendum and initiative of the people have been adopted also in the particular "countries" of the German Empire.

These methods, which permit the people to legislate directly, are now provided, in some form or other, in the constitutions of many states. This has been brought about in a number of countries since the World War, *e. g.*, in Austria; according to the constitution of the Czechoslovak Republic of 1920 the government, if unanimous, has the right of submitting government bills which the parliament has rejected to a popular vote; this, however, does not apply to government bills on constitutional amendments.

It seems that these methods have been favored by the development of democracy in recent years. The chief argument advanced for them is that, through direct legislation of the people, a check is placed on the arbitrary power of parliament. But it has been advanced against them that while the mass of people are fitted to elect legislators, they are not fitted to vote on bills. It is interesting to note that in some countries the referendum has shown itself to be rather conservative.

### III. THE STATE WITH SEVERAL SUPREME, COÖPERATIVE ORGANS

#### *A. The Older Form: The Feudal State*

##### 1) The Feudal Monarchy

In the exercise of the supreme power, the estates in the feudal monarchy were limited by the monarch, and the monarch by the estates. The estates, however, were also limited amongst themselves, by each other. These estates were made up of organized classes, namely the nobility, the clergy, the townspeople, and sometimes also of the peasants; their members enjoyed special rights (privileges); to the rest of the population, non-members of the estates, were not accorded political rights; their dependence upon the estates had the character of a bondage. The estates were separated from each other. It was very difficult to transfer from one estate to another. In some estates membership was determined by birth; hence most of them, including the townfolk ( " bourgeoisie " ) had an aristocratic character. The estates differed from each other in privileges and social rank. Some of them were further divided internally; there was, for instance, the higher and the lower nobility ( gentry ).

In the earlier period of the feudal monarchy, only members of those estates which were interested in the subject under discussion attended or were even allowed to attend the general deliberations with the monarch. But in the later period the members of the particular estates became so numerous that it was impossible for all of them to come to these gatherings; they therefore elected and delegated deputies. These deputies represented the interests of their fellow-members (belonging to the same estate) who gave them instructions under an imperative mandate and who could also recall them; thus, they were not representatives of the interests of the whole state.

The other factor, a rival of the estates, was the monarch. He asked for public needs certain tributes from the estates which, however, were, as a rule, willing to meet his desires only in exchange for various concessions.

The more the monarch asked (especially money and soldiers), the more of his power he was forced to yield to the estates. The mon-

arch, on the one side, and the estates, on the other, thus resembled two bargaining parties. As there were no taxes in the modern sense, the monarch was obliged to provide for the necessities of the state either with the revenue from the domains (crown-lands), or with what the royalties (certain rights connected with an income) yielded or, in an extraordinary way, with the grants made by the estates. Governmental power, in the modern sense of the term, was exercised extensively not only by the monarch but also by the estates. They demanded and collected taxes from their subjects; they had their own armies and sometimes even their own legations in foreign countries. They defended the interests of their class (order) against the monarch, called to account his counselors, and even fought with him. At any rate, they were to a great extent independent of the monarch and exercised administrative, military and judicial power over their subjects; only the highest jurisdiction was reserved to the monarch, but even this not without exceptions. In these struggles between the monarch and the estates one or the other finally was returned the victor. If the monarch won, then the feudal monarchy was turned into an absolute monarchy; if the estates won, then the feudal monarchy became a feudal republic. The first was the destiny of the French Kingdom, the second, of the German Empire.

## 2) The Feudal Republic

This state form differs from that of the one just discussed in the fact that the powers of the estates in this case are not limited by monarchical powers; in the final analysis they alone exercise the supreme power. The feudal republic exists even in the case when the estates elect a head of the state and call him "king" or "emperor." For these "kings" do not acquire their power in a hereditary way as real monarchs do, and do not transfer it in this manner. On the contrary they, as well as their successors, are elected like presidents of a republic. The eligibility was, it is true, limited to the members of certain estates or even of certain families, and the electors often were the representatives of the most eminent estates only. But it is just for this reason that such a state form must be classified as an aristocratic feudal republic. This applies especially to the German medieval state, not only because many of the German emperors were entirely dependent upon the estates, especially upon the highest ecclesiastical and secular peers, but also because those peers elected the emperor (peer-electors).

*B. The Newer Form: The Modern State*

## a) The idea of representation and of separation of powers

## i. On representation

The absolute monarchy in France and the feudal republic in Germany were both products of the antagonism between the monarch and the estates. In England this antagonism evolved in a special way and, finally, brought forth institutions which were determining factors in the formation of the modern state. The struggle between the monarch and the estates need not always culminate in complete victory for one side or the other. It can lead to compromise, a change of attitude, not only toward each other, but also toward the people whom they govern, so that they cease to consider the administration of the state as their personal right and at length subordinate themselves to the interests of the state in general. Thus public affairs cease to be performed primarily for the benefit of the person who performs them; the right turns into a duty, the power or authority becomes service, monarch and estates begin to consider themselves as members of *one* great, common organization. This change of attitude has been briefly expressed thus: that he who formerly was vested with rights became an organ of the state bound to work for public, and not for private, interests.

One of the most important factors in this process was the gradual wane of the imperative mandate which has been, of course, for a long time an institution in England as well as in other feudal countries. Owing to the increasing volume of state business, the feudal parliament, which was bound by imperative mandates, was in many cases unable to transact all its business or, if it really did finish its work, could not give an account of it to its constituents. The instructions (mandates) therefore became very broad; the delegates of the estates gained more freedom of action; but in spite of the fact that the delegate had no mandate for a particular question, the fiction that he represented the will of the people who elected him was maintained. Not only the number but also the character of the agenda was such that they could not always be performed on the basis of binding instructions. The English parliament was not merely a legislative assembly but occupied itself, and had done so from very early times, also with important administrative and judicial matters. It is very likely that amongst these questions were some in which not all

of the constituents of the delegates, who dealt with these questions, were interested. But even when they happened to be interested, their wishes could not be taken into consideration to the same extent as in questions subject to legislation, because legislative work permits of a greater use of discretion than administrative or judicial work. The administration and the judiciary work on the basis of law already in force; for this reason administrators and judges appear to be representative of the law to a greater degree than the legislators insofar as the latter are not so strictly bound as the former. Now, it is just this legal constraint which is the discriminating mark of the state organ. If a man in performing one part of his business is conscious of his obligation to observe objective law and the common interests expressed by the law, it is only natural that this consciousness will reassert itself when he is doing other work with which he is entrusted, for instance legislation. This bit of psychology must be taken into consideration in dealing with the lower as well as the upper chamber of the English parliament; as to the latter, one would perhaps be inclined to think that it represents certain classes, especially the nobility, or even, that each Lord represents only himself. Yet, the House of Lords was in very early times and is still now the highest tribunal in the land. As for the House of Commons, we must not forget that there were mixed up in it members of the lower nobility and of the townfolk (burghers); for these reasons alone the house was compelled to represent broader interests than the interests of one class alone.

The change in the situation of the members of parliament from mere deputies of their constituents to state organs is reflected in a very characteristic manner in the financial side of their profession, that is in the question of who pays their expenses. In the beginning of the parliament (Edward I. 1272-1307) persons who did not have the franchise were exempt from contributing payments for their deputies. Petitions were presented several times beginning with the reign of Edward III. (1327-1377) until Henry VIII. (1509-1547) asking that the sum due for the aforementioned allowances be apportioned among the entire population of each county. In the 14th century the idea gained ground that the contributions for the payment of the members of parliament are a common tax that is to be paid by the entire population of the electoral district. And so the idea arose that the deputy is the representative of all the people in his electoral district, and not only of the electors. It is difficult to say what in this process was

the cause and what the effect (the same difficulty appears in many other questions of historical evolution);—whether the conception that the deputy represents the entire population was the cause for the population having been considered obliged to remunerate him,—or whether the fact that the entire population paid these expenses begot the idea that the deputy is the representative of the entire population. One could urge the following argument for the latter explanation: The allowance, especially because of the great travelling expenses, was very high, and this, of course, was true particularly in countries a great distance from London; the local population was afraid of such a burden; for just this reason some remote counties sent no delegates at all to parliament; but in allotting these sums to a great number of people relief from the burden was found. The connection between the payment of parliament members and the idea of representation is illustrated by this incident: when in the beginning of the 15th century, the freeholders who lived on franchises (“immunities”) refused to contribute to the payments of the deputies, they were answered that these deputies were elected just as much for the “immunity” as for the other parts of the counties throughout the kingdom.

Finally also the king was considered as a representative of the nation or of the state. This had already appeared in England in the old distinction between the king and the “crown.” The fictitious and abstract idea of the “crown” means the power represented by the monarch. He does not exercise the governmental powers in his own name but on behalf of and as a representative of the “crown.” The idea of such a representation was applied even to the absolute monarch, and thus so much the more so to the monarchs of a constitutional and parliamentary regime, under which some rights, still attributed to the “crown,” are not exercised by the king, but by other state organs.

The institution of “imperative mandates” was set aside in France later than in England and not, as in this country, through a long historical process, but suddenly by the revolution of 1789. In this year the instructions which the deputies of the estates got for their work in their assemblies (*états généraux*) were abolished. It was said in the constitution of 1791 that the deputies who are elected in the districts, are not representatives of the particular district, but of the whole nation, and that no mandate can be given to them. The French theory of the representation of the nation, which is still very

widespread not only in France but in many other countries also, was created in these revolutionary years. However, the idea of a mandate bestowed upon the elected deputy was not abandoned by this theory but only changed. The elected deputy is not a mandatary of his electors or of his electoral district, but the entire parliament is considered as the mandatary of the entire nation, that is of the totality of voters. The deputy is not responsible to his electors, but the entire parliament is responsible to the totality of voters. Such a mandate is called a representative mandate. The nation is represented by the parliament.

The objection was raised against this theory, that in reality there is no juridical relation between the parliament and the nation and that therefore the term "representation" has only a political meaning. The nation is merely an organ which by means of elections creates the legislative organ (the parliament), but does not give it a mandate. The members of parliament do not represent anybody; they draw their powers directly from the law (this is the opinion of the German Professor Laband). There must be, according to another opinion, some connection between the parliament and the nation, otherwise the parliament would be a kind of oligarchy; the nation, *i. e.*, the voters, are to be considered as a primary state organ, whereas the elected delegates, *i. e.*, the parliament, are an organ of this organ and thus a secondary state organ (opinion of Professor Jellinek). To this opinion, which seeks to establish a juridical relation between parliament and nation, the French jurist Duguit objects, that it comes into conflict with the assertion maintained by its advocate himself, namely that there can be no juridical relations between organs. Duguit holds that the basis of representation is the solidarity of the represented people and their representatives; this solidarity creates "situations" of objective law, but not subjective rights. Hauriou, on the other hand, considered elections to be a kind of investiture, and not a delegation, etc.

Whatever the theoretical explanation of the idea of representation may be, it played an important rôle in the great movement that freed the administrators of state affairs from a mere personal dependence upon those persons who entrusted the state administration to them; this movement changed the officials of the monarch into state officials, that means into organs who, though appointed by an individual, do not serve this individual, but serve state interests, the public welfare. The same idea developed in the English theory and practise concern-

ing the parliament and was better expressed there than in the French theory of the representative mandate. Blackstone said in his *Commentaries*, Book I, Chapter 2, p. 159: "And every member, though chosen by one particular district, when elected and returned, serves for the whole realm; for the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the common wealth . . ." The important point is that public service is emphasized in the work of members of parliament; they do not exercise rights either of their own or of their electors; it is their duty to serve as well as they can the interests of the commonwealth.

What then is the juridical link between the deputy and his electors? It consists merely in the fact that they have elected him. In this case, as in the case of every organization, the question, which person shall be entrusted with a certain task, is extremely important. The voters themselves solve the question who shall serve the public interests (and thus, of course, also the interests of the voters) in legislation and in other parliamentary work. But it is left to the elected member to choose how he shall serve these interests. There is no other juridical link between the voters and the persons they elect, save the election itself. Of course, in solving the question of persons there are indicated also the principles according to which the elected are to serve the public interests; this fact explains why the deputies are politically dependent upon their voters. There has appeared, however, in modern parliaments another dependence, namely party dependence; the liberty of the deputy is jeopardized often not so much by his dependence upon his constituency as by the severe party discipline.

If we seek for a closer or more extensive juridical relation between the electors and the elected than we have just pointed out, then we should either enter into unnatural constructions or we should return to the imperative mandate, which, it is true, has in recent times again been advocated.

The idea of representation is, though regularly, not necessarily connected with elections; in the sphere of legislation this idea means that the interests of those persons who do not participate in the creation of the law, must be considered by the legislator. A customary way of achieving this aim is through elections. The purpose of elections is that those people in whose interest law is created may have an opportunity of choosing the members of the legislative body. Elections, therefore, are an essential institution in modern democracies.

But democracy is not always carried out in all parts of a state in

the same degree. The native population of many "colonies" which are ruled by modern democracies is not represented in the parliament of the ruling country and, therefore does not participate in the colonial legislation. We speak rightly then of the "ruling" country which "possesses" the colony; and the more does this become so, when, as it often happens, rules for the colony are given by decrees of the government and not by laws for which the consent of the parliament is required, democracy thus being limited to the ruling country; colonies, insofar as they lack autonomy, are, in most cases, ruled autocratically.

Democracy requires that the right to vote be granted to the maximum possible number; this means that all those people whose interests can be the object of legislation must have their share in electing the legislators. As, however, the mere creation of rules is not yet a guarantee of their actual execution, the democratic idea has further in many countries produced the power of the parliament to control the execution of the laws in the field of state administration. When this is the case, the heads of the different branches of the administration (the state ministers) are responsible to the parliament. And a further consequence of this system is, that the head of the state, who is not responsible to the parliament, must have, in the performance of his official duties, the coöperation of a responsible minister, this coöperation appearing especially in the minister's countersigning the acts of the head of the state.

The claim that the right to vote may be granted to everybody equally is only a consequence of the principle of general equality before the law which is the negation of the inequality and the privileges of the feudal system. Therefore the principle of equality has been inserted in the constitutions; in connection with the principle of equality and of liberty, its derivative rights as well as the rules which guarantee those rights to the individual have been codified; thus a set of so-called "rights of the citizen" and "rights of man" was formed.

The conformity of the administration to law is secured not only through the responsibility of the heads of the administration but also by the institution of administrative courts; and the conformity of courts in general to law is best secured if they are independent of other powers; this independence has been expressed particularly by the principle of separation of powers.

So we have briefly enumerated a series of institutions which are in relation to each other and which characterize many of the modern

states. We shall now deal in particular with the principle of separation of powers, as it was of great significance in the development of the modern state.

It is worth while remembering that the ancient Romans did not find, as was the case in more modern times, a remedy for absolutistic government in the aforementioned principle. They tried to check absolutism in another and very interesting way: not by dividing the powers of the state amongst several persons and thus giving them separate jurisdictions, but by investing different persons with the same jurisdiction. During the period of the Roman republic there were created for the exercise of important state powers a number (usually two) of equal organs who were invested with precisely the same jurisdiction, for instance two consuls. They were entirely independent of each other, neither being able to command the other; but either could annul the other's acts through the "intercessio."

## ii. On separation of powers

Attempts to classify the spheres in which state organs might exercise the powers vested in them, were made in very early times. Aristotle distinguished three parts of the state organization: 1. Τὸ βουλευόμενον περὶ τῶν κοινῶν. 2. Τὸ περὶ τὰς ἀρχάς. 3. Τὸ δικάζον.

He placed the first part on the highest level. But his classification does not coincide with the modern division of state activity into legislative, administrative and judicial power. According to Aristotle, the first part comprises deliberation not only on legislative but also on those matters, which we would classify as belonging to the administration or to the judiciary. And the second part includes all that concerns the state magistrates in general, whereas the third part is concerned only with the courts called *δικαστήρια*. But Aristotle does not carry out this classification strictly, nor does he demand either that those powers be entirely separated or that they be independent of each other.

Later on, the jurisdiction of the state was classified in other ways. The doctrine which John Locke expounded in his famous "Two treatises of civil government" (1690) is especially important in the development of the modern theory. Locke distinguishes the legislative from the executive power, which latter consists in the execution of laws and therefore is subject to the legislative; he does not speak of the judicial power explicitly, but demands that all powers be subordinate to the legislative power. The third power, according to J.

Locke, is the one which decides matters of war and peace, which makes international treaties, and, in general, handles foreign affairs; it is called by John Locke the "federative" power. He acknowledges besides these powers also the "prerogatives" of the king; namely that in some matters the king can act at his own discretion for the public good without being restricted by the parliament.

The ideas of Locke were not without influence upon Montesquieu who conceived in his book *Esprit des lois* (The Spirit of Laws), published in 1748, his famous theory of the separation of powers. The three powers, the legislative, the executive and the judicial power must be, according to him, separate from each other, *i. e.*, they ought not be concentrated in one person or in one assembly; otherwise there is no liberty. As every one endowed with power is inclined to abuse it, every power must be limited by some other power. Liberty disappears where the legislative power is not separated from the judicial and the executive powers, because there the danger exists that the legislator will enact tyrannical laws in order to execute them tyrannically (that means: laws would be created for the purpose of securing particular administrative or judicial decisions, and, therefore, legal security would be lost). But if the judicial power were linked with the executive the judge would have the power of an oppressor (that means: the judgment which ought to be unbiassed would be warped by the partial views of the executive). Montesquieu conceived the legislative and the judicial power in the same way as we do; but he defined the executive somewhat differently; it comprised, in his opinion, the power over war and peace, of sending and receiving ambassadors and of keeping order at home. Montesquieu did not classify the state powers from a merely theoretical viewpoint, but in order to secure political freedom through a balance of these powers. Neither did he recommend that these powers be entirely severed from each other. He even asked that the chief of the executive power coöperate in the sphere of legislation through the right of sanctioning laws and of summoning and adjourning the legislative assembly. And to the legislative power he gave the right of controlling the executive's carrying out the laws. He admitted also exceptions to the rule forbidding the legislative assembly to exercise judicial power. His first aim was to secure a reciprocal limitation of the principal state activities, and, in the legislative assembly, a limitation of one house through the other.

Whereas Montesquieu advocated the separation of the state author-

ities only to a certain limit, the French Constitution of 1791 in carrying out this principle went further and especially rendered difficult a collaboration of the legislative assembly with the executive; each of these powers had, according to this constitution, full sway in its own sphere; but, therefore, each became isolated. The subsequent constitution of 1793 does not speak of a separation of powers, but of a limitation of public functions; however, the preponderance of the legislative power, apparently under the influence of Rousseau's ideas, was so accentuated, that the executive power amounted to nothing more than the execution of the commands of the legislature.

This constitution was not put into practice. The constitution of 1795 turned back to the principle of a strict separation of powers; but for just this reason serious conflicts arose between the legislative and the executive power. With the ascendancy of Napoleon I. in 1799 this constitution was abolished. Kant (*"Rechtslehre,"* § 48) expressed the idea of a strict separation of the three aforementioned powers in a special form which attributed to each of them the character of a "moral" (we would say a "juristic") person.

The principle of a separation of the three powers has been realized nowhere to such a degree as in the United States of America. The reason therefore is to be found not only in Montesquieu's influence but also in the tradition of America itself. North America (as far as it was colonized) was an English colony until 1776. The English emigrants themselves who went there in the 16th and 17th centuries established constitutions for some of the colonies and these were confirmed by the King; constitutions (charters) were given to other colonies either by the King himself or by the owner of the colony duly authorized by the King. The organization of each colony was fixed in its constitution; it comprised three principal organs: 1) the legislative assembly, 2) The governor, who was to be either elected or appointed by the English King or by the owner of the colony, and 3) the courts. However, the colonial legislature could not, as it could in fully independent states, conclusively fix the rules for the conduct of all the judicial and administrative organs; for there were, above the colonial laws, not only the colonial constitutions, issued or confirmed by the English authorities, but also the English laws. The governor, therefore, could effectively veto laws overstepping the limits just mentioned; and, on the other hand, the English court could ignore such laws. Thus, there appeared an administrative and a judicial power which was independent of the colonial legislature and

which could determine the validity of the colonial laws; so, there existed a real separation of powers. All this was possible, because the final judicial resort was an English tribunal, and because the governor, the chief of the colonial administration, was dependent upon the English government. The higher authority, however—and this is the important point—which was placed over the colonial authorities, was not in the colony, but, beyond the ocean—in England. Just for this reason it appeared that the legislative, administrative and judicial power were, within the colony itself, exercised as separate from and independent of each other.

The Americans wanted to keep this counter-balance of powers even when they seceded from England. After the separation, the governor was, of course, no longer an English official; but he retained the veto power. The supreme courts ceased to be English; so they were now no longer concerned with the question of the conformity of American laws to English law; but they did question their conformity with the American constitutions. However, even on the American continent, the separation of powers could not be carried out effectively at a time when these powers had ceased to be connected with each other through English laws and authorities. And so, although the open collaboration of the federal executive (president and secretaries of state) with the legislature (Congress) is not admitted, there has nevertheless evolved a sort of collaboration in standing committees of the Senate and the House of Representatives. Thus, there was established not merely a connection between the legislative and the executive power, but even a control of the former over the latter. Americans themselves (especially Woodrow Wilson in his book *Congressional Government*) admit that the principle of division or separation of powers, or, as it is also called, of "checks and balances" is far from being carried out consistently in America. We shall see later on (p. 79) that in America even the courts could not be kept aloof from the influence of the legislature.

The principle of the separation of powers has not been expounded theoretically with sufficient clearness; for the reason perhaps that, being contradictory to the unity of the state, it cannot be, in practice, fully actualized. The unity of the state categorically demands the existence of some one power, to which all the other powers are subordinate; but this power need not be exercised by one organ only; it can be exercised by several organs acting in harmony with one another. Only in a sphere below this supreme power can a division of powers

take place; otherwise, the unity of the state, and so the state itself would be put in question. Within these limits, then, the principle of separation may imply: 1) division of work in the state organization; each does that for which he is best fitted (there are *e. g.*, other qualities necessary for making laws than for executing them); 2) the organs of the chief state jurisdictions may be appointed, as far as possible, by organs of their own jurisdiction; 3) these organs to whom the protection of the most important human interests is committed, *viz.*, the judges, ought to be independent in reality; this independence is also to be secured through the procedure of appointment. In spite of the fact that all powers are subordinate to the legislative (or to the constitution-making) power, it is practicable to commit to the judiciary, as the power endowed with the highest guarantees of independence, the control over the conformity of the executive to law (this control can be given to ordinary courts or to special administrative tribunals); and even the question of conformity of legislation to the constitution (especially when legislation is divided into a central and a provincial one) can be committed to a special court.

These requisites embody the historical and political meaning of the famous device of separation of powers. If, however, we want to make a juridical division of the state organization we must do it according to the different levels of legal authority, as will be demonstrated in the chapters dealing with the state law and the state organs.

### 1. The Constitutional Monarchy

This state form evolved directly from the absolute monarchy and is the first step towards the development of the modern state. The theory of the constitutional monarchy was closely connected with the doctrine of the separation of powers by which an attempt was made to keep a balance between the chief of the executive (the monarch), on the one hand, and the parliament elected by the people, on the other. These two organs were to exercise the supreme power conjointly; the monarch, his power heretofore unlimited, was now limited in exercising the supreme power (*i. e.*, in making laws and altering the constitution) by another organ designated in the constitution; for this reason such a state is spoken of as a constitutional monarchy, in contrast to the absolute monarchy. Nevertheless the monarch remained the chief center of the state authority. In the constitutional monarchy, the ministers are more dependent upon the monarch than upon the parlia-

ment. Their dependence appears clearly from the manner in which they are chosen. The monarch is not bound to appoint the ministers from the membership of parliament or with its consent; neither is it indispensable that the appointees enjoy the confidence of the majority in parliament; but they must have the confidence of the monarch. The parliament can, it is true, impeach the ministers for unconstitutional or illegal acts; but politically the ministers are in no way held responsible to parliament. For this reason the control of the parliament over the administration has proved very ineffective; and so it happened that the monarch, in the constitutional monarchy, was able to retain, as far as the executive power was concerned, many of the rights of an absolute monarch; and he continued to exercise these rights unhampered by the responsibility of his ministers, *e. g.*, the right to organize and command the army and the right to grant pardons. For the rest, he is limited even in his capacity as chief of the executive by the collaboration of the ministers, who must countersign his acts. If there is any doubt about which powers belong to the parliament and which to the monarch, the question is settled by the monarch. As to legislation, the monarch holds the position of an organ exactly equal to and concurrent with the parliament. Agreement between both organs is necessary in order to create laws; hence the regular legislation depends as much upon the monarch as upon the parliament. The monarch is at liberty to sanction or not to sanction a bill and, therefore, has the power of absolute veto; as it is, the great majority of laws are proposed by the government itself; they have the so-called "pre-sanction" of the monarch. However, in some constitutional monarchies, as, for example, in Austria before the World War, there existed a kind of extraordinary legislating power, in addition to the ordinary or regular legislation. In urgent cases and if parliament was not assembled, the monarch himself could issue laws provided they involved no change of the constitution and imposed no lasting financial obligations on the state. Such legislative decrees of the monarch, it is true, were issued under the responsibility of all the ministers; also they had to be submitted to the parliament at its next meeting and, if not approved by it, lost their force. But, by means of an extensive interpretation of the constitutional text in question, the monarch, who had the right to summon and to adjourn the parliament, and his ministers were even able to issue without parliamentary vote financial laws and to alter the budget. Some of the fundamental rights of citizens could also, when the state was threatened by some danger, be

temporarily suspended by a similar procedure. It may be mentioned that there has been worked out by Professor Laband, as applying to the constitutional monarchy and especially to the former German Empire, a special theory on the budget whereby, as we shall see later on (pp. 158-9), the power of the parliament was pushed into the background.

The constitutional monarchy has its name from the "constitution" which was given to the people by the monarch; it is thus indicated that not any constitution, but only a certain kind of constitution, is characteristic of the so-called "constitutional" monarchy. Its main features are concessions given willingly or unwillingly by the once absolute monarch to the people and to their representatives, the elected parliament, the preponderant power remaining, however, in the hands of the monarch. So it is easy to understand that this state form prevailed in countries with old, traditional dynasties. Examples are the German and the Austrian empires, both of which vanished in 1918.

## 2. The Parliamentary Monarchy and the Parliamentary Republic

The parliamentary monarchy came into existence in many cases through revolution; *i. e.*, when the people or the parliament repudiated the old dynasty and established a new one. For this reason the parliament, under such a state form, holds the preponderant power. An example of a parliamentary monarchy is England, where, in the time of the revolution of 1688, the dynasty of the Stuarts was deposed and the Orange dynasty established. Institutions characteristic of the parliamentary regime, which was later on imitated by still other nations, developed there during the 18th and 19th century. In England this process was rather slow; the old traditional forms were tenaciously maintained and the new ideas introduced in their guise.

Attempts of the English kings in the 17th century to govern without the parliament, or in opposition to it, failed; also the attempts of the parliament (Cromwell), to rule without the King, failed. The struggles between these two powers, revolutions on one side, coups d'état on the other, showed clearly that the liberty of the parliament and of the nation is jeopardized if the executive power is not answerable for its acts, but also it showed that to fix this responsibility on the head of this power, *i. e.*, the King, is to court dangers just as great. For this responsibility is necessarily linked with punishment or the deposition of the King, which is a political event of far-reaching effect

and which may shake the foundations of the state like a revolution. The question therefore is: How can the responsibility of the executive power coexist with the irresponsibility of the head of this power? The English solved this problem by fixing the responsibility on the ministers, which means this: The ministers are responsible before the parliament as a *court* for illegal acts committed by the King and for illegal acts committed by themselves; and they are, further, responsible before the parliament as an organ controlling the administration for other acts, which, though not illegal, are prejudicial to the state and which have been performed either by the ministers themselves or by the King. An inevitable consequence of this fixing of responsibility is the shifting of political power from the King to the ministers.

English constitutional practice, which has the force of unwritten customary law, has developed three principles which are fundamental with the parliamentary regime:

1) The irresponsibility of the monarch. No court can pass judgment upon the King; in this respect the principle of the absolute monarchy was maintained. The King can do no wrong from a legal point of view. This, however, being a privilege only for the person of the King, nobody can refer to a command of the King in order to justify his own illegal act.

2) The responsibility of the minister for any act, either illegal or prejudicial to the interests of the state, which he has committed or helped to commit, *e. g.*, by countersigning an order of the King. In very early times (14th century) the criminal responsibility of high state functionnaires was realized through the so-called impeachment, that is by accusation which could be brought against them by the lower house of parliament before the higher one; the latter passed judgment. This procedure was used at first only when illegal acts were in question, but in the 17th century it began to be used in cases of charges involving serious political mistakes. The right to pardon ministers who have been condemned was withdrawn from the King in the year 1701 in order that their responsibility might not be circumvented. This responsibility of the ministers, as far as it concerns illegal acts, passed from English law into American and French law and then also into the constitution of other countries. In England, however, impeachment and criminal responsibility of the ministers have lost all meaning. The last who was impeached in this way was Lord Melville in 1804. The impeachment has now become obsolete in England, because a

simple vote of the majority of the House of Commons can turn a minister out of the Cabinet; owing to the elaborate system of political responsibility, a special criminal responsibility before the parliament has proved to be superfluous.

3) Whatever the King does officially or politically must be done in coöperation with a minister (or a responsible member of the Cabinet). This principle was developed from the old custom according to which important acts of the King, in order to be valid, had to be in the form of a letter sealed with certain seals. High functionaries kept the seals and sealed the King's letters with them; thus they became responsible for the legality of the King's acts. This custom evolved into coöperation or at least assistance of the ministers at every official or politically important act of the King, whether it was performed by letter or otherwise. Only thus could the responsibility of the ministers for the legality or political expediency of the King's acts be justified from a moral point of view. This coöperation is expressed in the saying: *The King cannot act alone.*

The aforementioned principles served as the basis upon which the parliamentary system was worked out. The possibility of a conflict between the King and the responsible Cabinet on one side and the parliament on the other is the most remote when the counselors of the King, who at the same time are the responsible administrators of the state power, enjoy the full confidence of the parliament, *viz.*, of the parliamentary majority. This confidence is secured in a high degree when the ministers themselves are members, and in an even higher degree when they are leading members of the majority in parliament. But, in spite of all that, they remain responsible to the King as well; they must therefore also have his confidence, which is assured by the fact that he chooses and appoints them out of the parliamentary majority and with its approval.

This is the kind of government that has been evolving in England since 1688, but only slowly and by degrees. It appeared to be more and more difficult to rule against the will of the parliament particularly because of its budgetary rights. But it was not before 1792 that the Cabinet, which had lost the confidence of the parliament, resigned. In the 19th century the political responsibility of the ministers consolidated more and more; and with this the idea developed that responsibility is not due to parliament as such, but to parliament as representing the opinion of the people. It is therefore not necessary

that a Cabinet retire immediately when it has lost the confidence of the majority in parliament, provided it believes that it is supported by public opinion which will be expressed by the opinion of the majority of the voters. But if the Cabinet does not retire in such a case it must propose to the King the dissolution of the parliament (of the lower chamber); the result of the ensuing elections decides whether this Cabinet shall continue to be in power or not. Such a test, through dissolving the parliament, was first made by Pitt in 1784; at the new elections he gained the majority. So the power to decide in the question of the Cabinet was shifted from the King to parliament and then to the voters.

In England in the last century, the question whether a Cabinet, defeated in parliament, was to remain in power or not, became linked with the question whether and to what degree public opinion was represented in parliament; and with the advance of democratic ideas public opinion proved to be stronger than a parliament which was elected on the basis of a very limited franchise. The franchise had to be extended in order to harmonize parliament and public opinion; this was done through the electoral reforms of 1832, 1867, 1884, 1918 and 1928. Thus public opinion, *i. e.*, the opinion of the politically interested parts of the nation, was enabled to express itself through the elections.

The result of the election ought to show a concurrence of opinion between the majority in parliament and the majority of the voters. But a difference between the opinion of the parliament and public opinion, *i. e.*, the opinion of the majority of the voters, as defined above, can easily arise after the elections and during the period of one parliament. Political parties, as it may happen, change their programme, deputies shift from one party to another, voters change their opinion as expressed at the last election; some voters die or lose the right to vote and other people acquire this right, for instance through attaining to the required age. The political structure of the parliament and of the constituencies or of both may be, for all or any of these reasons, altered in such a manner that harmony between parliament and the voters is disturbed. The parliamentary system therefore demands that the period (term) of one parliament ought not to be too long and that parliament has to be newly elected at appropriate intervals so as to represent the actual voters; the government then must be formed according to the new political complexion of parliament. A further demand of the Cabinet system is that parliament may be dissolved even before the expiration of its legal term, if, in the opinion of the government or of the parliament itself,

its composition no longer corresponds to the political orientation of the voters. New elections prove to be necessary, especially if there arise questions of great importance which were not at issue at the last elections.

Thus, the modern parliamentary system requires not only a concord between government and parliament, but also between parliament and public opinion which has to be expressed: 1) through a sufficiently extended franchise, 2) at rather short intervals, 3) when important problems arise. The head of the state can play an important rôle in this latter respect by taking the initiative for the dissolution of parliament and for new elections. If the government does not see or does not want to see a discrepancy between the parliament and public opinion, then it would be in keeping with the very spirit of the parliamentary system for the head of the state to appoint a new Cabinet whose sole purpose would be to conduct the elections, and this strictly according to the law; after the elections, however, a Cabinet should be appointed which would correspond with the majority of the newly elected parliament. We can also, on this basis, answer the question whether the monarch in a parliamentary monarchy is obliged to sanction the bills which have passed parliament. As a rule, he must sanction them. Only in the case when he thinks that the majority of parliament differs from the majority of the nation concerning the bill in question is he allowed to dissolve parliament in the aforementioned manner. But after that he must submit to the "will of the nation" as expressed in the result of the elections and he must sanction the bill if the new parliament votes in favor of it; he must do so because he could not find a minister who would stand responsible for the refusal of the sanction before parliament. Another and immediate dissolution of parliament could scarcely alter the situation, for the result of the elections, in all probability, would be the same. Successive dissolutions at brief intervals would, moreover, be inconsistent with the parliamentary regime which requires that the work of parliament be not interrupted for too long. Such a situation could not last because parliament must make appropriations annually and must (as is the case in England) re-enact all those laws which are in force for only one year.

In the parliamentary state, not only the conduct of state affairs but also the responsibility for them lies with the ministers. This conduct must have a certain direction and consistency in important questions. The head of the state, in order to secure the homogeneity of the Cabi-

net, usually calls upon the leader of the majority, or upon another prominent member thereof, to choose the other ministers and thus to form the Cabinet. This person then is appointed prime minister or, as he is called in some countries, president of the council of ministers. The prime minister presides at this council (the Cabinet), in which questions of great importance are discussed and decided, represents it, guides it politically and settles differences between the ministers (see p. 243). Corresponding to the unity of the Cabinet is the principle of collective responsibility of all the members for the general policy of the government; but each minister is individually responsible in matters pertaining to his department. As a consequence of the solidarity of the Cabinet all its members must resign if the prime minister resigns, provided he is doing so for important political reasons; as a rule, other officials who occupy politically important posts also resign in this case. Parliamentary responsibility, it may be here observed, does not imply that parliament has authority to give orders to the ministers; it means only that parliament has the right to examine and judge their conduct in the past. But the initiative for action belongs to the ministers.

Parliament in a parliamentary state cannot be restricted in its right to vote the budget, which right is its strongest weapon; for taxes cannot be collected and expenses cannot be paid out of state funds without a budget passed in parliament. The power of raising revenue and of meeting expenses is that ultimate means with which parliament can render powerless a Cabinet in which it has no confidence, and so force it to resign.

In many parliamentary states parliament must be convoked according to terms fixed by law. The closing of parliament, though done by order of the head of the state, is sometimes dependent on certain conditions, *e. g.*, that the budget has been voted; adjournment, however, in some countries is left to the discretion of the parliament.

In France, in the first revolutionary period, the parliamentary regime could not be introduced owing to the predominant influence of the theory of the separation of powers and, later on, owing to the absolutistic government of Napoleon I. This regime was introduced after the fall of Napoleon by a constitution (*Charte*) given by Louis XVIII in 1814. After various revolutions and political changes in the 19th century, the parliamentary regime was established in France again by the republican constitutional laws of 1875, which are still in force. But this regime works differently in republican France than in monarchi-

cal England. The President of the Republic is elected by the parliament at a joint meeting of the Senate and the Chamber of Deputies; this joint assembly is called "Assemblée Nationale." Owing to this election, the President of the French Republic is much more dependent upon parliament than is the King in a parliamentary monarchy. Concerning parliament he has the following rights: to convoke an extraordinary session (which he is obliged to convoke on request of the majority of the members of either chamber); to adjourn parliament, but for not more than a month and not oftener than twice during one session, and to close parliament, without infraction, however, of the rule that both chambers must be assembled five months at least every year; but parliament assembles of itself for the ordinary session; the President has also the power to dissolve the lower house, *i. e.*, the Chamber of Deputies, but only with the consent of the Senate. Up to now this has happened only once. The President has the right to introduce bills in parliament and the right to veto bills voted by both chambers; but if either chamber votes the bill again by a simple majority, then the President must promulgate this bill as a law. The French Presidents never used this veto; perhaps because it would be ineffective without the dissolution of the Chamber of Deputies, for a simple majority is sufficient, as we know, to make the repeated vote of the parliament fit for promulgation as law. The President is politically irresponsible; it is only for high treason that he can be impeached by the Chamber of Deputies before the Senate, which then acts as court. The political responsibility of the ministers is settled in Article 6 of the constitutional law of February 25, 1875, which states that the ministers are collectively responsible before the chambers (of parliament) for the general policy of the government and that each minister is responsible for his own individual acts. They are responsible for the President of the Republic who is politically irresponsible. Thus, the parliamentary regime is fixed. The President can appoint only such ministers as enjoy the confidence of the parliamentary majority. In spite of the text and the spirit of the constitution according to which the President, elected for a period of seven years, ought to be irresponsible, it has several times happened (the last time in 1924) that he was obliged to resign by desire of the parliament (the Chamber of Deputies) before the expiration of his seven years' term. Thus even the position of the head of the state has proved to be dependent upon parliament. The French legislators in 1875 imitated, as to the text of the constitution, British parliamentary government. But it turned

out that such a government developed in a different way in a republic and under a bicameral system, which has, as in France, two chambers which are both constituted in nearly the same manner. What has evolved out of a tradition of many centuries in England, where the irresponsibility of the monarch is maintained, does not work always in the same way if transplanted in other countries. The political irresponsibility of the President of the French Republic could not be maintained in some cases; the parliamentary regime of the British monarchy turned, in France, into a regime of the parliament.

In many European countries the parliamentary regime has been introduced, though in various forms: *e. g.*, in Belgium, Germany, Poland, Czechoslovakia, Roumania, Austria.

### 3. The Presidential Republic

As an example of this form of state, which bears some resemblance to the constitutional monarchy, let us refer to the United States of America. Up to 1776 these states were British colonies. In spite of their separation from England they preserved in their constitution many features of their earlier political life. For instance, they vested in the elected President of their republic approximately the same powers that the English King possessed at that time. The parliamentary regime in England, it must be remembered, was then not yet fully developed; and the English King had much more power than he has today. However, in England political institutions gradually developed in the direction of a complete parliamentary system, whereas government in the United States has remained, on the whole, almost the same as it was when established in the 18th century. This marked stability of institutions as first constituted is due in part to the principle of the separation of powers, which, as we have already seen, found in America conditions peculiarly favorable for its application, and in part to the great difficulties provided in the constitution itself of amending that document. In England, on the other hand, there was no written constitution to hamper the free development of constitutional practice.

But the great difference between a constitutional monarchy and a Presidential republic is that in the latter the head of the state is not an hereditary one but an elected one; and in the United States he is elected for a comparatively short term of four years. He is elected by the people and not by parliament, and therefore is independent of the legislature to a much greater degree than is the president of a parlia-

mentary republic. His power to veto bills voted by the legislature is very great, in as far as such bills as are vetoed by the President must be passed again by both houses with a two-thirds majority in each in order to become a law. The President is commander-in-chief of the Army and the Navy; he makes appointments to all important posts in the federal government,—this, however, only with the advice and consent of the Senate. He has the power to ratify international treaties but no ratification is valid without the consent of the Senate. On the other hand, the legislature is also largely independent of the President; the President has not the right of initiative in legislation and he cannot dissolve Congress. The members of both houses of Congress (of the Senate and of the House of Representatives) are not elected for the same period as is the President. The President has the right to deliver messages to Congress (though usually he does not appear personally); this affords him an opportunity to express his desires to the legislature. But neither he nor the chiefs of the administrative departments participate in the debates of the chambers. The ministers (secretaries of state) do not form a Cabinet; they are responsible only to the President; they are in no way politically responsible to Congress. Impeachment, however, is provided for the President, the Vice-President (who is at the same time president of the Senate) and other high federal officials; the right of impeachment belongs to the House of Representatives; the Senate tries the impeached. The person convicted for high treason, bribery and other high crimes must be removed from his post.

The great power of the President is sustained by the separation of powers, by the difficulty of changing the constitution, by the bicameral system (one house possibly being a counterbalance against the other) and by the high authority of the judiciary which prevents the legislature from transgressing the limits of its activity as drawn in the constitution. On the other hand, the short presidential period and the federal character of the republic check the President and prevent him from becoming a dictator. Though presidential reëlections are not forbidden by the constitution, no President has, up to now, been elected more than twice.

As we have already mentioned (p. 67) a collaboration of the government with the legislature in committees of the Senate and the House of Representatives has developed because of the impossibility of completely carrying out the principle of separation of powers. The legislature has, according to some, thereby gained an excess of power over

the President, whereas still others say that the President has appropriated to himself a dictatorial power contrary to the spirit of the constitution. Whatever the case may be, it is noticeable that the legislative power appears to the executive to be too strong, and vice versa; this is a consequence of the theory of the separation of powers which does not allow the two powers to be in a sufficiently close legal connection.

It is generally held that the judicial power, as the custodian of the constitution, is entirely independent even of the legislature. But, as Wilson writes,<sup>2</sup> the Congress can create new posts for judges in the supreme court and, further, the Senate must approve the appointment of the highest judges; thus the legislature can exert an influence upon the appointment of judges. Also it may change the laws according to which the court has jurisdiction and thus affect cases even while they are pending.<sup>3</sup>

We are concerned in this chapter mainly with the "presidential" feature of government; political institutions in the United States are dealt with in many other chapters of this book, *e. g.*, in the chapters on "The referendum," "Separation of powers," "Confederation" and "The federal state," "Notion and history of the constitution," "Fundamental rights," "Head of the state," "Judicial organs."

In Brazil and Argentina the distribution of powers is similar to that in the United States. The President of the German Republic, though elected by the people and possessing certain important powers, is politically restricted to a considerable degree through the parliamentary system; further, he can be removed from his post before the expiration of his seven-year term by a vote of the people (referendum).

#### 4. The Directorial Republic

The name of this type of republic comes from the "directoriate" created by the French constitution of 1795, which was a board of five persons elected by parliament and in which the executive power was vested; this board (*directoire exécutif*) appointed and dismissed the ministers. The designation "Directorial Republic" has been applied to modern Switzerland, where the highest executive power is vested in a board called the "Federal Council" (*Bundesrat*, *Conseil fédéral*) which is composed of seven members elected by the Federal Assembly

<sup>2</sup> *Congressional Government*, fifth edition, 1889, p. 38.

<sup>3</sup> *Ibid.*, p. 39.

for a term of three years. They must be Swiss citizens and must be eligible to the "National Council" (which is one of the chambers of the Federal Assembly representing the nation as a whole, whereas the other, "The Council of the States," represents the cantons). They are not allowed to pursue any other profession or to hold any other public office, and above all they cannot at the same time be members of the Federal Court or of the Federal Assembly. The Federal Council is present at the meetings of the parliament, and, as a board, has the right of initiative; it can also convoke the chambers for an extraordinary session; but it has no vetoing power and cannot dissolve parliament, to whom it is not responsible politically; the members of the Federal Council do not resign if their proposals are not accepted by the parliament or by the people; they are not leaders of political parties in parliament. Thus, there is no parliamentary system in Switzerland; the members of the Federal Council hold office for a fixed term. The fact that the executive is thus, though elected by the legislature, independent of the latter during the tenure of its office corresponds to the idea of the separation of powers.

The equality of the cantons in sharing in the highest executive authority is in some degree supported by the rule that more than one member of the same canton cannot be in the Federal Council. Each member of the Federal Council is entrusted with the direction of one section of the state administration. Out of the seven members of the Federal Council one is elected by the Federal Assembly to be chairman of the Federal Council for a period of one year; he has the title "Federal President." Neither he nor the vice-president can be elected for two consecutive years. The Federal President represents the state interiorly and exteriorly. He, therefore, is to be considered the highest state functionary in Switzerland; but owing to his short term and to the fact that the Federal Council always makes its decisions as a board, his position is much weaker than the position of the president of other republics. The highest executive and governmental authority is, at any rate, the Federal Council which, on some questions, acts also as an administrative court. But the governmental authority of this Council appears to be, on the other hand, limited to a considerable degree if we compare it with the Cabinet in other countries, because it is in many respects a mere executive organ of the Federal Assembly to which belongs, in addition, the supervision over all its actions.

This system which exists in the cantonal government as well as in

the federal is made possible largely by the peculiar conditions existing in Switzerland. Not only is the executive power divided between the federal and the cantonal government, which even takes care of the execution of many federal laws, but this power, as well as the legislative one, is at last subordinate to the national will as expressed by the referendum. And finally, the sphere of action of the executive in Switzerland is more restricted than in other countries. The administration of foreign and of military affairs in Switzerland, which has the international guarantee of a neutral state, is comparatively simple; whereas it is exactly these affairs which elsewhere comprehend very extensive and highly concentrated powers. And finally, in Switzerland, the executive power, which in many countries appoints the judges, is, in this respect, not so highly charged, for in many cantons the judges are elected either by the people or by the cantonal parliament; and the members of the Federal Court are elected by the Federal Assembly.

### 5) The Corporate State

The characteristic feature of this form of the state is that in some of its important activities it functions as a body composed of associations of men of the same profession ("guilds," "syndicates," "trade unions"). In a corporate state groups of professional men are endowed with special political rights and function essentially as parts of the state; they are state organs. In the corporate state, the territorial divisions, or, more accurately, the communities of men, whose existence is merely a result of their living in the same section of the state territory, recede into the background and lose their importance as political entities, while on the other hand the professional associations spread over the whole state territory, come to the forefront of political importance. Thus, the corporate state bears some likeness to the feudal state (p. 56) with this significant difference, however, that the "estates" of the latter were founded on a hereditary basis and that the great mass of the population was deprived of any political organization, whereas the corporate state of the modern type aims to organize as many of its citizens as possible into corporations.

Although in many states professional associations have almost always enjoyed a certain amount of autonomy and although they were even endowed with political rights in some states, it was not until just after the World War that several of the new constitutions provided for the creation of a kind of parliamentary body entirely on the basis

of the professional association (*e. g.*, in Germany, see p. 198). But there has been up to now only one modern example of organizing the whole nation in "corporations" and of giving these corporations the character of state organs, and that is Fascist Italy. We shall therefore try to give a short sketch of its corporative organization.

By the law of 1926 three kinds of professional groups or, as they are called, "syndical associations" were constituted: workers, employers and free professions (intellectual workers, *e. g.*, artists, etc.). They are organized in 13 national confederations: six of employers and six of employees (each comprising the following activities: agriculture, industry, commerce, maritime and air transport, transport by land and interior navigation, and banking) and a national confederation of free professions. If a syndical association is recognized by the state it represents all the persons engaged in the occupation it stands for, including even those who did not register in the association. Every person thus represented has to pay an annual contribution fixed by the association; and, likewise, the collective labor contracts entered into by the association are binding for all the persons represented by it. And thus, later on, the "Charter of Labor," which is not a law but rather a programme and a solemn declaration, and which was published in April, 1927, stated in its Art. III that, though the forming of professional organizations is not restricted, only that organization that is legally recognized and subject to the control of the state has the right of legally representing the entire body of employers or employed for which it has been constituted; of safeguarding its interests against the state or other professional associations; of entering into collective labor contracts for all belonging to the body, of levying contributions on them.

Issues arising from the application of the collective contracts or from the demands of new labor conditions are settled by special courts composed of judges and industrial experts. Strikes and lock-outs are prohibited under penalties.

A scheme has been further provided to combine the associations of employers and employees of the same occupation in a higher organization, in which all concerned in that occupation have to coöperate, under the supervision of the state, for the purpose of improving and increasing the production of the nation. These higher organizations are called corporations. Their scope is not to represent the interests of a particular class; their province is to conciliate opposing economic inter-

ests, to establish general rules concerning conditions of labor, to encourage the initiative for improving production; briefly, its purpose is to coördinate and organize production. Representing, thus, the general or national interest they are not endowed, as the syndical professional associations are, with a "juridical personality," but are considered to be organs of the state. A central organ of all the corporations, the National Council of corporations, is provided for; and, in addition, a Ministry of Corporations has been created and is the highest organ dealing with questions involving corporations.

The "syndical associations" also have, further, to perform an important rôle in electoral proceedings. According to a law of 1928, each national confederation of the legally recognized syndical associations has to propose a certain number of candidates for the Chamber of Deputies; the same right may be bestowed upon associations of national importance which engage in cultural, educational and kindred pursuits. The number of candidates thus proposed equals twice the number of deputies to be elected. From the list of these candidates the Fascist Grand Council chooses nominees at its own discretion and draws up the final list of candidates, in which, however, it is at liberty to insert, in addition, the names of persons of fame in science, literature, arts, etc. This final list, comprising 400 names, is published and, after a fixed time, submitted to the broad mass of the voters with the question: "Do you approve the list of deputies designated by the National Grand Council of Fascism?" and the voters answer either "Yes" or "No." The whole state forms only one constituency, comprising its entire territory. If a half, at least, of the votes is favorable to the list, then all the 400 persons on it are proclaimed deputies. If, however, a half plus one of the votes are "noes," the list is not approved and new elections have to be held; and in this election only those associations which have at least 5,000 members registered as voters may present a list of candidates, which list cannot contain more than three-quarters of the deputies to be elected. All the candidates on that list which gets the majority of votes are elected. The seats reserved for the minority are distributed amongst the other lists in proportion to the number of votes obtained by them.

Thus, the corporate state, in some respects, resembles a composed state (conf., pp. 84 et seq.); it is not made up, however, of territorial federating units but of professional groups of citizens extending throughout the whole territory and enjoying a certain autonomy, but at the same

time acting as state organs. However, the designation "composed state" is now generally used only for a state whose composing parts are, as will be explained in the next chapter, territorial units, or better, groups of citizens, each group consisting of the population or the citizenry of one territorial unit.

b) *The idea of the composed (federated) state*

1) The Confederation

A state which is not directly subordinate to international law is not a real state, as the discussion of the Protectorate shows (see p. 27). International treaties by which the contracting parties do not give up their capacity of performing acts which are subject directly to the authority of international law, do not affect their characters as states, the treaties themselves being a part of international law. Even in the case when special organizations and organs (bureaus, commissions, tribunals) are created by such treaties, the direct subjection of the contracting parties to international law is not thereby removed, provided that these organizations have an international character; and they have such a character when their existence depends solely upon international treaties and not upon the law of a state. Examples are: The International Postal Union with its bureau in Bern, The International Office for measures and weights in Paris, and also the League of Nations, established in 1919 by an international treaty, with its various organizations, the International Bureau of Labour, the Court of International Justice, etc.

The Confederation is said to be an international organization and is generally defined as a lasting union of states with permanent organs and with the purpose of fostering the common interests of its members, especially in the sphere of foreign policy. A state can be a member of more than one international organization, if these organizations have fixed and clearly limited purposes; but it cannot be a member of more than one confederation for the reason that the aim of a confederation is to protect, to the greatest possible extent, the interests of its members in relations with foreign states. It is, however, a historical fact (and at the same time characteristic of the weakness of this kind of association) that some states were members of a confederation in so far as only a part of their territory was involved: Only the Austrian, and not the Hungarian, part of the Austrian Empire, and only the duchies of Holstein and Lauenburg, and not entire Denmark, were members

of the German Confederation. The main difference between an alliance and a confederation is that the latter acts permanently and not, as the former, only in the event of a war (which is the *casus foederis*) and that the confederation has therefore its permanent federal organs. The confederation differs, on the other hand, from other international organizations, which we have mentioned before, in its far-reaching purposes and, accordingly, in its more elaborate organization. Since this difference appears only in the multiplicity of purposes and in the complexity of the organization, and since every relation between states finally belongs to the sphere of foreign policy, it is not surprising that the notion of the confederation and the notions of other international organizations have not always been clearly and decisively differentiated from each other. Unions showing a rather great diversity were all classified as confederations; as such, in more recent times, were considered: The united Dutch States from 1579 till 1795, the Confederation of the United States of America from 1781 till 1789, the Swiss Confederation until 1789 and further from 1803 to 1814 and from 1814 to 1848, the American Confederacy from 1861 to 1865, the Union of the Australian Colonies from 1885 to 1895, the "Rheinbund" from 1806 to 1815, and the German Confederation from 1815 to 1866.

However, all opinions, no matter how diverse, concerning the nature of the confederation, agree in this: that its members are real states; many even say "sovereign" states. That means, according to our opinion, that the members of a confederation are directly subject to international law. The confederation acts, it is true, in some respects as a unity: it has its ambassadors in foreign countries, concludes treaties, declares war and makes peace in its own name; but, at the same time, the members of a confederation are also in some respects considered as units of international law. The decisive point, however, is that the membership itself is an international relation. If a state withdraws from a confederation and if it does so in accordance with the constituting treaty, then, as far as the state in question is concerned, the treaty is legally dissolved; if, however, the state withdraws otherwise than in accordance with the stipulations of the treaty, then this action is to be taken as a violation of the treaty, which has all the consequences of such a violation, but it is not a rebellion against a state authority. The conflict that arose in 1866 when Prussia withdrew from the German Confederation was not considered as a rebellion against a

state authority but as a war in the terminology of international law; and there is great difference between the two; *e. g.*, it makes a difference whether the fighting troops are classified according to international law as soldiers or as rebels. Similarly, a real war may break out when a state which is a member of the confederation offers armed opposition to the "federal execution"; *i. e.*, coercive means employed by federal organs to carry out federal orders. The character of these orders is also proof that the members of a confederation are real states. For, the federal orders as such have no binding force in the individual states until they are, like international treaties, duly brought into the form of law or at least published as binding in each individual state. There is, further, no federal citizenship in a confederation, each state having merely a citizenship of its own. The confederation, being an international relation, can, like other such relations, be dissolved; if the constituting treaty does not provide otherwise, the dissolution may be effected in the same way as the foundation,—by a unanimous vote of all the confederated states.

The organization of the confederation corresponds to its juridical character. The chief organ is the federal assembly, which is composed of delegates of the individual states; these delegates are appointed, empowered, instructed and recalled by their governments. As a rule, all the votes are equal and resolutions have to be made unanimously. It is true that in some confederations, *e. g.*, in the German, voting by majority was allowed on certain questions and that larger states had more votes than smaller states, but the constituting treaty itself by which the confederation was established and in which the above-mentioned method of voting was provided, ought, like any amendment of the treaty, to have been concluded unanimously. It is therefore said that a confederation as such cannot settle upon or change its jurisdiction, that it does not possess the "competence over the competences," and this means that it has not the supreme or the constitution-making power; only all the confederated states together possess this authority and exercise it by unanimous vote. The chairmanship of the confederation was held either by one of the confederated states permanently (as was the case with Austria in the German Confederation), or by each of them in its turn (as in the Dutch and Swiss Confederation); or there was a president elected by the Federal Assembly (as in the Confederation of the United States of America) or even appointed by a foreign state (the president of the "Rheinbund" was appointed by

the French emperor). All the federal organs, *e. g.*, military commanders and ambassadors, are subordinate to the Federal Assembly.

Although the jurisdiction of various confederations showed a great diversity, it always comprised foreign affairs and the chief command of the federal army, which was composed of contingents of the member states. The federal judiciary usually had authority only to decide conflicts between the individual states; its authority was, however, wider in the Confederation of the United States, which can be explained by the great significance of the judiciary in this country. The federal finances were maintained by contributions of the individual states, the amount of which was fixed by the Federal Assembly. In some cases, means of transportation and communication and trade were also considered as common affairs or they were, at least, controlled by the confederation; even a special federal administration in the matters of money, measures and weights, commerce and post was sometimes established.

In consideration of the fact that the members of a confederation are real states whose membership depends upon themselves, whereas the jurisdiction of the confederation depends upon all the members taken together, some placed the confederation on a par with a society ruled by civil law (*societas*). Jellinek drew a parallel between the confederation and the old German "Gesamthandverhältnis," *i. e.*, a society whose partners form a legal unit whenever they all act together (with joined hands); otherwise each partner is a legal unit by himself. The importance of such parallels must not be overvalued (which becomes clear even by the exposition of Jellinek himself), especially if we consider how various forms of associations of states have been qualified as confederations.

The problem with which we are dealing in this and in the following chapter was one of the most interesting issues of the war between the southern and the northern states of the American Union from 1861 to 1865 (the civil war). Besides the question of slavery, the interpretation of the federal constitution was an important concern of the conflict. The southern states held the members of the Union to be true (sovereign) states. John Calhoun (1782-1850) had already defended this opinion in his treatise on the constitution and the government of the United States. This constitution is, in his opinion, founded upon a treaty between the states and not upon a law; therefore, the individual states have maintained their sovereignty. The cen-

tral (federal) authority, it is true, has direct legislative, executive and judicial powers over the citizens of the individual states; but these powers have been transferred, delegated from the states to the federal authority which, therefore, is not higher than the individual states but coördinate with them. Each state has the right to judge whether the federal organs have kept within the limits of powers delegated to them and whether their decisions are in accordance with the constitution or not. If a state decides that the federal authority has done something unconstitutional it has the right to declare provisionally that this act is invalid and to ask that all the states decide jointly whether it is or is not constitutional. This right, belonging to each state of the Union, is called the right of nullification. If the requested decision arrived at by a majority vote of the states, is against the state in question and if the latter still holds that the contested act was unconstitutional, then it has, being sovereign, the right to nullify, as far as the state in question is concerned, the federal treaty and to withdraw from the Union (right of secession). According to this explanation, the American Union would be a confederation rather than a federal state. But with the victory of the northern states it was decided that the individual states have not the right to interpret the constitution as a treaty, that they are subordinate to the Union, that they have not the right of nullification and secession, and that therefore the constitution has to be interpreted as being a constitution of a federal state.

Confederations could not be maintained anywhere over a long period of time for confederation was an attempt to harmonize two opposing tendencies, *i. e.*, it had, on the one hand, to establish, out of several states, a new unity which would give to all its members the advantages of a large unitary state, and, on the other, it had to maintain the independence of each of the federal states in the question of its membership in the union. This immanent conflict also makes the understanding of the confederation, from a legal point of view, rather difficult. All the confederations of the past have, by this time, either been dissolved (German Confederation), or have changed into federal states (the United States of America, Switzerland, Australia) or even into unitary states (Holland). Nevertheless, there is a very recent association of states which might be classified as a confederation: The League of Nations. But its covenant and its scope show important divergences: The League of Nations is an open associa-

tion; any state can, under certain conditions, join it; it is precisely the scope of this League to unite all states of the world so that peace can be maintained between them. The historical confederations were far more limited in their scope.

There is a special kind of confederation, a union of two or more states, the chief feature of which is their having a common supreme organ. Such unions have been actually effected only among monarchies, and then in one of two forms: as a "personal" or as a "real" union. A merely "personal union" is not intended by the parties involved and the identity of the monarch in the states concerned is not established by a legal act of these states together, and thus this union is not considered to be a juridical union. It comes into existence when, according to the unilateral rule regulating the succession to the throne in one state, the same person who becomes monarch of it, also becomes monarch in another state according to the latter's unilateral law; the same situation can arise through the choice of a monarch who is at the same time the ruler of a foreign state. The identity of the monarch, not being obligatory, ceases when according to the laws (independent from each other) of the countries concerned different persons again become monarchs in each of them. It may be further observed that each of the countries, being united only by the person of an individual monarch, is free to change its law concerning the succession to the throne, and, generally, concerning the form of state. The "personal union" means the identity of the person of the monarch in several states, but it does not mean that there is a common rule or a treaty between them, that they must have a common monarch.

The personal union, for a time, linked England with Scotland, Great Britain with Hanover, the Austrian crown-provinces with each other, and Austria with Hungary. The destiny of the personal union was that it dissolved (Great Britain-Hanover) or that it turned into a unitary state (Great Britain) or into a "real" union (Austria-Hungary).

We speak of a "real union" when two or more states are obliged to have the monarch in common. This obligation is established by an agreement which is exposed in a formal treaty or which appears in other legal acts. Real union, in contradistinction to the personal one, is not an accidental union appearing merely in a person, but an intentional union hinging upon an institution to be held in common. The identity of the monarch is an essential institution in a real union, but it is not essential

that he have identical powers in all the countries concerned. However, it can be agreed upon, that certain of his powers be the same in these countries. In spheres to which such an agreement does not extend, he exercises his monarchical powers according to the constitution of each state concerned only. The real union is a species of confederation because the basis of the community in question is a treaty. Nevertheless, it is a special kind of confederation, the common organ being not an assembly of delegates but one person, who is monarch in either state. Founded upon an agreement the real union lasts as long as the agreement lasts. In this respect the same is to be said as was said concerning the confederation. As is the case in the confederation, so also in the "real union" there are no laws common to all the states thus united; neither is citizenship common. It may, however, be agreed upon to have certain other institutions, besides the monarch, in common. In Austria-Hungary common affairs were: The monarch, foreign representation, military affairs, and the expenses for the maintenance of these matters; and also the administration of Bosnia and Herzegovina, these two countries being then under the common dominion (*condominium* or *coimperium*) of Austria and Hungary. Organs in common were the monarch, the minister for foreign affairs, the minister of war and the minister for common finances. Besides permanently common affairs there were others, which were from time to time, by an agreement, designated as common. Each state had its parliament and its government. The administration of the common affairs was controlled by "delegations," *i. e.*, committees elected by the Austrian and by the Hungarian parliament, which, however, as a rule did not sit together, and which had no legislative power. The common expenses were not paid out of the common revenues but by contributions of both states, the amount of which had to be fixed from time to time by an agreement of both parliaments. A real union existed also between Sweden and Norway from 1815 to 1905. Real unions have the same drawbacks as confederations, the advantages of a unitary organization being hardly compatible with the almost complete independence of the states thus united. Such a union presents great difficulties particularly in parliamentary monarchies where the parliament possesses an overwhelming political power; in this case the supreme power in both countries is exercised not only by one person common to both countries but also by two separate parliaments. With the growth of the parliamentary regime in Austria and Hungary the union between

them became weaker and weaker. With the break-up of the Austro-Hungarian Monarchy in 1918 the last example of a real union disappeared.

## 2) The Federal State

If several states unite in such a manner that they renounce, at least as far as the existence of the union is concerned, their direct subordination as individual states to international law, and if they organize the union so that the union itself becomes directly subject to international law, then the new organization has, according to our definition of the state, become a state; those organizations, however, which went to make up the union have lost their statehood in the sense of our definition. All this can be effected by a treaty. To the assumption that *one* new state can be created out of several old ones by means of a treaty, it has been objected that the new state, in order to be a true state, must be independent of the states by and out of which it was created; but that this is inconsistent with the character of an international treaty, which is supposed to be the legal basis for the existence of the new state. An international treaty, it has been alleged, can be rescinded by the states which contracted it; and so the existence of the new state would depend upon the states of which it was formed and this is inconsistent with its character as a (sovereign) state. However, this opinion overlooks the fact that the essential feature of the treaty by which the new state was created is a renunciation of "statehood" on the part of the contracting states (as far as the existence of the union is concerned), *i. e.*, they renounce their direct subordination to international law, a characteristic, which is at once acquired by the new organization. After the conclusion of the treaty, the old states cease to exist as such; and thus every power which could rescind the treaty has been eliminated. The legal situation is similar to that of a state which has irrevocably accepted the lasting protectorate of another state (see p. 27).

The false idea that a new state cannot come into existence out of old states through a treaty between them, is mainly due to that theory of the juridical personality of the state whereby the state is considered to be a legal subject in the same way that man is (see pp. 37 et seq.). Man, according to the modern idea, cannot, it is true, lose his legal personality, not even by his own volition; and thus not by a treaty. But the situation is quite different with the so-called fictitious or juridical persons amongst which the state is usually reckoned. For these "per-

sons" (and the state as well) are nothing else than organizations of men; we cannot see why it should not be possible for the representatives of several states to agree to the creation of a new common organization in such a way that some or all the powers of the old organizations pass over to the new organization. If this transfer concerns only *some* powers which are not transferred permanently and irrevocably so that the contracting states retain the right to rescind the treaty and to withdraw from the common organization, then we are accustomed to speak of a Confederation. If, however, all the powers of the former organizations have irrevocably been transferred to the new one, then a new unitary state has arisen out of the old ones. The old states have disappeared entirely; in their place is a new organization which is directly subject to international law and which, therefore, is a true state. The treaty is irrevocable because, according to it, the organizations which contracted the treaty have vanished. The treaty presupposes contracting parties; however, since such parties, according to the treaty itself, no longer exist, then the treaty itself, as soon as it has been definitely concluded, loses its juridical feature as an international treaty. It appears to those who draw from it powers, rights and duties as a permanent and irrevocable organizational rule, independent of the former contractors, which can be changed only in such ways as are settled within itself; briefly, it has the character of the constitution of a new state and it is that from the point of view of international law also whose rules regulating treaties can not be applied to a treaty, the contractors of which have disappeared entirely.

The situation is essentially the same if the prior organizations have not disappeared entirely, but have subordinated themselves to the new organization so that it has acquired the full power to regulate the relations between them; in this case also the former states, which now form the parts of a new state, have lost their international rights at least as far as the existence and potential change of the new community is concerned and they have, for this reason, disappeared in their capacity as contractors of the treaty by which the union was built up. Again a new state has been created, with this difference, however: that the former states which created it kept, as organizations subject to the new state, certain powers for themselves. These powers are determined in the federal constitution which, though it has come into existence through a treaty, does not continue its existence as a treaty. It depends upon the importance and the extent of these powers whether we speak of a federal state or of a decentralized (localized) unitary state whose provinces are

either autonomous or self-governing. All that, however, is a question of the interior organization of one state. It is therefore possible that a unitary state may, through a change of its interior organization, turn into a federal state, as happened in Brazil in 1891.

Such state organizations do not always appear in pure and clear form and so it is comprehensible that sometimes one author classifies an organization in one category and another author the same organization in another category. However, "confederation" includes all those cases in which the question of the membership of its constituent parts and the question of the revocability of this membership is to be decided according to international law. On the other hand, it is the characteristic mark of the federal state that, in spite of any powers, no matter how extensive, which its members enjoy, they have no international rights in the question of their membership, and that the union itself possesses the supreme constitution-making power. It is no longer contested, for example, that no particular state in the American Union can secede from it by rescinding a "treaty of union" or that the distribution of powers is to be determined by the instrument of the common organization (the federal constitution), as must be done in a federal state. The same applies to the former German Empire in spite of the fact that some of its parts enjoyed far-reaching and, to some extent, even international rights.

There are, on the other hand, organizations of states which present doubts as to whether they are to be classified as "federal states" or as "decentralized unitary states with autonomous units." The present German Republic is certainly to a much lesser degree a federal state than was the German Empire; this difference appears even in the designation of its component parts which formerly were called "states" (Bundesstaaten), whereas now they are called "countries" (Länder). The parts of the Austrian Republic, which is labelled as a federal state in its constitution, are likewise named "countries." The component parts of the United States of America, of Brazil and of Australia are called "states," whereas Canada and Argentina are divided into "provinces" and Switzerland into "cantons." Those designations indicate various types of federal states, depending on whether they lean more toward the confederation or more toward the decentralized unitary state. In the first case the particular component parts possess relatively large powers, and so they are usually called "states."

From our point of view which considers one of the essential features of the state the fact that it is directly subject to international law, it is

perfectly clear that the separate parts of a federal state lack the character of a true state. Prominent German writers, however, endeavored to assign to the parts of a federal state the character of a state. Jellinek tried to prove that the notion of the "state" (including the non-sovereign one) requires only that it exercise its powers by "its proper right," proper right meaning uncontrolled right. He says that the parts of a federal state, in contrast to municipalities, exercise their powers in an entirely independent way. This opinion is wrong, however, because the parts of a federal state can exercise their powers only within the limits drawn by the federal constitution, as is the case in a municipality, which is allowed to exercise its powers only within the limits of the law. Just as the municipality is limited and controlled so that it may not act beyond the pale of the law, so also are the parts of a federal state limited and controlled so that they may not violate the constitution; this control is effected by federal organs; for example, by a federal tribunal. Later on, Jellinek urged that a state is characterized by the right of self-organization, and that this right is possessed by the parts of a federal state, for they organize themselves within the frame of the federal constitution; therefore the organs of its autonomous jurisdiction are its own organs. To this we must object that this power of "self-organization" can be carried out only within certain limits, as is also the case in a municipality, with this difference of course, that the sphere of activity of the part of a federal state is much more extensive; but through a change of the federal constitution, this sphere can be narrowed and even abolished. Another very distinguished writer, Laband, endeavored to identify the characteristic mark of the state with its "ruling by its own right" or "through its own power"; here "ruling" means the right to impose obligations upon free persons and to enforce what is imposed. This right, according to Laband, belongs also to the non-sovereign state, *e. g.*, to the parts of a federal state. But again, to this theory we must object, that logically such a "right of ruling" must always have its source in a superior norm, *e. g.*, in the constitution of the federal state; essentially the same relation exists between the state and a municipality or other self-governing body which also can "rule" and "force." But no one of the "states" which form the federal state has a "proper" right in the sense of an "independent" right; the best proof of the correctness of this statement is that all these rights can be abolished through a change of the federal constitution. It is, however, not difficult to understand why it was that German authors in particular tried to assign to the parts of the federal

state the character of a state: The German Federal State succeeded the Germanic Confederation whose component parts had been real states (monarchies) which preserved their monarchical organizations even after the confederation turned into a federal state; with this change however that the legal source of the powers of these "states" was then transferred to the federal constitution. The opinion of the aforementioned German writers, though historically and politically comprehensible, but nevertheless wrong, proves to be entirely unjustified if we take into consideration a federal state which has arisen out of a unitary state, *e. g.*, Brazil; in this case we cannot even find an historical reason that could justify the opinion of "proper" and "independent" rights of the particular "states." A theory of the federal state must, however, if it pretends to be exact, be applicable to all the types of this form of state.

The bond that ties the separate parts of the federal state together is not, as in a confederation, an international treaty, but a constitution, even though the original constitution of a federal state may have had at the moment of its inception—but at that moment only, as we have already explained—the character of a treaty. The constitution of a federal state can be altered only in such ways as are indicated within itself and cannot be changed as international treaties are usually changed. For this reason, the constitution-making organs determined in this constitution have authority to alter it in a prescribed manner and, along with this, consequently, also the authority to alter the organizational rules of the individual parts of the federal state; these rules also are sometimes called a constitution. Thus, the federal state, through its constitution, distributes and also changes the powers which, on one side, the union possesses, and on the other, its units.

The federal state has its legislature, its judiciary and its executive. The parliament is not, as in a confederation, merely an assembly of delegates of the individual states. The resolutions of the federal legislative organ are real laws, which directly bind both organs and citizens; they therefore do not need, as is the case in a confederation, to be transformed into laws by the legislature of each individual state. The same thing often applies to acts of the judicial and the executive federal organs; nevertheless the execution of these acts is sometimes left to the organs of the individual parts of the union; in such cases one speaks of an indirect federal administration which, however, is under the control of (central) federal organs. The parts of a federal state have, like it, also a legislature, judiciary, and an executive of their own. In some

federal states federal laws supersede state laws in the case of a conflict between these two kinds of laws. But in all federal states the supreme law is the federal constitution which stands above the federal laws and the laws and constitutions of the individual parts of the Union.

In the federal state which is a true state there is a common citizenship; membership in one of its parts is sometimes called citizenship also; and so it is said in such cases that there are two citizenships within the federal state; but we cannot regard the belonging to only a part of a real state as a true citizenship. In Germany and in Switzerland the so-called citizenship in a "country" or a "canton" carries with it, *ipso iure*, federal citizenship and the capacity of having the same rights and duties in any other "country" or "canton" as the so-called citizen (*indigenes*) thereof. In this latter respect the rule in the United States of America, is, in the main, the same; the relation between federal citizenship and citizenship in one of the states, however, is fixed so that one's federal citizenship constitutes, *ipso iure*, his citizenship in the state in which he resides.<sup>4</sup>

Within the limits of a federal state as we have determined them by expounding its essential features we find the greatest variety in its organization. There are federal states of a monarchical type, like the former German Empire, in which even the majority of its component parts were monarchies. The British dominions which are organized as federal states must also be classified as monarchies, since their supreme ruler is the British King, who is represented in the dominions, as well as in their divisions, by governors. All the other federal states, including Germany, are now republics.

The powers in a federal state are variously distributed among the federal organs and the organs of the individual units—according to the closeness or the looseness of the union. There is, first, the important question of who possesses the powers which are not defined in the federal constitution, namely the so-called "reserve of power." It is held that of those having powers under a given constitution an authority whose powers are defined and therefore limited is less powerful than the authority whose powers are left undefined and which, thus, has a reserve of powers for almost unlimited activities. It is indeed true that in the United States (and also in Switzerland and Australia) where the reserve of powers is with the federating units—Art. X of the American Constitution stating: "The powers not delegated to the

<sup>4</sup> Article XIV, Section I of the federal constitution.

United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"—the units form a looser or more "federal" union than in Canada where the powers of its "provinces" are defined, the reserve of powers thus being left to the federal authority. Further, within the sphere of defined powers are those which belong exclusively to the federal legislature, then those powers which can be exercised by both the federal legislature and the legislatures of the federating units (the German Constitution leaves certain powers to the "countries" as long as the federal legislature does not exercise them) and, finally, those powers which are reserved exclusively to the legislatures of the federating units. Furthermore, the powers are distributed sometimes also so that the federal legislature establishes for certain matters only the major principles, leaving the detailed regulations to the legislatures of the units which may even be obliged to make these regulations. The carrying out of federal laws is entrusted sometimes to federal, and sometimes to state organs, who apply them in the form of judicial or administrative acts; but it is not impossible and really sometimes happens that federal organs carry out the laws of the individual units.

Usually, the exclusively federal powers comprise foreign affairs, the army and the navy, important means of communication, post and telegraph, measures and money, customs, the federal finances and the federal judiciary. But also the powers of the federating units are themselves rather extensive in the legislative, executive and judiciary spheres. The same may, however, be the case in a unitary state having highly decentralized autonomous provinces which also have their legislature, administration and judiciary; even autonomous municipalities (for instance larger towns) sometimes possess similar, though generally more restricted, powers. What, then, is the difference between an autonomous province of a unitary state and a federating unit of a federal state? The difference is that the latter is not only autonomous, which means that it has its own organs possessing far-reaching powers in its own territory, but that it also participates in the organization and in the powers of the federal state itself. Therefore the expression "federating" units, employed by Mr. C. F. Strong,<sup>5</sup> seems to be a very happy one. An attempt has been made to explain this fact in the following way: The individual parts of a federal state are united as territorial organizations into a territorial organization of a higher

<sup>5</sup> *Modern Political Constitutions*, London, 1930, Sidgwick & Jackson.

order; they are subject to the union which, however, they themselves constitute. The federating unit is, on the one hand, subject to the federal authority, but it is, on the other, to a certain degree, also a holder of this authority. The authority which rules over the united members is nothing else than their common will, whereas the vassal state is, to a great extent, ruled by the will of a foreign state. For these reasons, the federal state has been called a corporation of territorial corporations, which are its organs, and which together form its will or, at least, coöperate in the creation of the common will.

Leaving aside the question whether this explanation is exact and clear, it is, at any rate true, that the individual units (or better their organs) of a federal state participate in the federal legislation and administration and sometimes in the nomination of the members of federal courts. In a unitary state likewise the people are not to be considered always as a solid (undivided) unit, but in some important respects also as divided into groups, which are formed according to their residence in particular districts; this applies not only to questions of local government but also to questions which are common to the whole state, for instance taxation, and especially elections to parliament. Even highly centralized states are divided into electoral districts, so that the deputies who have to make laws in parliament for the whole nation are elected by territorially separated parts of the nation. A state would be unitary in a strict sense only when its territory formed but one administrative and electoral district or body. Such state form has proved, especially with regard to administration, to be practical only in very small states (cities of antiquity and the middle ages). However, whereas the particular parts (or more exactly the inhabitants of these parts or their representatives) of a unitary state have a share in the administration of common affairs, as separate groups, only in one respect or another, and whereas, further, the districts organized for one purpose (*e. g.*, taxation) do not coincide territorially with the districts organized for another purpose (*e. g.*, election), so that there is no concentration of powers on one and the same territory,—each particular unit in a federal state has, to its full capacity, an eminent share in the discharge of some of the important affairs of the federal state.

This appears especially in the bicameral structure of the federal legislature, which is purposed to give to the federating units as such their share in the federal parliament. A ruling principle in every federal state is that one chamber (the lower one) of the parliament is

to represent the whole state as a nation and the other chamber (the upper one) the interests of the federating autonomous units (the member-states). The upper chamber, composed of the delegates of the federating units is called in Switzerland the "council of the states"; in the United States of America, in Canada, in the South-American federal states (Argentina, Brazil, Venezuela) and in Australia it is called the Senate; in the German Republic it is called "state council" (Reichsrat), in which each country has at least one vote, though it may have more in proportion to its population. In Switzerland, however, and in the United States of America a complete equality rules in this respect, each federating unit (canton, state), small or large, having two delegates in the upper house. Further, in both these countries at least one representative must be elected to the lower house, in each of the federating units, no matter how small it be, even when the population of this unit does not come up to the "ratio," *i. e.*, the number of inhabitants fixed by law for which one representative can be allotted. This is a concession to the federal idea even in the composition of the lower house.

The more the federal character of the federal state is accentuated the wider the powers of the upper house become. Thus, the powers of the United States Senate are very far-reaching, whereas the authority of the German "Reichsrat" is rather weak; as a rule, it has to pass on bills introduced by the government; but if no agreement can be reached between this body and the government, the latter has still the right to propose the bill to the National Assembly (Reichstag). If the "Reichsrat" protests against a bill passed in the National Assembly, a second vote is taken in the latter; but if no agreement can be reached between both houses, then the President of the Republic may call for a referendum of the people; if he does not do this the bill dies. In the case however that the National Assembly repeats its vote with a two-thirds majority, the President of the Republic is bound either to promulgate the law or to order a referendum.

The problem of the participation of the federating units in the federal executive is still more complicated than that of their participation in the federal legislature. In Switzerland each of the seven members of the federal Council, which is the highest executive, must be from a different canton, so that as many cantons as possible are considered in this body (conf. p. 80). The highest executive in federal states which have a parliamentary regime is the Cabinet and this is made up according to the principles of a parliamentary government.

The federating units being represented in the upper house, it is possible to give them a share in the federal executive by appointing members of this house as ministers; it is, for example, stated in the Australian Constitution that no minister can be in office more than three months if he is not elected as a member either of the Senate or of the House of Representatives. The problem is even more difficult when the highest executive organ is not a board but one person, one elected president. The North Americans (and after their example, the South Americans) have solved this problem very ingeniously by making important executive acts of the president dependent upon the consent of the Senate which represents the federating units; the consent of the Senate in the United States is required for the ratification of international treaties (in this particular case a two-thirds majority of the senators present is necessary), for the appointment of federal functionaries such as ambassadors, consuls, members of the supreme court and others.

The constitution of the federal state can be altered, as we know, only as prescribed in the constitution itself, whereas the constituting treaty of the confederation can be changed in a regular way only by agreement of all the confederated states. However, this latter method of amendment is provided also, though in a modified form, in the constitutions of some federal states for their own amendment, since these constitutions require for their amendment the agreement of at least a certain number of the federating units or allow them in some other way to exert an influence upon constitutional amendments. The Swiss Constitution requires a simple majority, the Constitution of the United States a majority of three fourths of the federating units (besides other conditions, see p. 52) for an amendment. The German State Council (Reichsrat) has the right to demand a referendum of the people, if the National Assembly has, against its protest, voted an amendment of the constitution.

It is necessary to have in the federal state an authority to settle conflicts arising between the federal organization and the organizations of the federal units or among the latter themselves. In the majority of federal states this authority is the supreme federal court. Sometimes this court has jurisdiction also in trials involving serious political crimes, as well as in law-suits concerning infringements on constitutional (political) rights and, in general, in such cases as are held to concern the whole state. (The federal states in North and in South America have, besides the supreme federal court, also lower federal

courts). The decision of the federal court, in case of non-compliance, is executed by force. In some federal states it is also provided that federal organs, even without proceedings before the federal court, may act directly against that unit (state) which refuses to fulfill its duties to the federal state (federal execution). The Swiss Federal Assembly has the power to decide that such an execution against a recalcitrant canton is to be carried out. The President of the German Republic has a similar authority.

All the citizens of a federal state having, as a rule, uniform and equal political rights, the people of each federating unit, as a whole, enjoy besides autonomy also a share in the common federal organization. Some federal states, however, comprise also some parts which are not, or are not to the same degree, autonomous as are the fully qualified federating units and which do not participate in the same manner as the latter in the administration of common affairs. In the United States of America such a part is, in contrast to the notion of a particular state, called a "territory"; Alsace-Lorraine had such an irregular position within the former German Empire and was called "Reichsland"; the German colonies, called "Schutzgebiete," had a still lower status. In such territories federal organs perform also that part of the state affairs which in true federating units is carried out by their own autonomous organs. This applies in the United States to the federal District of Columbia also in which the capital, Washington, lies. In the United States a special procedure is provided by which "territories" can become "states," *i. e.*, fully qualified members of the union.

### 3) The Union of Socialist Soviet Republics and the British Commonwealth of Nations

These two vast political bodies, both being unions, belong to the type called composed or, to use the more common term, federated states. However, any attempt to classify them according to one or the other of the classes discussed in the last two chapters meets with great difficulties; these difficulties arise not only from their intricateness but also from certain inconsistencies in their organization.

#### The Union of Socialist Soviet Republics

arose from the revolution in 1917 which destroyed the Russian monarchy. "Soviet" means council, and since the time of the general strike of 1905 has been employed in Russia to indicate a council or

an assembly of representatives of workers. The communist party carried out its program by establishing a system of "soviets," an institution already familiar to the Russian people.

The basic organizatory principle of the Soviet Union is a scale, or better, a pyramid, of elected "soviets"; at the bottom of this structure are the soviets of the lowest units, the local soviets (*e. g.*, the soviets of villages, towns, factories, works); they delegate members to the next higher ranking assembly which is called a "congress of soviets" of the higher territorial division; this assembly again sends delegates to the congress of soviets of the still higher division, and so on, up to the congress of soviets of the republic concerned, and finally to the congress of soviets of the entire Union. However, this principle of gradual progression is not observed in all cases; for soviets of certain units (*e. g.*, of towns and cities) send delegates directly both to lower and to higher congresses of soviets. And the congress of soviets of the entire Union is made up of representatives of city and township soviets (one delegate being apportioned to every 25,000 voters) and of representatives of provincial and district congresses of soviets (one delegate being apportioned to every 125,000 inhabitants). The suffrage is occupational (vocational, professional) insofar as the voting unit is a "productive unit" (factory, village, etc.) consisting of persons of the same profession (mainly workers and peasants) and organized at the place where they work. This system, it has been advanced, brings about a close contact between the voters and their representatives; reports of the deputies to their electors as well as recall of the former by the latter are provided for.

After the break-down of the Czarist regime various independent socialistic republics were established in Russia; they concluded amongst themselves treaties of alliance. On the basis of the treaty of 1922 the "Union of Socialist Soviet Republics" was established; no designation implying a national character was added to this name, any socialist soviet republic being allowed to join the Union.

According to the constitution of 1923 the Union consists of: 1) The Russian Socialist Federated Soviet Republic; 2) The Ukrainian Socialist Soviet Republic; 3) The White Russian Socialist Soviet Republic; 4) The Transcaucasian Socialist Federated Soviet Republic. —In 1924 this Union was augmented by: 5) The Uzbek Socialist Soviet Republic, and 6) The Turkmen Socialist Soviet Republic;—and, in 1929, by 7) The Tadjik Socialist Soviet Republic which, in

that year, was raised from the status of an autonomous republic to that of a member of the Union (a union republic).

These republics are subdivided into various territorial and administrative units. Particular kinds of units exist especially in the two "federated" republics (the Russian and the Transcaucasian), which are both in themselves federal states. The first includes eleven "autonomous republics" and thirteen "autonomous areas"; and the second has three "autonomous republics" and two "autonomous areas."

The chief organs of the Union are: The congress of soviets of the Union; the central executive committee; the presidency, called the "presidium," of this committee; the council of the commissaries of the people; and the commissaries individually. With respect to their powers these organs are ranged in the order given, each organ being responsible to the organ named immediately before it. The legislative business, along with other business, is entrusted to the first three of these organs. When the congress of soviets is not assembled the central executive committee is vested with its authority, and the presidium of the committee has all the powers of the committee during the intervals between the meetings of the latter.

The central executive committee is made up of the council of the Union and the council of nationalities. The council of the Union is elected by the Union congress of soviets from representatives of the union republics, in proportion to their population. The council of nationalities is formed of representatives of all the republics (five delegates from each) and of representatives of the autonomous territories (one delegate from each).

The legislative and administrative business carried out by the central executive committee is very far-reaching owing to the fact that the congress of soviets, which is the supreme organ of authority, rarely assembles. Moreover, as the presidium of this committee exercises all the powers of the latter during the intervals between the meetings of the committee, this presidium has become a real legislative organ; it is, during these intervals, also the supreme administrative organ of the Union. But even otherwise, its powers are very wide.

The council of the people's commissaries is the executive organ of the central executive committee; it is appointed by this committee and is responsible to it and to its presidium; this applies also to the individual commissaries who, in addition, are responsible to the council of commissaries which they constitute. The central executive committee and its presidium have the right to suspend and repeal the resolutions

of the council of people's commissaries—and that, it appears, also upon protest of the individual republics. The council of the people's commissaries is assisted by various boards and commissions.

The supreme court of the Union decides upon conflicts between the union republics, and in certain cases of charges against high officials of the Union; it gives the supreme courts of the union republics guiding interpretations on questions of the general legislation of the Union; it gives opinions on the constitutionality of resolutions of the union republics; it also examines and protests those decisions of their supreme courts which may be contradictory to the general legislation of the Union or which affect the interests of the other republics. This court is attached to the presidium of the central executive committee; this presidium appoints the major part of the court's members. And the procurator (we would perhaps say the state's attorney) of the supreme court, if he does not agree with the decisions of the plenary session of the court, may protest them before the aforementioned presidium.

According to the constitution of 1923 the jurisdiction of the Union, vested in its supreme organs, extends chiefly to the following: international relations, treaties concerning admittance of new republics into the Union, declaration of war and conclusion of peace, the armed forces, the finances of the Union, legislation on migration, fundamental legislation on labor and on citizenship, general union statistics, the right of amnesty extending over the whole Union, the repeal of decrees of the congresses of soviets and the central executive committees of the union republics infringing upon the constitution, the settlement of disputes between these republics, and the alteration of the fundamental principles of the constitution; then, the direction of foreign trade, of transport, post and telegraph, the establishment of the system of internal trade, of the foundation of the national economic policy of the Union, of a single money and credit system, of general principles for the development of agriculture and the use of mineral deposits, forests and waters, of the bases of courts of justice, of legal procedure and of civil and criminal legislation of the Union, of the general principles of popular education, of the general measures for public health, and of a system of weights and measures.

The administration of certain of these matters is entirely centralized, the chiefs of the respective departments (people's commissaries) carrying out this administration in the particular union republics through their own organs. Thus, "people's commissariats of the whole

Union" are as follows: foreign affairs, army and navy, foreign and internal trade, ways of communication, posts and telegraphs. The administration of certain other matters is, under the direction of the people's commissaries of the Union, carried out in the particular union republics by the people's commissaries of these republics; this applies to the departments of labor, finance, workers' and peasants' inspection, and to the supreme economic council. The autonomy of the individual union republics, extends to agriculture, internal affairs, justice, education, health, social welfare, each republic having people's commissaries of its own for these branches.

The particular union republics are organized on the same lines as the Union, as can be gathered from the provisions of section X of the constitution of the Union of 1923. Thus, for example, is organized the largest unit of the Union, the Russian Socialist Federated Soviet Republic, according to its constitution of 1925. And when a unit happens to be federated itself (as in the case just mentioned) we see then that even the members of such a federation, *i. e.*, the autonomous republics and, to a certain extent, the autonomous territories, are organized in the same way (congress of soviets, central executive committee and its presidium, council of people's commissaries and the individual commissaries of the people). This system, with the exception of the institution of the people's commissaries, is likewise applied in the administration of lower administrative units.

In view of the wide powers of the federal (or union) organs one might be induced to classify the Union of Soviet Republics as a federal state. This opinion might, moreover, find support in the fact that there is only one citizenship in the Union, and that the supreme organ of the Union, *i. e.*, its congress of soviets, alone has the right to change the foundations of the federal (or union) constitution. But, on the other hand, it is said in the constitution also that every union republic has the right to freely withdraw from the Union; and it states that this provision can be altered only by an agreement among all the republics which form the Union. In view of these provisions the Soviet Union assumes the aspect rather of a confederation, for the "ius secessionis" is expressly reserved to any member, the membership in the Union thus being dependent finally upon each member and not upon the Union. However, it appears that the classification of the Soviet Union as a confederation would not coincide with the reality of facts; for the free withdrawal of a republic from the Union, though

legally possible, is hardly probable. And apart from particular questions such as these, we can get a good general view of the actual functioning of the whole system only if we realize that behind the state organization stands the powerful communist party which, through its own "political bureau," decides on all questions of internal and external policy, and that its activity practically overshadows the federal organization of the country as established in the constitution.

### The British Commonwealth of Nations

The organization of this Commonwealth defies classification according to any type of the composed state. The British themselves are averse to calling the British Empire (this title was employed in the peace treaties after the World War, and also in the covenant of the League of Nations), or the British Commonwealth of Nations, as it is called now, by any of the terms for state forms generally acknowledged in political science. This Empire which, in area, is the largest political body in the world and in which more than a quarter of mankind lives, is made up of a great number of different parts (units). On account of their great variety which manifests itself in the manner of their interdependence as well as in their government and administration, it is very difficult to classify them all; some of them are themselves organized as composed states. Yet, apart from the protectorates and "mandated territories" (which are administered under the control of the League of Nations) and apart from the special status of India, we may distinguish two main groups: 1) Great Britain (now including England, Wales, Scotland and Northern Ireland) and the dominions, and 2) the colonies. The dominions are former colonies which now enjoy full self-government having a responsible government of their own. The other parts which depend directly upon the English parliament and the government in London are commonly called "colonies." Such parts, moreover, as have a middle position between the aforementioned two groups, their self-government not being extended to all affairs, are called "self-governing colonies" (Malta, Southern Rhodesia).

Up to the middle of the 19th century Great Britain, together with its colonies, was a unitary state; this was governed by the government in London, which was responsible to the parliament elected in England. But in this vast state, scattered as it was over several continents, centralism did not work. This was shown by the rebellion of the British colonies in North America. Chiefly on account of taxes which were

laid upon them without their consent they rose against their mother country and, in the second half of the 18th century, established an independent republic—the United States of America. Another instance was the revolt in Canada in 1837-38. But here the English finally gave way and, in 1840, established a responsible government. By the North America Act of 1867 passed by the British parliament, Canada was organized as a federal state, consisting of "provinces" (now nine). It was then that Canada was called a "dominion" instead of a "kingdom" as was first proposed; this was done out of regard for the republic of the United States. In Australia beginning in 1842, the particular colonies were successively endowed with responsible government. But in 1900, the Commonwealth of Australia, consisting of six federated states, was created by an English act.

The individual parts of British South Africa were granted responsible government partly before and partly after the Boer war; by an English act of 1909 they were united in the Union of South Africa, which may be classified as a unitary state consisting of four autonomous provinces. The colony of New Zealand was granted self-government in 1852 and became a dominion in 1907. Newfoundland, the oldest English colony, got representative government in 1832 and is now likewise a dominion.

Finally, in southern Ireland, in 1921, the Irish Free State was established. It is stated in the treaty concluded between Great Britain and Ireland in 1921 that the Irish Free State shall have the same constitutional status in the British Empire as the dominions of Canada, Australia, New Zealand and South Africa; subject to the provisions of the treaty "the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the dominion of Canada."

Thus the dominions (namely, those parts of the British Commonwealth which have, after the English example, a government of their own; *i. e.*, a cabinet which is responsible to an elected parliament and, through it, to the voters) are: Canada, Australia (both, by their organization, being federal states), the Union of South Africa (a strongly decentralized, but still a unitary state), New Zealand, Newfoundland and the Irish Free State (these three being unitary states). The dominions are now referred to as such in the statute of Westminster, 1931, in which it is also stated that the expression "Colony" shall not include a dominion.

However, the British Commonwealth includes in addition a large

number of colonies as well as other political bodies whose condition exhibits some features of a colonial and some of a dominion status, as is the case with India. Yet, both British India and the Indian states appear to be speedily evolving into a federated dominion with a bicameral legislature and into a far-reaching autonomy of the individual units.

The constitutions of some of the dominions are, in fact, British acts, passed by the London parliament, in which the dominions are not represented. Consequently, an act of the British parliament was necessary to change these constitutions. Indeed, the constitution of Canada was changed by British acts in 1907, 1915 and 1916; but Canada itself asked for these laws to be issued. As far as British legislation was necessary before the commencement of the statute of Westminster for alterations of the constitutions of Canada, Australia and New Zealand, this condition has, at the request of these dominions, been expressly maintained by this statute.

The governor general is the representative of the King in the dominion and, with regard to its legislature, has the same rights as has the British King with regard to the British parliament; but the right of the governor to "reserve" bills passed in a dominion parliament for the consideration of the British government as well as the right of the British Crown to "disallow" legislation of a dominion against the will of the latter has become practically obsolete. The importance of the governor in other respects also has been lessened; for, at the end of the World War, the custom developed and has since been maintained that the prime ministers of the dominions communicate directly with the British prime minister, and no longer through the governor and the secretary of state for the colonies. (The distinction between colonies and dominions was sharply marked in 1925 with the establishment of the new office of the "secretary of state for the dominions," which took over the dominion affairs from the colonial office).

The independence of the dominions has grown to such an extent that British laws affecting a dominion are passed only if the dominions consent to or ask for them. Yet the carrying out of a dominion law implying secession from the British Commonwealth, whose unity is represented by the King, if not sanctioned by the King would be a revolutionary act.

British control over the dominions still exists in certain judicial matters. It is exercised by the judicial committee (established in 1833) of the "Privy Council" (this council includes all the ministers, even

those who have resigned, and other high government officials and prominent personalities). The powers of this committee comprise jurisdiction over appeals against decisions of any court in the British possessions. Subsequent legislation, however, greatly restricted this jurisdiction, so that now this judicial committee passes judgment on decisions of the supreme courts in the dominions practically only, as it appears, in those cases which involve constitutional questions. The recent development of the inter-imperial relations within the British Empire shows that the jurisdiction of the judicial committee in dominion affairs depends, virtually, upon the desire of the dominions themselves.

With regard to questions of national defence (army and navy) it may be said in a general way that as far as the maintenance of order in the interior of each dominion, local defence, and the regulation of the military service are concerned, the autonomy of the dominions is beyond any doubt; but, in case of a war, waged in common, the contributions of armed forces given by the dominions voluntarily would be under a common chief command.

The unity of the British Commonwealth in foreign affairs, however loose it be, is still maintained in certain respects. It is true that in recent time diplomatic representatives of certain dominions have been appointed (in the United States, *e. g.*, there is a diplomatic representative of Canada, of the Irish Free State and of the Union of South Africa; a diplomatic representative of the Irish Free State is accredited at the Holy See, and a diplomatic representative of the Holy See at the Irish Free State). But, in any case, the representative of the dominion is appointed by the British King. This instance shows the importance of the Crown as the symbol of unity in the legally very loose community of self-governing units within the British Commonwealth. And it is the King who has the ultimate authority to ratify all treaties between any unit of this Commonwealth and a foreign country.

Yet, the independence of the dominions has developed very far also in the field of international treaties. It was acknowledged as early as the end of the 19th century that general commercial treaties have validity only for those units of the British Empire which expressly accepted them. And now the principle rules—in full harmony with the independence and the importance of the dominions—that no treaty obligation may be imposed upon them without their consent. Thus, it was stated in Art. 9 of the treaty of Locarno, concluded in 1925 between Germany, Belgium, France, Great Britain and Italy, that the

obligations of this treaty shall not apply to the British dominions unless their respective governments accept them.

The growing influence of the dominions, not only in inter-imperial relations, but also in international affairs and in political questions of a common concern to the whole Empire, became evident during the World War when the representatives of the five dominions and of India joined the "imperial war cabinet." And it was only a natural consequence thereof that the representatives of the dominions (except Newfoundland) and of India participated in the negotiations of the peace conference and that they signed the peace treaties; but all of them were empowered by the British King. The dominions and India are, individually, members of the League of Nations and are represented in its various organizations with a separate vote; but the British Empire, as such, is also a member of the League and, in addition, occupies a permanent seat in the League's council.

Thus, while the British Empire or, as we now say, the British Commonwealth of Nations, may be considered a legal unit in international relations of a general and common concern, it is certain that, within the League of Nations, this Commonwealth, its dominions (except Newfoundland, but including since 1923 the Irish Free State) and India are individual international units. This state of things is apparently inconsistent with strict logic; but the practical consequences of this inconsistency are somewhat mitigated by the fact that according to the principle of unanimity which is the rule within the League of Nations, no resolution can be taken without the consent of the representative of the British Empire. It may be observed, moreover, that Great Britain has expressly denied to the League the power to decide conflicts between Great Britain and the dominions.

The predominant influence of the London cabinet in the conduct of the foreign policies of the Empire is a consequence of the fact that the great distance of the dominions from England has so far rendered permanent collaboration of their governments in common questions of foreign policies very difficult; even permanent representatives of the dominions in London could hardly, on their personal responsibility, commit their governments on all such questions; real collaboration, on an equal footing, would require a permanent council of members of the various governments and that again would not be in full harmony with the parliamentary regime in the dominions, which demands close and permanent contact of the responsible cabinet members with their respective parliaments. These difficulties are but partly overcome by

a special institution, namely, by conferences held from time to time by the representatives (prime ministers and other cabinet members) of Great Britain, of the dominions, and of India in order to discuss common affairs. These conferences were started in 1887 and were first called "colonial," but since 1907 (when certain colonies were raised to dominions) they have been called "imperial" conferences. India was represented for the first time at the conference of 1911, and the Irish Free State at the conference of 1923. But the resolutions of imperial conferences, however great their moral authority and however useful they were in fostering intercourse (especially commercial) within the British Commonwealth, are not legally binding upon the individual units, unless and until accepted by their governments and parliaments. One of the most important imperial conferences was that held in 1926; its significance lies not in having introduced something new with regard to the inter-imperial relations but rather in having laid down and defined principles which had already evolved. The equality of Great Britain and the dominions was emphasized in the statement that "*they are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*" It was stated also that the governor general of a dominion is the representative of the Crown and not of the British government, and that this government and the dominion governments should communicate with each other directly and not through the governor general. Apart from provisions embodied in constitutions or statutes expressly providing for reservation, the King shall be advised on dominion affairs by the dominion government and not by the British government, which principle renders "reservation" of dominion legislation by the British government generally, impracticable. The question of appeals from dominion courts to the judicial committee of the Privy Council was left to be settled in accordance with the wishes of the individual parts of the Empire interested in that question. International treaties should be signed by plenipotentiaries for the various units, under full powers issued by the King on the advice of the governments of the units concerned. The main principle laid down with regard to legislation and to treaties which might affect more than one part of the Empire is: there must be previous information and consultation amongst the parts interested; no part can be committed to an international obligation without consent of its government. How-

ever it was admitted that the major share of the responsibility in the sphere of the conduct of foreign affairs generally, as in the sphere of defence, must continue for some time to rest with the British government. The conference held that nothing would be gained by attempting to lay down a constitution for the British Empire; "considered as a whole, it defies classification and bears no resemblance to any other political organization which now exists or has ever yet been tried." In compliance with the desire expressed in this conference to develop a system of personal contact, both in London and in the dominion capitals, an official to act as intermediary for the British government was appointed in New Zealand in 1927, and in Canada and South Africa in 1928.

The imperial conference of 1930 continued the work of the foregoing conferences on the same lines and upon the basis of a report of a conference on the operation of dominion legislation, held in 1929. It recommended a statute to be passed declaring, in the main, the complete and unhampered legislative autonomy of the dominions. Some of the recommendations appear to serve merely for the clarification of principles already acknowledged; thus, the principle of consultation and agreement among the several members of the British Commonwealth of Nations is to be extended to the question of the "common status" (*i. e.*, nationality) within this Commonwealth. It was further recommended that there be established a Commonwealth tribunal for the settlement of "justiciable differences" between the governments of the members of the Commonwealth; this tribunal of arbitration should not be permanent, but constituted *ad hoc* for each dispute to be settled; however, proceedings should not be obligatory but voluntary; *i. e.*, all parties involved must agree upon arbitration. In accordance with principles laid down by the 1930 conference dominion ministers may now, as is already practiced by the Irish Free State, approach the King in person and not only through the channel of the secretary of state for the dominions, and the dominions now have the right to use their own seal.

The independence of the individual members of the British Commonwealth of Nations, as outlined in the imperial conferences of 1926 and 1930, appear now to be so complete that the only solid legal link remaining between these members is the Crown. Regarding the Crown, the statute of Westminster of 1931 stated "that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common

allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the parliaments of all the dominions as of the parliament of the United Kingdom."

The statute of Westminster, passed upon the request of the six dominions, important though it be, cannot be called a Constitution of the British Commonwealth of Nations, for it did not regulate all vital constitutional relations amongst the units of the Commonwealth; moreover, it gave effect only to certain resolutions of the imperial conferences of 1926 and 1930. Thus, certain "constitutional conventions" existing even before the statute of Westminster have been endowed by it with statutory force; but, besides these statutory regulations there are still other non-enacted, customary rules regulating, as expounded in this chapter, the relations amongst the members of the British Commonwealth. The Westminster Act sanctions, in the main, only the complete legislative independence of the dominions. It states that no law made by the parliament of a dominion shall be void on the ground of its being repugnant to the law of England; that the parliament of a dominion shall have the power to repeal or amend any act of the English parliament or any order, rule or regulation made thereunder in so far as the same is part of the law of the dominion; and that no act of the English parliament shall extend to a dominion as part of the law of that dominion, unless it is expressly declared in that act that that dominion has requested, and consented to, the enactment thereof; that the parliament of a dominion has full power to make laws having extra-territorial operation (evidently the dominions are thereby given the same power as other independent states have to legislate for their subjects outside the state territory). However, some clauses restrictive of this legislative independence have been inserted in the statute of Westminster at the request of certain dominions and applying to them, on account of their internal constitutional conditions (being federal states) or in compliance with their desire of maintaining or, eventually, restoring closer communion with the law of England.

It is worth while noticing that in the proceedings of the 1930 conference as well as in the statute of Westminster, 1931, the expression "British Empire" was avoided, and in lieu of it the expression "Brit-

ish Commonwealth of Nations" was employed. According to a recent interpretation, the name "British Empire" should be applied only when referring to Great Britain and those British possessions which are not dominions; accordingly the British Commonwealth of Nations would comprise the British Empire as well as the dominions. If this interpretation were adopted, then the contradiction mentioned above, which concerns the membership in the League of Nations, would disappear.

## PART III. THE STATE LAW

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### I. THE CONSTITUTION

#### 1) Notion and History

The organization of a society is reflected in its laws, be they written or unwritten, customary or statutory; thus we may call the totality of all these rules in a broader sense the organization of the society. The number of the rules increases as the society extends its scope. It is evident that the rules of societies with numerous and changing scopes cannot be established all at the same time and cannot remain unchanged forever. This applies especially to the state; its law, therefore, is not something which has been created once and for all and which always has the same form, but it is a thing that is subject to evolution, modification, change, invalidation and regeneration. The law of the modern state does not consist of one group of rules only, embodied in one document, but of several groups, which are graduated according to their legal authority and which, thus, are divided into higher and lower.

As in every organized society, there are in the state certain persons who are entrusted with the special task of creating, changing, and putting into effect the rules of the law and of interpreting their meaning whenever it is disputed. We call these people organs, and the extent to which and the legal procedure by which they are obliged to perform these tasks, their jurisdiction. Further, we call the rules which determine the organs and their jurisdiction organizational rules, and the totality of these rules the juridical organization in a narrower sense. In the organizational rules the structure of the state appears because they show how law is to be created, employed, and interpreted. Amongst the organizational rules there are higher and lower ones; the rule, for instance, by which the composition and jurisdiction of the legislative organs is established, is higher than the rule that regulates the municipal authorities; for, the first rule conditions the very existence of the legislature, which, in its turn, creates the rules applying to the municipal authorities. We call the Constitution the highest set of organizational rules of the state, for they establish the highest state organs, their functions and the relations between them, and thus determine the form of the state. The constitution is the source of positive law, because it determines how law is to be created, employed, and interpreted. The

constitution, therefore—be it written or unwritten, be it contained in one document or in more—is essential for every state and determines its form. Aristotle long ago distinguished the constitution, which is the foundation of the state, from the laws which are based on the constitution.

The fundamental organization of the state, *viz.*, the jurisdiction of its highest organs, is dependent upon, and is largely the outcome of political exigencies, and is thus more reluctant to submit itself to a detailed codification than is the case with the regulations of the lower authorities and with those which concern the relations between the inhabitants of the state. Thus it is that customary law continues to prevail in matters of constitutional concern, even at times when other branches of law, *e. g.*, criminal and civil law, have taken the form of written law; and even now, in spite of the fact that constitutions have been codified, custom is an important factor in constitutional law.

The practice of collecting the fundamental rules of the state organization into a special document and of attributing to these rules, thus collected, a higher authority than to the other rules, is of comparatively late date and came about, mainly, in this way: Competition between the king and the estates was one of the characteristic features of the medieval state; thus it happened that the rights (privileges) and duties of the estates towards the King, on one hand, and the rights of the monarch, which in England were called "prerogatives," on the other, were fixed in contracts. These contracts were written, and the documents thus drawn up showed, at least in the main, the fundamental organization of the country, because in them the rights and duties of the most important factors in the state were determined. Very often these contracts, without creating any new law, only expressed in written form and confirmed anew the old, unwritten, customary law, which had been disregarded by one side or the other. In England particularly the estates maintained that this was so; but by having the old customary law repeatedly confirmed, they succeeded in having it interpreted to the detriment of the King's prerogatives; and this was the way that the modern constitutional and, finally, the parliamentary monarchy evolved out of the old absolute monarchy in England. The most important of these documents, on which English constitutional law is still, at least partly, based, are the following:

*The Magna Carta*: this is a compact between the English barons and King John, made in 1215, by which the rights of the barons as well

as those of the people in general were asserted; in it was the explicit statement that no one (no free man) should be, in any way whatsoever, restrained in his personal liberty or deprived of his rights "except by the lawful judgment of his peers, or by the law of the land" (*nisi per legale iudicium parium suorum, vel per legem terrae*). In addition to other clauses concerning for instance liberties of the church, immediate payment for property requisitioned, there is one of special importance which embodies the principle that no tax shall be imposed without consent of the parliament. But the Magna Carta, which is considered by the English even today to be the fundamental document of their liberty, is interesting also for the means of enforcement provided in it. There are 25 barons elected to see that it is carried out, and if the King or any of his officials should violate the provisions of the Charter, they may ask the King to redress the wrongs. If the wrongs are not redressed within 40 days "the said five-and-twenty barons, together with the commonalty of the whole land, shall distrain and distress us (*i. e.*, the King) in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed according to their pleasure, saving harmless our own person and the persons of our queen and children; and when it is redressed they shall obey us as before. And any person whatsoever in the land may swear that he will obey the orders of the five-and-twenty barons aforesaid in the execution of the premises. . . . As to all those in the land who will not of their own accord swear to join the 25 barons in distraining and distressing us, we will issue orders to make them take the same oath as aforesaid."

The Magna Carta was confirmed repeatedly by the kings of later times. In 1628, Charles I., who had arbitrarily imposed taxes, was compelled upon demand of the parliament to acknowledge the principles of the Magna Carta in a law, called the *Petition of Right*. The *Bill of Rights*, a law issued (1689) by William of Orange, who was called upon the throne after the deposition of James II., contains the following main principles: It is illegal for the King without consent of the parliament to suspend laws, to dispense with laws, to raise or keep a standing army within the Kingdom in time of peace or to levy taxes for the use of the Crown. The freedom of elections of members to parliament must not be violated; the same applies to freedom of speech in parliament whose debates or proceedings "ought not be impeached or questioned in any court or place out of parliament."

Parliament must be assembled frequently. These rights and liberties are spoken of as "ancient" and "undoubted."

The *Habeas Corpus Act* of 1679 introduced effective means of securing personal liberty; it provided a new procedure for the protection of the old customary (common law) right of personal liberty. It concerned only persons imprisoned on suspicion of a crime. The administrative officer detaining such a person had to bring him before the judge, who, of course, had to discharge him if the commitment was unjustified. If the person had been lawfully arrested he could nevertheless insist on being discharged upon giving security; if, however, he was charged with treason or felony, he remained imprisoned, but had to be tried at the first session after his commitment. If he was not tried at the second session after his commitment, he could insist on being discharged without bail. Officers who infringed upon these prescriptions had to pay large sums in compensation to the persons concerned and made themselves liable to dismissal. An act of 1816 extended the procedure provided in the "Habeas Corpus Act" in cases of imprisonment for crimes only, to all cases in which personal freedom had been infringed upon. Thus, also this act improved the procedure, but only this; no new rights were created. In 1701 the *Act of Settlement* was issued primarily to change the order of succession to the throne; but at the same time it stated the principle of the independence of judges and, further, declared "that no pardon under the great Seal of England be pleadable to an impeachment by the Commons in Parliament."

However, there was another historical development which led directly to the codification of modern constitutions. In the time of the Reformation, the opinion gained ground in England that the state comes into existence in the same way as a Christian commune, namely, through a contract which is concluded by all the members unanimously. This idea was connected with the idea of the social contract, by which the philosophy of the Law of Nature tried to explain and to justify the most diverse forms of government, absolute as well as democratic. In reality, however, this idea was carried out by the English colonists, who settled in North America at the beginning of the 17th century. Among themselves they made agreements regarding the establishment of government. The first agreement of this kind was made in the year 1620 on the ship "Mayflower" by the emigrants who then founded the colony New Plymouth. The same view appeared in England itself in the revolutionary movement about the middle of the

17th century. A draft of a constitution, the "Agreement of the people" was worked out in Cromwell's army in 1647; it was intended to be proposed for the signature of the entire English nation. The purpose of this document was to determine through a sort of treaty the fundamental rights of the nation, the limits of the supreme power and the powers of the parliament. In 1653, Cromwell himself tried, but without success, to put through a written constitution, the "Instrument of Government." A distinction was made in these projects between fundamental and other rules; and, according to the idea of these documents, even parliament could not alter the fundamental rules, which concerned the rights of the nation. Thus the principle was implied that the constituent contract stands higher than the laws created upon it as a basis. It was natural that such constitutions should be agreed upon in a written form; not only for the reason that important contracts were generally concluded in this form, but also for the reason that it would greatly help in the stabilization of a situation created by a revolution. The authors who wrote at that time on the law of nature were also dealing with the problem of the constitution; for the social contract is nothing else than the fundamental law (*lex fundamentalis*) or the constitution. But the ideas of two English philosophers, Thomas Hobbes and John Locke, each of whom, in his own way, taught that according to the social contract the will of the majority rules in those states which have parliaments, contributed to the disregard for the difference between constitutional and other laws, which disregard, of course, is a consequence of the principle that no law whatever requires more than a majority vote. The English constitutional custom and practice did not at that time and does not now acknowledge this distinction. Neither was the claim for a written constitution (originated in England) ever realized in that country, a fact due largely to the dawn of the parliamentary regime at the end of the 17th century. England, so far, has no codified constitution.

The evolution in North America, which until 1776 was under English rule, moved in a different course. The conditions of the thirteen English colonies situated there gave to their political institutions a special character, as we have seen in the chapter on the separation of powers (pp. 66 et seq.). There, besides the separation of powers and in connection with it the principle of the superiority of the constitution over ordinary laws could actually be carried out. After their liberation from England, the American states organized their new

constitutions, in the main, after their old ones; in them we find, as a rule, embodied the individual rights, the organization of the state according to the idea of the separation of powers, and the superiority of the constitution over ordinary legislation. The superiority of the constitution is evidenced in the extreme difficulty of changing it, which in some states is even dependent upon a referendum, and also in the power of independent courts to decide whether laws conform to the constitution or not.

The framework then of European constitutions is derived from America and England, though their direct models were the French constitutions of the period of the Revolution. The ground for the constitutional movement in France was prepared by the authors who were writing on the Law of Nature, and especially by Rousseau with his book on the "Social Contract" in which he urges unanimity for the social contract, but a majority vote only for ordinary laws. The doctrine on the constituent power (*pouvoir constituant*), however, which constitutes and, thus, limits the other powers (*pouvoirs constitués*) was expounded by Sieyès and asserted itself under the influence of American ideas. Sieyès said, it is true, in his famous pamphlet, "What is the third estate" ("Qu'est-ce que le tiers-Etat," 1789) that the only source of constituent power is the people; but the people may, in this respect, be substituted for by a special, extraordinary assembly of deputies entrusted with the task of making or amending the constitution. This, now, is the idea of the constituent assembly ("Assemblée Constituante") or, as it is called in America, the convention, *i. e.*, a parliament which has special power from the people to make or to alter the constitution and which, properly, should not occupy itself with the business of an ordinary legislature. The decision of the constitution-making parliament (which, in France, consists of the two chambers sitting together) is conclusive in some countries, but in others a ratification of the people, over and above this, is required (the referendum in America and in Switzerland). In several countries the people themselves also have the initiative for an amendment of the constitution (see pp. 53 et seq.). In still other countries this initiative is vested either in the head of the state or in the ordinary legislature whose decision, however, must have a special majority vote which is cast with a special "quorum" present, or a decision must be rendered and concurred in by several consecutive parliaments. When such an initiative has been taken a new parliament with the ordinary or even an increased number of members is

elected. In Belgium, this new parliament, which decides with a special majority vote on the change of the constitution, has a limited power, *i. e.*, it has authority to alter the constitution only in those respects which are contained in the initiatory proposal and which, therefore, were known to the voters when they elected the constituent assembly. For the procedure for the amendment of the German Constitution see p. 55. An amendment of the constitution is still more complicated in federal states, where the federal units, as such, have a share in the constitution-making power.

The first French Constitution (1791) did not ascribe the constituent power to the people, but to the parliament, this, however, with many restrictive qualifications; the first two legislatures were not allowed to alter the constitution at all; it could be altered only by later legislatures if three of them consecutively proposed an amendment and if it was accepted by a fourth legislature, which had to be composed of an increased number of members; in this case the King had no right of sanction. This constitution which gave the legislature consisting of but one chamber preference over other powers, and which subjected the executive entirely to it, served as a model for other constitutions which sought to unite democratic principles with the monarchy, especially for the Belgian Constitution of 1831, and through it, for many other constitutions. The other French constitutions before Napoleon emphasize the democratic principle to a much higher degree (instituting, *e. g.*, the republic as the state form and the referendum for constitutional amendments), whereas the French constitutions after the fall of Napoleon are based upon the principle of the "sovereignty of the monarch," *e. g.*, the "Charte" of 1814 given by Louis XVIII. The constitutions of the first French Empire (Napoleon I.) and of the second Empire (Napoleon III., 1852-1870) are called "caesaristic," because—as it has been held—the people transferred all power to the monarch in a way analogous to that done by the Romans with the "lex regia"; this transfer as well as changes of the constitution were effected by a plebiscite, *i. e.*, by a vote of the people. After the plebiscite, caesaristic monarchies become absolute; but, generally, even the first plebiscite is only a democratic gesture as it serves merely to confirm the already existing absolute power of the monarch.

A natural consequence of the idea of the constituent power is that the product of this power, *i. e.*, the constitution, has superiority over the product of the legislative power, *i. e.*, ordinary legislation, and, further, that the constitution can be altered only with greater diffi-

culty than an ordinary law. If the fundamental rules of the state organization are worked out in this fashion we speak of a rigid constitution. If, however, the fundamental organizatory rules are worked out in the same way as are other laws and if they can be changed by the same procedure as other laws, we speak of a flexible constitution. But this distinction between flexible and rigid constitutions is significant only if we are able to tell entirely from the rules themselves, without regard to the manner of their creation, whether or not they belong to the fundamental organization of the state. But it will be noted that opinion as to which institutions belong to the fundamental organization varies in different countries and at different times, this even in the same country. The French declaration of the "Rights of Man and Citizen" (Art. 16) of 1789 states that an association in which rights are not guaranteed and in which there is no separation of powers has no constitution. Today, however, constitutional guarantees, on one hand, are required for certain other political institutions, *e. g.*, in many countries for the responsibility of the ministers or for the administrative courts; on the other hand, the separation of powers is no longer considered to be to the same degree as it was formerly, an object of constitutional regulation.

Generally speaking, a constitution provides for the supreme state organs, especially the legislative organs, and defines their powers; in addition it contains all those things which are intended to be preserved from change by ordinary legislation, *e. g.*, the fundamental rights of citizens. But opinion as to what is to be protected in this way changes. The regulation of a certain thing in one country may depend upon the constitution and in another on an ordinary law (*e. g.*, suffrage) or even on an ordinance. Furthermore, the customary law may have a very important influence on constitutional questions; also the rules (standing orders) regulating parliamentary proceedings in many states, especially in those which have a parliamentary regime, contain regulations which are so important that they must be considered as fundamental organizatory rules, *e. g.*, those which regulate the legislative procedure. Finally, in modern times, international law regulates many questions regarding the basis of the state, *e. g.*, the boundaries of its territory.<sup>1</sup> Thus we see that the instrument called the constitution does not comprehend all the fundamental rules of a state, but that these rules are expressed in part in other prescriptions of national or

<sup>1</sup> Conf. the peace treaties concluded after the Great War.

international law. Therefore one may speak of the constitution in contrast to other kinds of juridical norms, particularly ordinary laws, as a special form of law only when a higher legal authority than that assigned to ordinary laws is attributed to a group of norms through rendering their alteration more difficult than that of ordinary laws; however, an effective legal guarantee of this higher authority is given only when the functionaries employing these latter have the power to determine whether they are in conformity with the constitution. If this power is given to no one, not even to the courts, the result is that the authorities will acknowledge a change of constitutional rules even when this change is effected by ordinary and not by constitutional legislation.

## 2) The Significance of the Fundamental Rights (of Men and of Citizens)

The rights of men and of citizens occupy a prominent place in almost all written constitutions. The constitution being the first and principal organizatory law, one would expect that only the most important state organs and their powers would be defined in it, and that personal rights would be secured by ordinary legislation. But this is not so, for "The Rights of Man and of Citizen" constitute a very important exception. They are distinguished from ordinary rights by the very fact that they are embodied in the constitution, and thus have the same guarantees as other constitutional provisions, *i. e.*, that they cannot be abolished or changed by ordinary legislation. But, what is still more astonishing, is that these rights are oftentimes considered to be inalterable even in the face of the constitution itself, which means that they cannot be abolished or altered even by a legal and regular amendment of the constitution itself. Thus it would appear that these rights are a part of the constitution and at the same time superior to it! This opinion places the aforementioned rights above the highest legal rule, the constitution, and so above the state itself; how can it then be reconciled with general juridical notions and with the provisions regarding the amendment of the constitution, which, one would think, apply to all parts of the constitution equally? A short historical review will explain the rise and development of the idea that the state is not unlimited and that, besides the rights conferred by it there are still other rights which, though they can be defined in detail by the state, must, in their essence, always remain unchanged.

In the state of antiquity there was no such limitation. As a rule, there was nothing to prevent the state authority from extending its jurisdiction to all human affairs, however intimate. The organization of state and church being identical, the influence of the state upon religious life was especially apparent. Religious liberty did not exist; each person was obliged to profess the religion of his state; religion set a peculiar mark both on private and on public life; the highest officials were at the same time priests; patriotism and religious feeling were almost the same; the law, like the religion, did not reach beyond the boundaries of the state and was applied only to its citizens; there was no legal right for the alien. The struggle against the religious conception of the state and against the political conception of religion was begun long before the appearance of Christianity (*e. g.*, by the philosophy of the Stoics), and with the wane of religious feeling faith began to sever itself from law and the state.

Christianity reawakened and deepened religious feeling, but it did so entirely in a spiritual sense. The old visible gods, which were personifications of nature and of the human senses, fell. Divinity was no longer identical with nature; now it was above it. In the place of numberless gods—each state and each family had its own gods—was put the idea of one invisible God who is the father of all mankind. Hence the new faith was not concerned with one nation only or with one state, but with the whole of humanity; its commandment was to love not only one's fellow-citizens, but the alien also, and even the enemy. The human race was conceived as a unity; justice was not to be confined to the limits of a particular state, because justice, now, had no political or national boundaries. Thus was laid the foundation for interstate or international law. Christianity, in separating religion from any particular state set up a conception of the state different from that of pagan religions of the time. For this reason the state organization has lost its absolute power over man. Christianity taught that man does not belong completely, but only with a part of his being, to the social organization in which he lives, that he must be, it is true, obedient to the state authority, that he must even sacrifice his life for his state, no matter what form of government the latter has,—but it also taught that man's soul is free and bound only to God. Thoughts similar to these were expressed also in the philosophy of the Stoics; but they were never preached with such intensity and universality as they were in the teachings of Christ, who clearly separated religion from the state, saying: Render unto Caesar

the things which are Caesar's; and to God the things which are God's. The notion of personal liberty evolved from these Christian principles; for, now, besides the life consecrated to the state, man is capable of living another life independent of any compulsory secular organization.

This short sketch, in which we have followed the illuminating explanation of the French historian, Fustel de Coulanges,<sup>2</sup> is not meant to imply that there was no liberty in any of the ancient states. There were even then some spheres of life in which the state authority usually did not interfere; but this liberty was not acknowledged and guaranteed, and this fact hampered the development of the idea that there are certain rights which are more fundamental than the state and prior to it and which cannot be abolished by any secular organization. It was not until religion and law, the organization of the church and that of the state were separated, that the idea was conceived that man has certain rights independent of the state; or, more exactly, that there is a field upon which the state is forbidden to encroach, namely, man's conscience. Conscience must be independent of state authority; this is the principle of liberty of conscience. Every man has this right; it is innate; therefore, it must be recognized by the state.

This liberty, which had its origin in religious ideas and was acknowledged when these ideas began to prevail, was a very important factor during the period of religious wars at the beginning of the new era. The right of liberty of conscience, challenged by the state and championed by the Christian church, was claimed again at the time of the Reformation by the various sects into which Christendom had split. The religious movement, particularly in England, allied itself with the political movement then in progress and directed against absolutism. Protection was demanded not only for liberty of conscience, but also for other human interests which were jeopardized by the absolutistic government; this appears clearly in the contemporary literature dealing with the Law of Nature. John Locke, for instance, held that man's life, liberty and property were under the law of nature (which is God's law) and had been even at times when there was no politically organized society and when men lived in a "state of nature." "The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who

<sup>2</sup> *La Cité Antique*, Book V, Chapter III.

will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."<sup>3</sup> But "the execution of the law of nature is in that state put into every man's hand." The purpose of the society or of the state is precisely this, to protect man's personal liberty and property, which in the "state of nature" are not sufficiently protected. A political society exists, according to Locke,<sup>4</sup> only when every one has relinquished his natural power (namely, to preserve his life, liberty and property and to punish the aggressor) and surrendered it into the hands of the community. But if the state organs themselves endanger liberty and property, instead of protecting them, as is their duty, and if such abuses become general, then there arises a "state of war" and in such a case people are justified in building up a new political organization. Thus Locke acknowledged that the people were the supreme custodian of the natural rights of liberty and property, and considered self-help and revolution allowable, if through a long succession of illegal acts committed by the state organs the legitimate order has essentially ceased, for these organs themselves must then be considered rebels.

Thus, the purpose of the social contract (or constitution) concluded between the citizens, or between them and the head of the state, was held to be this: that an organization shall be created by which the most important human interests and rights are safeguarded, which rights, however, are not conferred by a law of the state, but by the Law of Nature or of God, which is in force for all eternity and cannot be changed by any secular organization. To the liberty of conscience were added also as rights derived from the divine law, personal liberty and property, as it was thought that, in concluding the social contract, the contracting parties were not willing to transfer these rights to the community, and that they did not, in fact, have the power to do so. Nor were the people in general at this time of the opinion that these rights were derived from the social contract; and this conception was wholly in conformity with the then current idea of the purpose of contracts which was that they often only serve to confirm, to make clearer, and to protect certain rights which already existed according to common law (see p. 116). Also religious liberty, in times of religious wars, was similarly protected through contracts;

<sup>3</sup> Locke, *Of Civil Government*, Chapter II, § 6.

<sup>4</sup> *Loc. cit.*, Chapter VII, § 87.

and, under the influence of the literature on the Law of Nature, other liberties were also protected in this way.

All this makes clear why two different groups of rules are discernible in constitutional instruments: 1) In one group, old rights which existed before the constitution and which derive from the Law of Nature or the Law of God are enumerated and solemnly proclaimed. Not being conferred by the constitution these rights can be changed neither by the constitution nor by an amendment of it (the change of a document which serves the purpose only of confirming rights cannot affect these rights which existed before and without this document). 2) The other group consists of organizatory rules, by which the organization of the society is regulated; that is, by which organs are appointed and charged with the task of protecting the aforementioned rights of man. This is expressed in Art. 2 of the French declaration of 1789: "The aim of every political association is the preservation of the natural and imprescriptible rights of man." The organizatory rules, which serve only as a means for the better protection of the aforementioned immutable rights, can be altered, of course, in the way provided in the constitution. For this reason the fundamental rights have often a conspicuous place in the constitution, being sometimes placed first, or even being sometimes embodied in a separate document. Examples of such practice are to be found both in France and in America. It is for the same reason, comprehensible, that one of the most recent constitutions, the German Constitution of 1919, is divided into two chief sections: 1) The organization and the functions ("Aufgaben") of the state. 2) The fundamental rights and duties of Germans.

Thus we see how close is the connection of the idea of written constitutions, on the one hand, with the idea of a social contract as laid down by the champions of the Law of Nature, and, on the other, with the fundamental rights of man. For, the written constitution is nothing else than the affirmation of these rights and the definition of the organization that has to protect these rights. The first part of the document of the constitution, in which the protected rights are embodied, has a higher value than the second part, which only provides for the protection; and, therefore, in case of emergency, the second part may be set aside to save the first. When the state organs do not protect, or even when they encroach upon the rights of man, then the abandonment of the existing form of state organization is, according to the ideas discussed above, justified. But who shall carry

this out? The only expedient way is to have the people or the nation act, so to speak, as an extraordinary organ for the protection of the rights of man and to abolish the existing and to create a new state organization. These observations, which are only inferred from the special and privileged character of the Rights of Man in comparison to the other provisions of the constitution, aid us to understand how it came about that the resistance of the citizens to the violation of these rights by the state authorities was held to be a special right and that this "ius resistendi" was even codified; for instance, in the English "Magna Carta" of 1215 (see pp. 116-7) and in the Hungarian "Golden Bull" of 1222. Christian theologians, Catholic as well as Protestant, advocated the right of resistance (some of them a passive, others a defensive, and still others even an aggressive resistance) if the state authority infringes upon the Law of God. There is an abundant literature on this question, *e. g.* of what circumstances justify the murder of a tyrant. John Locke, as we know, approved of revolution as a final resort to preserve the rights of man. The French declaration of rights of 1793 (Arts. 10 and 11) acknowledged the right of every citizen to oppose with force any illegal act which is intended to be executed against him with force, and Art. 35 of this declaration stated: "If the government violates the rights of the nation, then insurrection is a most sacred right and a very urgent duty of the nation and of its every part." And earlier, the declaration of 1789 quoted as natural rights of man: liberty, property, security and resistance against oppression.

The "Declaration of Independence" of July 4th, 1776, in which the separation of the North American British Colonies from England and their independence was proclaimed, stated: ". . . We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are

more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government.  
. . ."

The connection between the idea of written constitutions and the idea of the fundamental rights of man appeared, even earlier, in the attempt of the English "Agreement of the people" of 1647 (see p. 119) to formulate these rights. Later on, the formulation of these rights was gradually improved, first in the constitutions of the British colonies in America, beginning with the "General Fundamentals" of the colony New Plymouth of 1671; and then, after the liberation from England, in the constitutions of the individual American states, particularly in the famous "Bill of Rights" of the state of Virginia of 1776. This document served as a model for the "Declaration of the rights of Man and Citizen" which was adopted by the French Constituent Assembly on August 26th, 1789, and then inserted in the first French Constitution of 1791.

All subsequent constitutions, with rare exceptions, have a special chapter dealing with these rights which place a limitation on and are thus a negation of absolute state authority. Therefore absolutistic government of any kind, even absolute democracy, is inconsistent with these rights. Rousseau, the champion of absolute democracy, excludes them by affirming that each person, in concluding the social contract, gives all the rights he had in the state of nature up to the community; *i. e.*, the state. Rousseau, therefore, did not acknowledge perfect religious liberty, which was the starting point of the theory of the rights of man; he required everybody to believe in certain principles of a kind of "civil religion" and, according to him, the state authority is allowed to expel a person who does not believe in these principles.

The rights with which we are concerned in this chapter have been variously denominated: as individual rights, because they define the powers of the individual in contrast to the powers of the community; as rights of liberty or as personal freedom, because they determine the sphere in which man is free and independent of the state authority; as fundamental rights, because they are the foundations of the society

and also, perhaps, because they are embodied in the fundamental law, the constitution. It only remains to explain the difference between the rights of "man" and the rights of the "citizen," which, however, is not quite clear. Logically, rights of man would be rights which man possesses as a human being even before becoming a member of the state, whereas rights of the citizen would be rights, which man enjoys only as a citizen, as a member of a certain state and which he loses if he ceases to be a citizen of that state. Rights of the citizen would be a kind of compensation for the loss of the natural rights which man, as a member of a state, must surrender to the community; thus they would be tantamount to membership, *i. e.*, participation in the activities of the state organization; they would approximate closely the notion of political rights (*polites* = *civis* = citizen = citizen). Rights of the citizen would, therefore, be the expression of the ancient political conception of liberty as a partnership in the state authority, whereas the rights of man would express the Christian conception of liberty as a term denoting non-interference of state authority in human affairs. The modern state, with its rule of law, is based upon a combination of both conceptions of liberty. Political liberty has, as it were, an aspect even of duty or is connected with duties; *e. g.*, the political right to vote, with the duty to vote.

However, the distinction which we have endeavored to make was not made in the aforementioned constitutional instruments. Very likely the French declaration of rights of 1789 meant by the "*droits du citoyen*" the same as by the "*droits de l'homme*," the former (rights of the citizen) merely being protected and guaranteed through the state organization. On the other hand, the rights which derive from that liberty and equality, which members of a state enjoy as such, and which are defined by the restrictions imposed upon the public powers, need not be political rights in a true sense. Therefore the French sometimes called them "*droits civils*" or "*civiques*" or "*publics*," in contrast to private rights (*droits privés*) on the one hand and to political rights (*droits politiques*) on the other. But, whatever was the case, it was not stated in the first constitutions that dealt with the rights in question, which rights belonged only to citizens, and which to every man, and so also to an alien. This lack of clearness was perpetuated in subsequent constitutions as well as in those of our own time. But, in spite of this, if we interpret the prescriptions of some modern constitutions in the light of the provisions (applicable in certain states) of the peace treaties of 1919, we shall

find that personal and religious liberty, and rights deriving from these liberties, are guaranteed to all (and hence also to aliens); such rights as these which every man without distinction of nationality is capable of enjoying can properly be called "rights of man"; other fundamental rights (the treaties call them "civil and political rights"), such as the rights to assemble, to form associations, the liberty of the press, the security of the home, and freedom of movement within the state, are reserved for citizens only; and still others, primarily political rights, such as the franchise for parliamentary and municipal elections, are reserved for specially qualified citizens.

Whatever the solution of the aforementioned question may be, it is certain that in the 18th century the idea prevailed that there are some rights of a religious or natural character founded in the human being himself, which existed even before positive law was created; for this law was introduced for the purpose of better protecting these rights; the latter were embodied in the constitutions and, thus, provided with all the guarantees of a supreme law; but these rights were considered to have an even higher security, because law and constitutions were made for their sake. Because of their very nature, they cannot be abolished; they would continue to exist, any organization or constitution to the contrary notwithstanding.

At present, this conception of the fundamental rights, owing to the opposition to the Law of Nature and on account of the positivistic trend in jurisprudence, has faded. Securities for the lawful proceeding of the state authorities have been augmented by the improvement of the technical side of positive law (the procedure) and by securing the independence of the judges; in some countries, administrative courts now protect the constitutional "rights of man" against the administrative state organs. A remedy against the violation of these rights through legislation is, of course, given only if the courts in general are empowered to refuse the application of unconstitutional laws or if a special "constitutional" court has been established to annul such laws. In very recent times and in a somewhat cautious way, the international judiciary has been entrusted with the legal control of the application of these rights in certain countries. We have already mentioned the peace treaties, concluded after the World War, by which fundamental rights were—though only in some countries—guaranteed to a certain degree to all the inhabitants, to a still greater degree to all citizens, but with certain restrictions with regard to the citizens belonging to racial, linguistic, or religious minorities; the

articles of the treaties conferring these rights are recognized as fundamental law, for it is said that no law, regulation, or official action shall conflict or interfere with these stipulations, nor shall any law (evidently this includes the constitution also), regulation or official action prevail over them; the jurisdiction of the Permanent Court of International Justice was made to extend to all cases in which the rights of minorities, as guaranteed in these articles, were a matter of dispute between the state concerned and another state, a member of the Council of the League of Nations.

The extraordinary resort of self-help or "*ius resistendi*," however, is not acknowledged in any of the modern constitutions. In order to prevent people from recurring to such means, certain institutions meant to secure to the citizens an influence on legislation and government have been set up; some such institutions are universal suffrage, parliamentary regime, the responsibility of ministers, the referendum, the jury, etc. For these reasons, the clauses in the constitution describing the rights of man and citizen at present are not considered, under positive law, to be legally superior to the other clauses in the constitution; from a juridical point of view, they can be altered or abolished as well as the merely organizational part of the constitution; at best, whatever additional protection they have, is given to them by international treaties.

But in spite of the prevailing opinion that these rights have lost their legal superiority, they have lost nothing of their importance as a condition for the continued existence of positive law. For, as we pointed out in Part I, Chapter I, D, law which comes in conflict with urgent needs of the material and spiritual life of man cannot hope to survive very long. The outbreak of scores of revolutions, regardless of whether the "*ius resistendi*" was codified or not, is a sufficient proof that no state organization can long endure unchanged if it imperils the physical or spiritual welfare of man. The champions of the "*Law of Nature*" in protecting the fundamental human needs by obtaining the codification of the "*Rights of Man*" and in thus bringing to them the guarantee of legal force, intended to affiliate force with liberty by protecting liberty itself with force. This was a magnificent attempt to harmonize force, which is an essential element of law, with the moral principle of liberty, and thus to counteract the instinctive resistance of man to force. How deeply this resistance is rooted in man appears in the fact that even when force is opposed to the feeling of justice and when it presents itself as mere violence, it

tries to justify its action on the ground of moral principles, which it pretends to serve; this appears also in the fact that the attempt was made to deduce the fundamental juridical (and hence enforceable) rules from moral norms, *e. g.*, the obligatory character of agreements, as expressed in the words "pacta sunt servanda" from the moral commandment not to lie; and even in the fact that the juridical norms are put under religious and moral guarantees through the oath, which is an act of faith, or, at least, connected with faith.

All this proves that two things must be supposed for positive law: force and moral norms. There will always be a tension between these two notions and when the tension becomes too strong the struggle begins. The intention of those who formulated and proclaimed the rights of man was to prevent this struggle. These rights, regardless of whether they are codified or not, are, even at present, an actual guarantee of the rule of law. It is significant in this respect that certain French writers hold that the Declaration of Rights of 1789 is still in force and this in spite of the fact that the present French constitutional laws of 1875 do not mention these rights and that in the 19th century France underwent many revolutions and, thus, frequently changed its form of government so that there is no legal continuity which binds the present constitution to the constitutions of the 18th century; so it would appear that the declaration of 1789 is, as it were, a primary constitution, a standard by which the legitimacy of the subsequent constitutions may be tested.

The rights of man, which when embodied in the constitution represent law, but which as moral rules are independent of and above the constitution, exhibit thus a double form and a double meaning: 1) They guarantee man's existence against encroachments of the state powers, and 2) they guarantee existence of the state authority against unlawful encroachments of men. For, if these rights are duly respected, the people themselves furnish a potent guarantee of the maintenance of the state organization, the constitution and the laws.

Concerning the juridical character of the fundamental rights, as they are codified in modern constitutions, we may say this: In speaking of a "liberty" one means that the person enjoying that liberty must not be hampered in determining his actions for himself, and that he is legally entitled to ask the proper state organ to remove any obstacles to this freedom of action. But it may be that a state organ himself prevents this action. It is a principle of the modern state (in contrast to the absolutistic state) that organs are not allowed, even in

the interest of the community or the state, to do anything but what is permitted by law; for this reason, also the discretionary power of the state organs must be conferred by law. And so the citizen is protected against arbitrariness of the organs, if the aforesaid principle is sanctioned through their criminal, civil, and disciplinarian responsibility and through the control the courts may exert over their acts; he is further protected, in the same respect, even against the legislature, if fundamental rights are embodied in the constitution; for the sphere of liberty guaranteed to man by the constitution could, lawfully and regularly, be altered only through an amendment of the constitution, if, of course, the constitution itself did not dispose otherwise. Thus, some of the "fundamental rights" are nothing else than the constitutional protection of freedom of action. But there are other such rights which do not imply that state organs must leave man unchecked in his action and that they help him in maintaining this liberty; these rights impose on the organs the duty of giving to individuals or to groups of individuals something which they lack, *e. g.*, employment or financial aid. To such rights belong certain fundamental rights of an economic character.

### 3) The Kinds of Fundamental Rights <sup>5</sup>

The number of fundamental rights has not been the same always and everywhere, for opinions as to which powers may be given to the community and which to the individual are subject to change. These rights, though in some respects interrelated, can be classified under one or another of the following heads: 1) liberty of person (body); 2) spiritual liberty; 3) economic liberty; 4) usually, in connection with these, the principle of equality is treated.

1. The recognition of the *liberty of the "body"* resulted in the abolition of slavery, that is of the ownership of one man by another. In certain parts of the world slavery still exists.

The liberty of body implies liberty of locomotion: no one is to be hindered (*e. g.*, by confinement or imprisonment) in moving to whatsoever place he likes, except by due course of law (*e. g.*, if he has been legally imprisoned, or committed to an insane asylum after legal proceedings, or if he has been arrested in order to compel him to

<sup>5</sup> In some parts of this chapter, *e. g.*, in those dealing with the classification of rights, I follow the lectures on constitutional law delivered by my late master, Professor Bernatzik, at the University of Vienna.

render a service which cannot be substituted for). If a person is confined on a charge or on suspicion of a crime the judge (who is the most independent among state organs) must decide whether the imprisonment is lawful or not. This is the essence of the famous Habeas Corpus Act with which we have already dealt (see p. 118). Today, in England, a person who has been unlawfully detained or imprisoned, no matter by whom or for what reason, or any person acting on his behalf, is entitled to appeal to the judge to issue immediately a writ addressed to the official or private individual who has the person in question in his custody, and to order that individual to bring the imprisoned person ("to have his body") before the court and there to set forth the grounds on which the prisoner has been confined. It seems that, in spite of similar guarantees in other countries, the authority of the judiciary, as far as the control over limitation of personal liberty is concerned, is nowhere so far-reaching and so effective as in England. The English understood and proved that liberty depends far more upon the actual procedure of the state authorities than upon a proclamation of the Rights of Man. And indeed, some modern constitutions, following the example given by the Habeas Corpus Act, have embodied within themselves, besides mere solemn proclamations, certain rules regulating that procedure of state authorities which involves questions of personal liberty, *e. g.*, the principle that no person is to be kept in prison on the grounds of a punishable action without approval of the court; that he must not be judged without first being tried; that he must stand trial only before a court which has proper jurisdiction in that case; that only that punishment which is provided by law may be inflicted (*nulla poena sine lege*), provided that this law was issued before the punishable action was committed, or that, if issued afterwards, it is not disadvantageous to the accused, so that "ex post facto" laws are prohibited (conf. Art. I., Section 9 and 10 of the Constitution of the United States).

Closely connected with the liberty of locomotion is generally the right of dwelling where one chooses and of moving about on the territory of the state and also of emigrating from it. But these rights do not belong equally to both citizens and aliens, for the latter enjoy the right of choice of dwelling place in the state in a much lesser degree than citizens, who, in addition, cannot be expelled from the state as can aliens; whereas the emigration of a citizen is dependent upon his having accomplished his duties towards the state, especially the military

duty (insofar as this duty exists). Further, in many states a passport is required for travelling abroad and for returning from abroad to one's own country.

Here we must also mention the security of the home; that means that no private or official person is allowed to enter a lodging and to search it, without lawful reasons or without permission of the holder of the lodging; this right is protected in much the same way as is the liberty of locomotion.

Finally the secrecy of despatches (sent by letters, telegrams and telephones) belongs also to this group of rights.

2. *Spiritual liberty* appears, in the first place, in the liberty of conscience or of thought and belief. We have already dealt with the historical origins and sources of this kind of liberty, which in more recent times has been advocated by the champions of "toleration" (*e. g.*, by John Locke). This right forbids the use of force to extract from one the profession of a certain opinion or belief, *e. g.*, by compelling assistance at religious ceremonies. But there are exceptions to this principle, affecting persons who are under tutelage, *e. g.*, children. This right not only implies immunity from punishment for holding any opinion whatsoever, but it also precludes legal prejudices in general against the believer on account of his opinion. It implies, further, that the enjoyment of the "rights of citizen" as well as appointment to office in the state service is to be independent of religious belief; on the other hand, it is as a rule forbidden to refuse to fulfill one's duties as a citizen on account of religious belief. The principle of liberty of conscience is, however, inconsistent with the absolute and compulsory prescription of a religious oath to be taken before the state authorities, if no exception is provided for.

The right of publicly expressing one's thoughts is not identical with liberty of thought. This right is restricted by various limits varying according to whether the medium of expression is speech, publication, art, scenic performances, etc. So also the right of publicly professing a religion, especially in common and in public worship, is different from liberty of conscience or of belief; state laws usually require public ceremonies not to include what is illegal or immoral. Constitutional provisions in some countries guarantee the liberty of public worship only to denominations which are recognized by law.

The liberty of expressing thoughts orally (inclusive of radio broadcasting), by writing or through print exists only as far as criminal law and press law do not forbid the expression of thoughts (as is the

case with libels). The liberty of the press means primarily that publication must not be bridled by preventive measures, either such as censorship, *i. e.*, control of the publication before it goes to press, or by requiring a license for publishing periodicals (newspapers), or by requiring a bond (bail) as a security for collecting possible fines, or by prohibiting certain methods of advertising printed matter, *e. g.*, hawking. In modern states censorship, except under abnormal conditions, does not exist; in England it was abolished as early as 1695. But in many countries, publications, already issued, and containing prohibited matter may be confiscated and their further dissemination forbidden; information of such a confiscation, however, must be communicated to the court within a designated time, and the court must, also within a certain time, either confirm or annul the confiscation. In many states, the liberty of the press is guaranteed by the fact that delicts committed through the press are subject to the cognizance of a jury. But even in countries such as England where the press and opinion in general are allowed the greatest possible freedom censorship has been maintained regarding public artistic performances, *e. g.*, theatrical plays.

The liberty of science and art (including criticism) and of the divulgence of the results of scientific research belongs also to the sphere of spiritual liberty; it is protected chiefly through the protection afforded by the liberty of speech and publication; abuses of this liberty to the detriment of the author are subject to the legal consequences and penalties provided for in the laws on copyright.

The liberty of instruction (education) is usually accorded only to universities and not to secondary and elementary schools. The liberty of private teaching exists in modern states; but there is a differentiation in the authority attributed to these various kinds of teaching; often the state schools have preference over private schools which to some extent are under state control (*e. g.*, regarding the programme of teaching and examination); private schools in some countries in order to be placed on an equal footing with the state schools must have a special authorization (charter). In certain countries, universities are exclusively state institutions. There is great liberty regarding instruction and education in England.

The liberty of learning, including the liberty not to learn, is restricted in modern states at least as far as attendance at elementary schools is concerned, which is compulsory up to a certain age.

The liberty of forming associations and of assembling. A com-

bination of men organized by rules as an association is a body similar to the state, for the latter also is an association of men organized by rules. The closer the purposes of an association approach the purposes of the state, the greater becomes the competition between the association and the state; this appears most clearly in those associations whose purpose it is to exert an influence upon the formation and development of the state organization itself, and which are called political associations. For this reason the attitude of the state towards associations depends largely upon the form of the state. This attitude is, of course, rather unfriendly in absolutistic states which claim a monopoly in satisfying public and common interests; this is the case not only with the absolute monarchy, but also with the absolute democracy. Rousseau, the great champion of the latter state form, held the liberty of association to be inconsistent with the idea of the state. It is significant that the French Declaration of Rights of 1789 does not mention the liberty of association; a French law of 1791 (*Le Chapelier*) categorically forbade all professional associations, maintaining that their annihilation was in keeping with the fundamental basis of the French Constitution, and a French law of 1792 dissolved and forbade all religious orders. At that time associations were held to be dangerous to personal liberty; but now it is generally believed that the liberty of founding associations and joining them affords a very effective means of protection to the individual, who, alone, would be too weak to protect himself. But in France, even nowadays, associations, other than gainful and professional associations, are legally hampered in exercising the right of acquiring property; the French law is particularly severe against religious orders. The founding of an association in some countries is dependent upon a special permit of the government; in more liberal states a registration with the competent authority is sufficient, the latter having merely the right to disallow the association if it does not conform to conditions required by law; more rigorous restrictions are placed on, and additional guarantees required of, political societies of which, generally, aliens cannot become members.

A meeting also is a kind of association which, however, is temporary and is thus to a lesser degree organized than an association proper; yet it has a chairman, officers, recorders, etc. Meetings, except meetings of state organs (courts, parliaments, etc.), are under special state control, because, eventually, they may become dangerous to the organization of the state or to public order; this control, however, varies according to the kind of meeting involved, *e. g.*, a meeting of

an association, a public meeting, an open air meeting, an electoral meeting, etc.

Whether and to what degree the same rights, fundamental and otherwise, are to be acknowledged to men associated in a group as they are to the individual depends upon the attitude the state organization takes, as a matter of principle, toward associations. Liberty, which is the capacity of determining for one's self, when applied to associations, means autonomy and self-government, particularly as far as the property of the association is concerned, *i. e.*, that property which serves to the purpose of the association. In the Middle Ages, there were numberless associations with far-reaching powers; but with the appearance of absolutism their liberty was considerably limited. The writers on the Law of Nature did not view the problem of association in the same way. Some of them, *e. g.*, Rousseau, taught that the individuals conclude the social contract; others (as did Althusius) believed that the social contract is concluded not only between individuals, who are the units out of which associations are made up, but also between the associations themselves, which together make up a higher society, *i. e.*, the state. The corollary of the first opinion was that the associations derive their rights from a permit which is given by the state and which may be withdrawn by it; this was one of the reasons advanced during the French Revolution to justify the confiscation of church property. According to the second opinion, which exhibits a trend towards federalism, associations have their natural rights, for which they do not need the approval of the state, and, in addition, they possess rights bestowed upon them by the state. The German Philosopher Wilhelm von Humboldt (19th century) even held the state is merely a secondary (subsidiary) organization which may wield authority only in such matters as cannot be handled by individuals or by free associations of individuals.

The right of petition is usually given to citizens as a constitutional right, but sometimes also it is given to the inhabitants of the state in general. This right means that it may be requested that a certain action be undertaken by the state authorities, especially a legislative action by the parliament. In case such a petition is made the state authorities are bound to consider it officially. This right, as far as legislation is concerned, appears to be something similar to the initiative; and it was important at the time when parliament did not have the initiative. But<sup>10</sup> today this right has lost much of its importance, because parliament now possesses the full initiative in legislation and

the people have now a much more adequate means of expressing their views and desires—namely the press.

3. *Economic liberty.* In very ancient times the right of property had come to be considered the corner-stone of this liberty. Limitation of this right, even through taxation, was regarded as a sign of servitude. The budgetary right of parliament was a result of the victory of the view of the estates that the monarch could levy taxes upon them only with their consent. Some writers on the Law of Nature (*e. g.*, Bodin) deemed ownership a natural right by which the sovereignty of the state is limited. Others (*e. g.*, Hugo Grotius) held that there was, originally, a community of goods (communism) and that private ownership came into existence through a kind of agreement, which was concluded explicitly as in the case of a partition, or tacitly as in the case of occupancy. John Locke, on the other hand, considered labor as the origin of property. According to him, man acquires property whenever he changes anything from the state in which nature provides it; for, in so doing, he fuses his labor with and joins to it something that is his own (namely his labor) (*Of Civil Government*, Chapter V. Of Property). This opinion approaches the socialistic idea of man's right to the full output of his labor.

The last paragraph of the French Declaration of Rights of 1789 reads: "Property being an inviolable and sacred right, no one may be deprived of it unless public necessity, legally established, obviously requires it, and unless just compensation is made in advance." According to this clause, which has been incorporated in various constitutions, past and present, property is recognized as a fundamental right, but at the same time the right of expropriation is recognized, if law, in the public interest, provides for it and if full compensation is paid. Thus property, under these conditions, can be seized, but the total wealth must not be diminished; confiscation, *i. e.*, expropriation without just compensation, is forbidden.

Economic liberty implies the capacity of freely disposing of one's personal wealth (considering this in the broadest sense, *e. g.*, buying and selling real property) and, thus, also the capacity of disposing of one's own working power (right of freely negotiating labor contracts); moreover, it implies the free choice of profession; in the Middle Ages this latter capacity was limited to a great degree by the strict class distinctions, *e. g.*, with respect to the trades.

The liberal opinions regarding property, which characterised the

period of the French Revolution, were soon opposed by Babeuf, the leader of the communists, and even by Robespierre; Rousseau himself did not recognise any rights to be inviolable in an absolute democracy, and this of course applied to property also. At that time, the communistic idea did not gain the ascendancy; but the right to get work, or the right to other means of sustaining existence was recognized in the French Constitution of 1793. Later on, after the revolutionary period, Fourier strongly criticised the "rights of man" theory, and expressed the view that, for the majority of men, they have no value at all; on the other hand he claimed certain fundamental *economic* rights. In France and in Germany, the right to work was claimed in the revolutionary year 1848.

In spite of the growing force of the socialistic movement in the 19th century it is only since the end of the World War that, in some states, fundamental economic rights have been guaranteed in the same way as other such rights. This was the case in Germany whose Constitution of 1919 stated them expressly. This constitution laid down the principle that the opportunity to work and to earn must be given to every citizen; and if it is not, his continued existence must be secured. This constitution, further, has a clause according to which certain enterprises may be socialized and, in that case, the regulations for expropriations may be applied. The liberty of forming associations for the purpose of safeguarding and fostering labor and economic conditions is guaranteed; a comprehensive scheme of insurance for disabled persons is provided. Finally it may be mentioned that this constitution avows that the individual's economic liberty must be secured as far as that is consistent with the regulation of economic life according to the principles of justice, with a view to guaranteeing to everybody an existence becoming a human being. We can gather from all this why it is that individual liberty in economic life, as it was conceived in the liberal movements of the 18th and 19th centuries and realized by the abolition of the ancient guilds and by the proclamation of the liberty of labor, trade, commerce, etc., has now been restricted. Under the influence of the labor movement present day governments often are empowered to intervene in a far-reaching way in economic life for the purpose of increasing production, and particularly of preserving the working classes from evils affecting their health, morals, *etc.* Not only the liberty of contracting but also the liberty of trade and craft has been limited through prohibition of crafts prejudicial to health, through the prescription of

various conditions for exercising even allowed crafts, and through the establishment of state monopolies. Moreover, at critical times, economic liberty has been and still sometimes is subject to even stricter limitations, such as the fixing of maximum-prices, various seizures also called "requisitions" and the official assignment of lodgings in overcrowded towns. By such means as these, devised to protect the economically weaker classes, an attempt has been made to realize the idea of social justice, in contradistinction to the idea of unlimited liberty.

4. *Equality.* The principle of equality, which has its origin in the Christian idea that all men are equal before God, has been proclaimed not so much as a specific right but as a general maxim in legal questions and also as a condition for the realization of personal liberty. Equality also was a principle propounded by the school of natural law, which held that in concluding the social contract conditions are equal for all; however this opinion can be carried to the conclusion that conditions of life in common are in reality equal only for those participating in the said contract, *i. e.*, only for citizens, and not for aliens; and, indeed, as we know, citizens have a privileged position in comparison to aliens.

In the time of the French Revolution, the proclamation of the principle of equality was directed, in the first place, against the privileges of the high nobility and clergy; but it was not intended thereby to establish a general and absolute equality; in fact inequality based on something else than class distinction was recognized. The Declaration of Rights of 1789 stated: "Men are born and remain free and equal in rights. Social distinctions can be founded in public utility only . . . The law, whether it protects or whether it punishes, must be the same for all. All citizens, being equal in the eyes of the law, are equally admissible to all dignities, posts and public employments, according to their capacity and without any other distinction than their worth and talents." Thus, a difference between men with regard to their moral and intellectual qualities was recognized, and it was acknowledged that men are not entirely equal and that it is necessary that unequals be treated unequally. But the question arises, which inequalities, at certain periods of history, have been held as so important that legal consideration must be given to them. Religion, social or professional status, and wealth have all at one time or another been considered qualities that justified discrimination before law. And

even at the present time similar differences are still acknowledged, *e. g.*, on the basis of nationality, citizenship, race, sex. Equality before the law, therefore, means only that those who at a certain period are held to be equal, must not, for the time being, be treated unequally.

Thus, the question of who are to be considered "equals" is contingent upon culture, civilization, belief, etc.; this appears clearly in the problem of equality of men and women with all that it involves. However, it is true that with the French Revolution and its echoes in other countries, the group of men equally endowed with rights, became much larger than it was before.

Equality, declared by law, is not of great value if there is no equality in the application of the law by the authorities; hence special or extraordinary courts such as existed in feudal times, are now forbidden. This principle implies further that the authorities must apply the law uniformly; hence they are not allowed to take into account differences not considered in the law, and, when the law leaves free discretion to them, they must act in the same way in all cases attended by the same circumstances.

The equality of the citizens, finally, means that they must contribute equally in meeting the demands of the state, *e. g.*, in paying taxes and rendering military service; this, however, in proportion to the capacity and fitness of each of them, as was stated as early as in the French Declaration of Rights of 1789. This equality, further, is said to imply the right of compensation for a person who, on account of an act of an authority, has, in an unjustified manner, suffered damage which others did not suffer, *e. g.*, if this damage is due to an illegal act of the authority; but even if there is no illegality, it is sometimes held that compensation must be given out of public funds to a person who in the public interest, that is for the benefit of all, made sacrifices, and especially if he sacrificed more than others, as is *e. g.*, usually the case with damages caused by military operations in war time.

Legal equality in every respect does not exist even amongst citizens; an example of this is afforded by the rights of minorities as distinct from the fuller rights of the majority. The peace treaties concluded after the World War determined for certain states (but not for all states, which implies another inequality) the equality of their citizens with regard to their "civil and political rights without distinction as to race, language or religion." Adequate facilities are further guaranteed to the linguistic minorities for using their language before the courts (not before all authorities) and for having their children

instructed in the primary schools (*i. e.*, not in all the schools) through the medium of their own language. Thus, citizens belonging to a linguistic minority do not enjoy even where they are protected—and, of course, far less where they are not protected—the same rights as to the public use of their language, as do citizens belonging to the linguistic majority.

#### 4) Suspension of Fundamental Rights

The purpose of the fundamental rights is to protect the individual against the state, or better, against state organs, in order that they may not overstep their powers and, thus, imperil the liberty of the individual. But this liberty can become dangerous to the state organization if the state itself is imperiled. Therefore constitutions provide for a suspension of the fundamental rights in times of danger for the state and as long as this danger, *i. e.*, war and rebellion, continue to threaten (conf. art. I, section 9, ¶ 2, of the Constitution of the United States: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it").

It depends upon the form of government, when, how, and to what extent such a suspension can take place. Modern constitutions do not permit fundamental rights to be suspended without previous or, at least, subsequent consent of parliament. According to the French law of 1878 the "state of siege" (*état de siège*) may be proclaimed in time of war or armed rebellion by a law, in which, however, it must be determined for which districts and for how long this extraordinary rule is to be in force. The effect of this is that the jurisdiction of the civil authorities in the maintenance of order and security, passes over to the military authorities, whenever and insofar as the latter themselves deem such a transfer necessary. The military authority is entitled to order searches in houses, to seize arms, to remove arrested persons and persons whose domicile is not in the districts which are under military authority, to prohibit publications and meetings believed to foster the disorder. Delicts against the security of the state, against the constitution, and against public order and peace may be tried before military courts. If the necessity for a "state of siege" arises while parliament is adjourned, the President of the Republic is empowered, exceptionally, to declare it; but parliament must either approve or cancel his decree as soon as possible. Similar provisions are to be found

in constitutions of other European states, *e. g.*, in the German Constitution.

In England, a different procedure is observed. In times of danger, certain provisions of the "Habeas Corpus Act" are suspended by a special law; but this does not mean that personal liberty is abolished, for only a part of the protection secured by the Habeas Corpus Act is thereby suspended. The effect of a so-called "suspension" is that persons imprisoned on certain criminal charges (ordinarily only for high treason) can not claim a speedy trial or release. When however the "Habeas Corpus Suspension Act" ceases to be in force, anybody who has wrongly detained a person in prison, must assume civil and criminal liability for his wrong-doing. This applies also to acts done under "martial" law, *i. e.*, special measures taken to maintain public order, which, however, according to Dicey, can be taken only during time of war. But it would be morally unjustifiable to make the state organs responsible for every breach of law they had committed in times of great excitement, particularly when the urgent restoration of public order was in question. Usually therefore, when the Suspension Act has expired, an "Act of Indemnity" is passed by which state functionaries are freed from prosecution for having committed certain breaches of law during the time of the suspension. "Indemnity" is given in England in other cases also which are similar to this one; but we must remember that this can be done only by means of a law, and that it is therefore necessary that parliament itself believe that it is justified in freeing state organs from prosecution for having transgressed the law.

### 5) Citizenship (Nationality)

Citizenship is a term whose analysis reveals that it implies various rules belonging partly to national and partly to international law, by which the individual, in a particular and special way, is attached to a state organization; this attachment is emphasized in the citizen's oath of allegiance. In many states of the ancient world, this group of rules covered almost the whole field of law; that is to say, only citizens could enjoy the benefits offered by the law and aliens were not recognized by law. However, with the progress of civilization, the group of rules applying only to citizens has become and is still becoming smaller and smaller. In our days, an alien may enjoy almost the same rights as a citizen. Generally speaking, in civil and criminal law there is no longer any discrimination between an alien and a citizen; aliens

are protected by organs of that state on whose territory they happen to be. However, in some countries, aliens who are plaintiffs in law-suits have to give bail for law-costs, and, in certain countries, are subject to certain restrictions concerning acquisition of real estate. A differentiation between citizens and aliens is implied in the principle, adopted by almost all European states, according to which they do not extradite their citizens, as they do aliens, on account of delicts committed in a foreign state; another view is taken by Great Britain and the United States which, in such cases, extradite their citizens also. In many states, certain trades and professions are open to citizens only. Yet, in the main, even in the sphere of so-called "public" law, the legal situation of aliens has been assimilated to that of citizens, *e. g.*, regarding personal and religious liberty.

But, even at the present time, certain rights in almost all states are reserved exclusively for citizens. These rights are precisely those through the exercise of which influence can be exerted upon the development of the state organization or through which it is possible to participate in its functioning; we may call them political or organic rights, and the persons who exert them, organs. Such rights are the right to vote and the eligibility for membership in political bodies (parliament); the capacity to become a juryman or a state official; the right and duty of being a soldier. Often citizenship is required even for occupations which, though not state services, are to a certain degree connected with the state organization, *e. g.*, the profession of a public teacher, a notary, an attorney at law, a priest; sometimes these rights are coupled with the duty of exercising them (the duty to vote or to function as a juryman). The close relation between the citizen and his state appears also with respect to his dwelling on the state's territory. As a rule, the citizen can emigrate from his state only if he has fulfilled his duties towards the state. On the other hand he can not be expelled from his state, or obliged to live in a certain place within it. The reverse applies to the alien: immigration, generally, is not entirely free, but dependent upon a permit (this may be merely the visa on the passport) or upon the payment of a tax; sometimes immigration is allowed to a fixed number only (the quota in the United States). But the right of an alien, even if he has a permit of residence, is not so secure as the corresponding right of a citizen, which, as we know, is usually guaranteed in the constitution. Aliens are often under special police control and can hardly withstand expulsion if they are not protected in this respect by international treaties;

this applies particularly in time of war. The World War showed furthermore that the property of aliens also is not absolutely protected by law.

Even when abroad, the citizen is, to a certain degree, subject to the laws of his country; obedience to these laws, it is true, can not be enforced through the same means abroad as at home; still, there exist certain means of enforcement: the forfeiture of citizenship or of some other right which he has in his own country or of the protection extended to him by the representatives of his country abroad.

The set of rights encompassed by the word "citizenship" has not been the same at all times and in all countries. The coöperation of the "subjects" in the state organization extended as the process of democratization advanced, and, accordingly, the notion of citizenship changed; in fact it even split in two: hence the distinction between "active" and "passive" citizens. In the time of the French Revolution only citizens who enjoyed the franchise were considered as active citizens (*citoyens actifs*). Even today, not all citizens have the franchise, but only those who are qualified either by sex, as in some countries, or, as in all, by a certain age. In some states, citizens belonging to national minorities do not enjoy the same number of political rights altogether as the citizens belonging to the national majority; similar to theirs is the situation of the subjects in certain colonies in contradistinction to the citizens of the mother state; in some countries the status of naturalized citizens is not the same as the status of citizens by birth. Long ago, Aristotle made the distinction between "complete" and "not complete," *i. e.*, such citizens as, on account of some bar (*e. g.*, nonage, old age, banishment) have no share in the judiciary and the executive (*Politics III, 1275a*). He identified the notion of a state organ with the notion of a complete citizen, which is correct with reference to a direct democracy. But in the indirect democracies of our days we can regard as a "complete" citizen any person who has, if only indirectly, a share in government by electing state organs. However, the differentiation between various groups of citizens according to state law has no significance in international law.

There are various acts and happenings through which all or the greater part of the above-mentioned rights may be acquired (acquisition of citizenship). The most important amongst these are:

1. In almost all countries, the legitimate wife acquires the citizenship of her husband through marriage itself; among the chief exceptions are Russia

and the United States; in the latter, at present, an American woman does not lose her citizenship by marrying an alien unless she makes a formal renunciation of it; a non-American woman marrying a citizen of the United States does not acquire American citizenship through this marriage, but her naturalization is thus facilitated. In Yugoslavia, according to the law of 1928, a Yugoslav woman marrying an alien loses Yugoslav citizenship through this marriage, unless she does not acquire the citizenship of her husband according to the laws of his country, or unless she formally reserves to herself Yugoslav citizenship. In some states of South America the husband, in certain cases, acquires the citizenship of his wife (in order to foster immigration).

2. Legitimate children or children recognized as legitimate have the citizenship of their father (*ius sanguinis*). According to this system, citizenship is, similar to the monarchical right, inherited through the legitimate masculine lineage, illegitimate children having, as a rule, the citizenship of their mother.

3. In certain American states a person has the citizenship of the state in which the place of his birth is situated (*ius soli*). This applies in other countries to children of unknown parents and to foundlings who are considered to be born in the state where they were first found.

4. But there are also countries in which either system may be applied, for certain cases *ius sanguinis*, for others, *ius soli* (as in Great Britain and France).

5. *Naturalization* is an act by which the proper state authority grants citizenship to an alien who wishes it. This act, as a rule, is performed by an administrative authority, but sometimes it is performed by the legislature.

6. The inhabitants of a territory which happens to be ceded from one state to another acquire, ordinarily, with the cession itself the citizenship of the state which comes into possession of this territory. But very often an option is provided in international treaties in cases of this kind; this means that the aforementioned inhabitants can maintain the citizenship of their old country by declaration; but if they elect to make this declaration, they must then, as a rule, emigrate to the country whose citizenship they retained.

Usually the old citizenship expires with the acquisition of the new one. According to the laws of certain countries the citizenship of those citizens who declare for citizenship in another country is canceled thereby; but in other countries it is not considered as canceled unless the proper authority formally declares it so. The loss of citizenship is sometimes the legal consequence of taking residence for a long time in a foreign country, and sometimes also of unlawful emigration or of entering into the service of a foreign country without permission of the home state. But as the laws of many countries are at variance on the question of citizenship and particularly as they do not uniformly provide that an old citizenship need expire with the acquisition of a new one, and, on the other hand, that it expires only upon such an acquisition, there arise cases of double (or even manifold) citizenship of the same person (mixed subjects), and cases in which a person has no citizenship at all. On account of such very awkward cases, modern

international law is making efforts to bring it about that every person may have one citizenship (*i. e.*, that no one may be without citizenship and that no one may have more than one citizenship).

The fact of one's "belonging" to a certain municipality in the state, involves, in analogy to citizenship, certain rights and duties, which attach the person concerned to that municipality, so that he can not be expelled from it and so that the municipality is obliged, in case of poverty, to take care of him. What has in general been said about the acquisition and loss of citizenship applies also to the acquisition and loss of this other status: namely, (1) special extensions of it which sometimes can not be refused to persons residing in the municipality for a certain time, (2) birth and (3) marriage, on one hand—and, on the other, dismissal from the municipality. The "membership" in a municipality is a relation between a municipality and its members, similar to that between a state and its members, but a somewhat looser one.

"Citizenship" or "nationality" is merely a general term (not always having the same meaning) for a group of rules or, in particular cases, for a status, determined by these rules; this appears especially if one speaks of the nationality of a corporation or of other "juridical" persons or even of things, such as ships and aeroplanes. In speaking of the nationality of corporations one is not thinking of the nationality of its members, but rather of the question, of which state's laws apply to the administration and the property of this association. This "nationality" usually is determined by the place of residence of the governing body or by the nationality of all its members (shareholders) or of those members who have a majority of shares of the capital stock. Somewhat similar is the meaning of the term "nationality" as applied to ships and aeroplanes. Because of the traffic between states, and particularly in order to safeguard the freedom of the seas, it is necessary to know which state's laws apply to individual ships and to their crews; these juridical relations (or this status) are briefly called "nationality," which, for mercantile ships, usually is determined by the nationality (citizenship) of the owner, or of those part-owners, who have the greater share in the vessel. A visible sign of the nationality of a man-o'-war is its flag, and of a mercantile vessel, its flag and documents.

Many states hold the view that nationality ought to be acknowledged to aircraft (International Convention for the Regulation of Aerial Navigation, 1919). Air transportation involves questions of inter-

national, civil, commercial and criminal law, and, therefore, it is important to know with which state the aeroplane and its crew are particularly connected. It is worth noticing that some jurists and some states have refused to acknowledge "nationality" to aeroplanes for the reason that automobiles lack it likewise. However, from a juridical point of view, there is a considerable difference between the two means of transportation, aeroplanes being better suited and adapted to moving rapidly over several state territories and being more difficult to control than automobiles. Means, therefore, are necessary for easily and speedily determining what laws apply to the aeroplane, without searching for the nationality of the crew or the owner. Therefore, an aeroplane, like a ship, ought to have not only a "nationality" but also an exterior mark of it. The nationality of aeroplanes may be determined, similar to that of corporations and ships, in various ways, *e. g.*, by reference to its airport or the residence of its owner or by the place of its registration. ✓

## II. THE LAW

### 1) Juridical Significance

The conception of the constitution as a special set of rules which differ in their form and in their authority from other state rules is, as we said in a previous chapter, of comparatively recent date. In early times the fundamental rules of the state were not distinct, as to their form, from other less fundamental rules; there was no formal distinction (and, in England, there is still none) between the constitution and ordinary laws. In centuries past, the notion of the constitution evolved during periods of revolutionary movements together with the idea that there must be established a set of permanent rules, so framed as to be difficult to alter, in accord with which the law shall be created in the future. Thus, the rules of the constitution determined how additional legal rules are to be established. These legal rules are called laws, when they, on the one hand, are directly subordinate to the constitution, and, on the other, superior to all other legal rules except the constitution itself. Thus, where a formal constitution exists, the law ranks second, and where there is no formal constitution, it ranks first amongst legal rules.

If we want to understand the essence of law we must determine not only its relation to the higher rule, the constitution, but also its relation to legal phenomena which are inferior. For this purpose, however, it

is necessary to explain, without taking into special consideration the above-mentioned division of legal rules into constitution and laws, how and why law in general happened to be split into different kinds and grades of rules. For reasons of security it has always been held that law must not be created anew for individual cases, but that individual cases must be judged according to old, customary law or according to statute law already in force before the case arose. Only if this principle is respected can arrangements and relations between men have stability and security in case of dispute. Otherwise the Rule of Law is impossible. We call a state in which the law is not solidly fixed in advance and in which it is created for individual cases as they arise, a despotic state (conf. p. 46). An elementary condition for the Rule of Law is that the organ who decides on the rights and duties of the individual be bound, in doing so, by previously made legal rules. And therefore law, in general, has split, on the one hand, into general rules, and, on the other, into particular commands which are issued for individual cases and must be in conformity with the general rule. This general rule is either expressly established and laid down as such, or it is customary law (called in Anglo-Saxon countries common law) which is applied in individual cases on the basis of old usage.

In contradistinction to customary or common law, we speak of a law (in the narrower sense of the word) or of a statute law or of an act of legislation, when the legal rule is established and laid down by an organ having authority to legislate. For this conception of the law, it is immaterial who possesses this authority; it may be an absolute monarch or an absolute parliament, or monarch and parliament jointly. The history of Roman law shows that almost all the principal organs, in successive periods, legislated; thus it is that we can find so many Latin expressions for "law": *lex*, *plebiscitum*, *senatus-consultum*, *constitutio principis*. It is natural that the greater part of laws in the Roman, as well as in other states, had a general character, *i. e.*, that laws were not made for individual cases, but for an undetermined number of cases, which might have arisen in the future. We may repeat again that it is not only in the interest of the proper and efficient functioning of the state organization, but also in the interest of legal security itself, that the law be general and fixed in advance; for only in this way is it possible for everybody, to be able to reckon with the law; because, under such conditions, when an individual case arises, it is not the arbitrary will of a state organ which decides, but a

fixed norm or law, which must be reflected closely in the decision of the state organ. The idea and thus the starting-point of the Rule of Law is conditioned by the division of law into general rules and into particular rulings; the first are made by the (legislative) organ appointed for this purpose, the second by another organ who, in issuing the particular ruling, *e. g.*, in passing judgment, must apply the general rule.

However, legislators do not always confine themselves to making general rules. Various reasons account for this: first, it is difficult to control the legislative organ effectively; second, the generalness (or universality) of the law is a very broad and elastic notion; and third, it appeared that, under certain circumstances, it was necessary, and at the same time not prejudicial to general security, to have the legislative organ regulate directly (in the form of a law) certain individual cases of importance, which owing to their exceptional significance, are not of such nature as might properly be settled by some general rule. Some constitutions themselves offer examples of such cases, *e. g.*, those which confer upon an individual, designated by name, the dignity of a monarch. Thus, legislation includes not only general and abstract rules, but sometimes also rules dealing with a particular subject; but all of these rules, which are made by the same organ and issued in the same form, have the same legal force. Even in Roman law we find statutes which were not general but which concerned individual cases; for instance the law by which the supreme power was conferred on an individual monarch, the so-called "lex de imperio" (*e. g.*, that of Vespasian). The legislative power often took, and still takes the liberty of issuing, in the form of a law, commands which have no general application, but apply to an individual case. Examples are numerous: the designation of the head of the State (as mentioned above), the designation of the Civil List for him or of an appanage for a member of the reigning family, but, vice versa, also the confiscation of the property of a dethroned dynasty, the expulsion of its members, the declaration of war and the concluding of peace (both these acts, according to the present German Constitution, must be made in the form of a law); further examples are laws concerning the construction of a railway or of a building, *e. g.*, a theatre, or concerning the charter of a railway company; or concerning a loan; also a law by which a person is naturalized in an extraordinary way, and, properly speaking, any law which constitutes an exception to general laws; such are many "private bills" in English legislation and "bills of attainder," *i. e.*,

special laws by which in times past punishment was inflicted by a law upon persons directly, *i. e.*, without trial before a court. (According to the United States Constitution, Art. I, section 9 and 10, the United States and all individual states are forbidden to pass a bill of attainder).

Nevertheless it has always been advocated and still is today, that a law must be something general and that laws which are not general, are laws only in form, and not in substance. This claim is more than a test of man's deep-rooted moral sense for the regularity and universality of law; because it is a test also for accurate thinking, which demands that the same words be employed for the same notions, so that the same notion may correspond to the word law in jurisprudence, which corresponds in science, *viz.*: equality abstracted, and that means universality. Rousseau<sup>6</sup> emphatically advocated universality as an essential mark of the law, stating: "In saying that the subject of laws is always general I understand that law considers men as beings in groups, and actions as being abstract, and never a man and an action individually. Thus, law may establish privileges but it cannot confer them upon a person designated by name; the law may establish several classes of citizens, and it may even define the qualities implying the right of entering into these classes, but it cannot designate certain persons who are to be admitted; the law may establish a royal government, and a hereditary succession; but it can neither elect a king nor nominate a royal family; in one word, no function dealing with an individual subject belongs to the legislative power." This demand is natural from the viewpoint of the greatest possible equality. But experience proves that it is impossible to consider as equal what, by nature, is not equal, and this applies, in a certain degree, to men. Not even Rousseau claims that laws are always and without exception general; he admits privileges, provided that they are granted to men as a group and not to individuals. The same view is expressed in a modern doctrine, according to which universality is an essential element of the law. One admits, it is true, that even "special" laws are "real" laws, *e. g.*, the commercial law, which doubtless is an exception to the code of civil law, which is general; but the commercial law itself is general if contrasted for instance with the law on limited companies, which is an exception to the commercial law, etc. Thus, it is not a question of an absolute universality which could not be restricted with respect to the group of men concerned, or

<sup>6</sup> *Contrat Social*, book II, chapter 6.

with respect to the subject of the regulation or to the time of existence of the law (temporary, annual laws) or to the territory on which the law is to be in force; according to this doctrine, it is only to individuals or to individual cases that a true law may not refer. But the very example offered by Rousseau shows that "universality" is a very vague term which, in its extreme restriction, differs only slightly and, for legal purposes, immaterially from "particularity." If we set the establishment of a monarchy beside the acknowledgment by the law of the general legal and political equality of the citizens, it appears to be a more particular matter than the nomination of an individual monarch if set beside the establishment of the monarchy. So we see that the "generality" or "individuality" of the matter of a law will hardly help us to understand the very essence of a law from a legal point of view.

Rousseau, however, claimed "generality" not only for the subject of law, but also for the law-giver. The quality of the legislator, in his opinion ought to be the same as that of the law; both ought to be general. The general will ("la volonté générale," *i. e.*, the whole nation) should give laws, and the decision only on a general subject of this general will should be a law. The subject of the regulation by law then is, according to Rousseau, identical, as it were, with the legislator, each being viewed, however, from a different standpoint: "Mais quand tout le peuple statue sur tout le peuple, il ne considère que lui-même; et s'il se forme alors un rapport, c'est de l'objet entier sous un point de vue à l'objet entier sous un autre point de vue, sans aucune division du tout. Alors la matière sur laquelle on statue est générale comme la volonté qui statue. C'est cet acte que j'appelle une loi."<sup>7</sup> "But if the entire people ordain for the entire people, the people simply consider themselves; and if then a relation be established, it is the relation between a subject in its totality taken from one point of view and the same subject in its totality taken from another point of view, without any division of the subject. The matter then which has been regulated is general like the will which legislates. It is this act which I call a law." Rousseau, consequently, did not consider as laws those rules, which, though general, are not issued by the legislature; also he said that a ruling which is given by the legislator, but which concerns an individual subject (*objet particulier*) is not a law but a "decree" (*décret*).

<sup>7</sup> *Contrat Social*, book II., chapt. 6.

Legislation, however, did not follow the direction indicated by Rousseau. The French Constituent Assembly had already determined in November 1789 that all their decrees which were sanctioned by the king should be called laws (*lois*). The same definition was given in the French Constitution of 1791. All the consecutive constitutions have the definition of what is to be considered as law, determine how it is created, and fix its authority. Now, from a strictly legal point of view, there is to be considered only that definition which is given in the constitution, or, where no written constitution exists, that given by custom; definitions of law which are wider or narrower than, and sometimes even contrary to, that given in the constitution, have no juridical significance at all. It therefore appears useless—still speaking from a legal point of view—to construct the theoretical notion of a “formal law” and of an “essential law” or any notion of law applicable generally to every state, because the constitution of each state independently determines what a law is under that constitution, what organs coöperate in legislation, and how they do so, and what legal authority rules thus created have. As we know, legislative organs and proceedings in legislation are differently organized in different states. However, as a matter of fact, the product of the work of all these differently organized and differently proceeding legislators, or better, legislatures, in modern states, belonging both to monarchies and to republics of various kinds, has approximately the same legal authority. Thus we may, with due reserve, and only with regard to the legal authority of the product of legislative work, construct a comparative notion of the law as it exists in modern states.

Law has no authority against the constitution, but it has authority over all other juridical rules and rulings. Hence it follows, that the position of law in relation to rules superior, coördinate, and inferior to it is this: The law cannot alter the constitution but must be in conformity with it; the constitution, however, can, by its own amendment, amend laws also. The later law alters (or even abolishes) the former one, because two laws, contradictory to each other, cannot be valid at the same time, and because the lawful rule is that which the legislative authority enacts, for the time being, in due form as law (*lex posterior derogat legi priori*). All juridical rules save constitutional ones must conform to law, since they are inferior to it; otherwise they are not valid. Thus we have determined the place which law occupies in the hierarchy of state commands; any rule possessing the defined legal authority is a law. This applies, at least, to the

overwhelming majority of cases; still there are exceptions. The constitution may in certain cases alter this distribution of the legal authority of the various prescriptions of the state organs; it may confer on an ordinary law and even on an ordinance the power to alter provisions of the constitution itself; in exceptional cases it may allow another than the regular legislative authority to issue orders which have the same legal force as have ordinary laws, etc. Finally, laws in general sometimes differ amongst themselves in authority, *e. g.*, federal laws, in certain federal states, prevail over local (state, provincial) laws without regard to whether they were enacted before or after them.

All this warns us that we must attentively watch the rules of positive law, in order to understand well the legal significance of the particular norms or commandments. What positive law does not determine or what it does not, at least, tacitly imply, is of no legal importance. For this reason, therefore, the "generalness" cannot have any significance for the notion of the law, if the constitutions do not require this quality. Every rule which is not general, but which complies with the conditions set up by the constitution regarding the creation of a law is legally "law"; and any rule though it be general, which does not meet these conditions, is not a law; for it has not the legal authority of a law and it may be urged that it not be called a law (*i. e.*, "essential law," as a certain school says), because in calling it so, one modifies or lowers the terminology which alone is authentic, since this terminology is used by positive law itself.

Nevertheless, it is a rather wide-spread opinion that certain legal consequences derive from the mere fact that a norm has the quality of "generalness" without consideration of the prescriptions of positive law. If this were so, then of course, we should be obliged to differentiate between laws with a general substance and laws with a particular substance. It has been said that the above-mentioned principle "*lex posterior derogat legi priori*," which presupposes equal legal authority of the laws, does not apply when general laws and special laws are considered together; neither does a later special law, it was said, abrogate an earlier general one (*lex posterior specialis non derogat legi priori generali*), nor does a later general law abrogate an earlier special law (*lex posterior generalis non derogat legi priori speciali*). In these Latin sentences, it is true, a "special" law is spoken of, but this expression covers the notion of a "particular" law also, for the latter is by its very nature "special." If the first Latin sentence means that a special law does not abrogate the general law wholly, but only

insofar as the intention of the special law goes, then it is only the statement of a self-evident truth and merely serves to confirm the opinion that even a special law has abrogative force. But if the meaning be that a special law does not abrogate but only suspends a general one so that, with the eventual expiration of the special law, there may be no breach in the legal regulation of the affairs regulated heretofore by this law, but that the provisions of the general law, which were only suspended, may now extend automatically to them,—then we must make the remark that this assertion is by no means self-evident, and must be supported by a prescription of positive law. Any interpretation, in such cases, must take into account the intention of the later special law or of the (still later) law by which it was abrogated, or of a principle of interpretation lawfully applicable to the legislation in question. The validity of the second of the above-mentioned sentences—that a later general law does not abrogate an earlier special one, but that this special one remains in force as an exception—depends likewise upon the answer to the question whether it is the intention of the later general law to leave the provisions of the earlier special law in force. If no such intention can be found and if no provision of positive law decides this question, then, amongst "general", and "special", and "individual" laws, that law which is the latest in time, regardless of whether it is general or not, will prevail. This same principle is applicable, from the viewpoint of state law, to questions of which, amongst international treaties which have been enacted as state law, shall prevail, and also which shall prevail in questions of conflict between such treaties and other laws.

To conceive a notion of law which has still other marks besides the marks determined by positive law, not only is unnecessary but might also lead to errors of far-reaching effect. In this respect, and in addition to the opinion of some French writers concerning the quality of "generalness" as a requisite of law, which has already been rejected, we may mention the doctrine of certain distinguished German authors (*e. g.*, Laband and Jellinek) who attempted to set up—notwithstanding the requirements of the constitution for an act of the legislature to have authority as law—an absolute notion of an "essential law," (*Gesetz im materiellen Sinne*) by stating that every "juridical" norm is a law in this sense. They further held, however, that not every prescription given by state organs is a juridical norm; that only those prescriptions which delimit the sphere of rights of one individual as against another individual or against the state, are juridical norms;

and, according to them, the "sphere of rights" meant everything relating to the liberty of the activity of the individual, *i. e.*, to his personal liberty and property. According to this doctrine, rules which restrict or enlarge the sphere of rights of the individual are "essential laws" even if they are not given by the legislator, but by administrative organs; whereas merely "formal" laws, *i. e.*, those which, though given by the established legislative organ, do not contain "juridical" rules, are not "essential" laws. Thus, applying this latter notion, the provisions of organizational laws relating to "internal" matters of the administration, as well as laws establishing the budget or regulating state loans, would not be "essential" laws; these laws would be merely "acts of administration" in the form of law.

The fault of this theory is that in restricting arbitrarily the "sphere of rights" it restricts the notion of a juridical norm; for *every* state norm either directly or indirectly concerns the "sphere of rights" of the individual. The state budget, for example, concerns, through charges on one hand, and allowances on the other, though perhaps only indirectly, the property of the people. This explains why the regulations of certain municipalities provide that a proposed budget must, before its adoption, be made accessible for everybody to inspect; so that the members of the community may be able to make criticisms, which must be taken into consideration in the final discussion of the budget. It also explains the fact that, where the bicameral system exists, the lower chamber, which represents the interests of the entire population, has far more rights concerning the budget than the upper one. Similarly the organizational rules always are, to some extent, though in various degrees, significant juridically for the liberty of the people, if only for those who serve in the administration; not even the interior organization of the various offices is free from this influence. *Every* state rule is a juridical rule, for the state is nothing else than a juridical organization of men.

It is no wonder that such doctrines as we have just rejected have caused errors and confusion. This appears in a certain theory, advocated by Laband, regarding the budget. In his opinion, the state budget, even when enacted and published in the form of a law, is not an "essential law"; and the consent of parliament only means that the government is discharged, from then on and to the extent of the items adopted, of its responsibility to parliament. For, he says, the budget is only an economic plan, and does not embody juridical rules. In approving the budget parliament does not cooperate in the creation

of an "essential" law, but of an administrative act, and is therefore, in doing so, bound by prior laws; and particularly it is not permitted to cancel payment of revenues or expenses which have been provided for in these prior laws. Consequently this theory, elaborated, it is true, in the interpretation of the former German Constitution, holds that if the budget is not enacted by the time it ought to be, the government is within legal bounds if it levies all taxes and pays all expenses which are determined in the existing laws. So we see how this "essential" notion of the law forged the arms for a theory which minimized the significance of the annual coöperation of parliament in determining the state finances; thus the strongest right of parliament was threatened.

## 2) Promulgation, Sanction, Publication of the Law

When the legislator is *one* man alone, as in the absolute monarchy, his will, expressed in the proper form of law, becomes law. But when the law is created through the coöperation of several persons, it is necessary to establish and to attest that this coöperation has been performed in the prescribed way, and, consequently, that a law has really been created. If it is the resolution of an assembly that is to become a law, then some person, *e. g.*, the chairman, has to certify that the law has been created; not only must he declare this in the assembly, but also he must confirm it in a special document; for it would not otherwise be known with sufficient certainty outside the assembly whether the resolution was passed in the proper manner and hence whether the law in question had been created. Such an attestation that a law has come into existence is even more necessary when an agreement between several assemblies, *e. g.*, between two houses of parliament, or between them and the head of the state, must be reached in order to create a law. The act by which it is attested that a law has been created through the coöperation of all the organs designated for this purpose in the constitution, and that, consequently, it exists, is called, to use an expression employed by the monarchical state in feudal times, the promulgation of the law. This act, ordinarily, is entrusted to the head of the state.

The promulgation of the law is quite different from the sanction or confirmation of the law and also from the publication of the law. The act by which, in the legislative procedure, the head of the state expresses his consent to the bill passed in parliament is called the sanc-

tion. It is an act of the head of the state performed by him as one part of the legislative organ; if a sanction is prescribed in the constitution law cannot be created without it; in this case law comes into existence through the vote of the parliament and the sanction. We must, therefore, reject the theory which denies the formal equality of the parliamentary vote and of the sanction in states in which the legislative organ is made up of parliament and the head of the state, and which holds that authority is given to law solely by its sanction, the parliamentary vote merely formulating the substance of the law; according to this theory, the sanctioning organ alone would be the formal legislator. (Another question with which we have already dealt, p. 74, concerns the extent to which the head of a parliamentary state, in consideration of special conditions of this state form, is bound to sanction the vote of parliament.) In modern monarchies as well as in many modern republics, either the head of the state or the parliament, taken by itself, is only a part of the legislative organ and only both together, acting in accordance with each other, make up this organ. This agreement constitutes the substance of the law as well as its binding force as a legal command.

Sanction and promulgation are different things and must always be distinguished from each other even though, as is the usual case, the head of the state sanctions and promulgates the law by one and the same act. For a law does not exist without sanction if this is prescribed in the constitution; whereas a law does exist without promulgation; and in this case there is merely no declaration of the existence of the law. As only what exists can be the subject of a declaration, logically, sanction precedes promulgation. Sanction is an act of the legislative authority, whereas promulgation is not. A bill is sanctioned; a law is promulgated. A proof of the existence of a distinction between sanction and promulgation lies in the fact that distinct persons are sometimes entrusted with the performance of these acts. In the German Empire, up to 1918, the laws of the Empire were sanctioned by the federal council, but promulgated by the Emperor. In present-day France no one has the power of sanctioning laws; the law is definitely created when passed identically by both houses of parliament; but it is the duty of the President of the republic to promulgate the law. In so far as the sanction and the promulgation of laws belong to the authority of the head of the state, these acts are performed, in modern states, under responsibility of the ministers and with their counter-signature.

A bill which has passed through all the prescribed phases of legislative proceeding and which is attested (promulgated) as a law has validity. The effect of this validity is that the legislative organs as such, *i. e.*, in so far as they have to deal with legislation, are bound by the law in question. No organ whose coöperation was necessary for the creation of the law can now withdraw his approval and thus invalidate the law; the law can be abrogated only by a new law. However, since the principle of the "Rule of Law" requires that law must not be created anew for any particular case but that it must be determined in advance as a norm, it naturally follows that all must be given an opportunity to become acquainted with the law, and that law cannot become binding generally until all have had this opportunity. For this reason law must be made public. We can, of course, conceive of law as binding even without general publication; *e. g.*, in Japan, up to 1870, only those who had to put the laws into operation were notified of new laws.<sup>8</sup> But it would be contrary to the modern idea of the Rule of Law if laws were to assume binding force before publication.

It is however impossible for everybody to become acquainted with law immediately upon publication; thus there must usually be an interval between publication and the time when the law becomes generally effective (*vacatio legis*). Publication of the law is not an act of the legislative authority. The law is published by administrative organs (ministers) in official journals.

Both promulgation and publication are strict duties for the organs who have been entrusted with these acts. For these acts do not belong to the sphere of legislation, in which the legislative organs may act at their own discretion; rather they are a declaration of the existence of a real law and its publication. In view of the fact that most (but, as we have seen, not all) effects of the law are dependent upon its promulgation and publication, we must mention an opinion, though we do not accept it, according to which, law does not definitely exist before its promulgation or publication.

### 3) The State Budget

All things except those reserved by the constitution to the constituent power or conferred upon another than the legislative organ, can be regulated by law. Hence the English, who have no codified con-

<sup>8</sup> See Holland, *The Elements of Jurisprudence*, Oxford, 1916, p. 42.

stitution, speak of the sovereignty (*i. e.*, the absoluteness) of parliament as the legislative organ, which consists of the King, the House of Lords and the House of Commons.

Amongst the great variety of laws some of the most important are concerned with the finances of the state; the law containing estimates of public revenue and expenditure and which is effective for only a short time, usually for one year, is generally called the budget. In rejecting the distinction between a "formal" and an "essential" law we have rejected also the theory which considers the budget as an act of the administration in the guise of a law; we have, further, rejected the opinion that the budget is not a "juridical" norm, for every state norm is a juridical one. The mere fact that all the state organs in making expenditures have to conform to the appropriations determined in the budget, is a sufficient proof that the state budget is a norm, an obligatory order. The administration, of course, with respect to certain kinds of revenue, *e. g.*, taxes, cannot be held responsible for obtaining the estimated, *i. e.*, the approximately expected, amount; on the other hand, in states with a so-called "complete" budget, the administration should not be allowed to collect taxes, which are not provided for in the budget enacted.

In the great majority of states the budget includes the estimates for all expenses and revenues of the state for one year (universality or completeness of the budget); expenses and revenues must be registered as such and it is forbidden to register only their difference. Further it is required that all the expenses and revenues be calculated in one budget only and not separately in several (singleness of the budget). A very important requirement is the specificness of the budget, *i. e.*, that the purposes of the expenditures as well as the amounts appropriated for them, be stated in detail in it. Thus, the total amount of the appropriated expenses is divided not only among the several branches of the administration, but also among the divisions of these branches, which are again subdivided, etc. So, the state administration is bound to apply the appropriations in the designated amounts, and only for such purposes as are detailed in the budget. A sum apportioned for a certain use in a certain department cannot be used for another purpose either in that department or in any other department; this applies also to balances remaining in cases in which the appropriation exceeded the actual need. As this rule applies, at least, to all main divisions of the budget, parliament casts a separate vote

for each division. Any part of an appropriation for one financial period which is not utilized, is canceled.

The state budget is periodical and, almost everywhere, annual; nevertheless it is proper to question whether it is necessary to vote all of the expenditures and revenues annually. It is a principle of modern democracy that every expense paid out of the state purse and every payment of money received by it must be approved by the nation or by its representatives, the parliament. (Hence the fiction that every one [*i. e.*, every voter] has a voice in the disposition of his own property with which he contributes to the needs of the state). But certain public expenditures and revenues have their legal foundation not in the budget, but in other laws, *e. g.*, certain taxes and certain payments for amortization (sinking fund) and interest on state loans which have been contracted on the basis of a special law. Such revenues and expenditures are approved by law and it seems superfluous for the legislature to reapprove them by including them in the annual budget. In fact this is not done in England, that state in which parliamentarianism and its main feature—the power of parliament to raise and to appropriate money—were created and developed. There the receipts and expenses are of two kinds: permanent and annual. Most of the taxes are permanent; nevertheless—in order to strengthen the controlling power of the parliament over the government—some important taxes (amongst the direct taxes, the income tax with its surtax; and amongst the indirect taxes, the tea duty) are voted for one year only. This distinction holds also for expenditures, which are treated either as continuous (such as payments on the national debt and of the civil list, and the salaries of the speaker of the House of Commons, the judges, the comptroller and auditor-general, *i. e.*, the so-called “consolidated fund charges”) or as annual. Permanent receipts and expenses, which are established and regulated by standing laws, are not voted by parliament annually. But other receipts, *e. g.*, taxes which are imposed on the population for one year only must be approved by parliament by an annual law (Finance Act); and, likewise, all expenses not established by a standing law must be approved annually by the parliament, *e. g.*, the expenses for the army and navy (Appropriation Act). By these annual votes the British parliament has power enough to combat any attempt of the government to rule the country against the will of the parliamentary majority.

However, in many states, as we have already mentioned, the entire revenue and the entire expenditure, even if established by a standing

law (*i. e.*, a law which is not limited by time at all or, at least, not limited for one year) must be voted by parliament every year. Apparently, the reason for this practice is to make the government dependent upon the annual appropriation for the maintenance of the entire state administration,—but the reason might also be that British parliamentarianism in this case has been misunderstood in other countries (as it seems to be in some other cases too). An attempt has been made to justify these repeated votes of parliament by saying that this vote if concerned with revenues and expenditures regulated by previous laws has another character than if it concerns new receipts or expenses; and that only in the latter case would an original establishment be in question, whereas the vote in the former case would merely confirm or verify that the raising or spending of money has been established by a law. However, the parliamentary vote on a bill has always the same legal significance and consequence and, besides, it would be superfluous to verify or confirm by a law the fact that something has been established by law. But, in any case, it would be contradictory to consider certain receipts and expenses as permanent or continuous if they are subject to annual enactments. Because it is impossible to consider two contradictory rules in the same system of rules equally valid, perhaps the best interpretation of the relation between the annual budget and other (standing) laws which involve revenue or expenditure is this: If the constitution prescribes the annual enactment by the budget law of the entire revenue and expenditure, then this provision deprives all the laws of their unconditioned validity in so far as they involve the levying of taxes or the spending of money for state purposes, this validity being dependent upon the annual enactment; and this is actually stated in Article 111 of the Belgian constitution: "Taxes for use of the state must be voted every year. Laws establishing them have validity for one year only if they are not renewed."

The English practice demonstrates that parliamentary government is possible even without such a budgetary system as we have just discussed. If, however, this system has been adopted in a country, then one cannot contest the right of parliament at its own discretion to approve or disapprove new items in the proposed budget as well as those which are founded upon laws already standing. It is wrong then to deny to parliament the right to refuse the latter items and, if it really does so, to attribute to the government the power of collecting and spending money provided in them. It is not to be thought that

parliament would avail itself of this right arbitrarily in order to hold up the entire budget, for this would virtually destroy the state; parliament may reject the budget unconditionally only to a particular government in order to force it to resign. Furthermore, it cannot be urged that the power of parliament to approve or to disapprove at its own discretion the budget in its totality depends upon whether, apart from the provisions of the constitution on the annual enactment of the budget, the parliamentary regime is adopted in that country or not. On the contrary, if it is clearly set forth in the constitution that all state revenues and expenses must be fixed annually by enactment of the budget law, then, through this provision alone, which gives to the parliament control over all national finances, the parliamentary regime is clearly established. However, in some countries it might be that the actual balance of political power would not be truly represented if the entire state administration (or the government responsible for it) were annually made dependent upon parliamentary majorities for the time being; this is perhaps one of the reasons why Laband conceived the above-mentioned theory concerning the legal significance of the budget law, a theory which seems to have been well adapted to pre-war conditions in Germany and Prussia. The Polish law of 1926, by which the constitution of 1921 was amended, was an interesting attempt to safeguard the continuity of the budget in this way: If within a certain time both chambers of parliament do not pass on the budget bill in its totality, this bill is enacted as voted by either one of the chambers; if, however, no vote is taken by either chamber, the bill as proposed by the government is published as law. But this does not apply when the Chamber of Deputies has rejected the government bill in toto. If parliament is dissolved without having voted a budget for the year in progress, the government may spend and receive money within the limits drawn by the last budget, until parliament votes a provisional budget.

The annual parliamentary vote on all revenues and expenditures facilitates a practice which is very prejudicial to legislation in general, namely, legislating through the budget. The financial basis of state institutions is subject to change, in so far as new items are introduced or old items changed or canceled in the budget, and, for this reason, it often happens that these institutions are affected and sometimes recast by the budget law. Thus the door is open for the introduction through this law of administrative reforms and, in general, for regulations which have no substantial connection with the budget as a merely

financial basis of the state administration. This practice is not only contradictory to the purpose of the budget law but is also at variance with the function of the parliament in its legislative work proper. For parliament proceeds differently in passing a bill such as the budget whose term is strictly fixed than in passing a law by which state institutions themselves and the legal status of citizens are established and regulated. No wonder that, as a result of this state of affairs, precipitate and cursory rules are sometimes enacted which, though they are perhaps intended to be lasting, are valid in a strict sense for one year only. Such a calamity is less likely to occur under the English system, for in it a great many state institutions are not dependent on the annual vote of parliament for their support and are therefore protected from hasty reforms through the budget. This form of legislation is all the more abnormal if it is brought about through a "provisional" budget and not through the regular one. If the fiscal year approaches its end and if there is no hope of enacting a new budget bill (which represents a complicated and very extensive piece of work) before the beginning of the new fiscal year, then a special law is invoked to retain the old budget in effect for a short time. It is evident that such a prolongation is effected in the greatest hurry; and it is so much the more out of place to carry out administrative reforms by means of a provisional budget.

If urgent needs create expenses which are not provided for in the budget for the year in progress these must be granted by a special law. Such supplementary or additional grants are made either when the amount fixed in the budget proves to be insufficient and when it is not possible to make up the deficiency even out of the "budgetary reserve," *i. e.*, an auxiliary fund provided in the budget to make up for insufficient estimates, or when there is no appropriation at all in the budget for a need arising during the fiscal year. If the government must meet any expenses which are not provided in the budget law (*e. g.*, in the time of war) it must ask the legislature to sanction them at the first possible opportunity.

The state budget being enacted in the form of law, it rests with the legislature to exercise final control over the administration, with respect to whether it has raised or spent money in accordance with the budget. This it does by passing a law on "the balance of accounts," or, in lieu of this, by resolutions approving or disapproving the accounts rendered by the government. Such a bill bears the same features as the budget, except, however, that, instead of prospective

expenses and revenues, expenses already met and revenues already collected are scheduled in it. Controlling authorities, independent of parliament and government, are usually established in order to make the necessary preparations for the audit of the government's accounts by parliament and, sometimes, even as a means of preventive control before the payments are made.

### III. ORDINANCES, REGULATIONS, BY-LAWS

The constitution is, logically, the source of all the law in the country, but the form of the constitution is not the final form which law in general takes in regulating relations amongst men. It is not the task of the constitution directly to determine the rights and duties of particular persons; it does this only exceptionally, *e. g.*, when a person, specified by name within it, is appointed as head of the state. Generally the chief aim of a constitution is to establish organs, that they may create law, develop it, and apply it in individual cases. One could readily understand how the constitution might establish only the legislative power and leave to this power, together with the task of creating laws, all the care of determining how and by whom they are to be applied and executed. However, in reality, the constitution does more than merely establish the legislative organs; it prescribes in addition how laws are to be carried out, so that the legislator is bound by the constitution and obliged to leave the application of the laws to those organs alone to whom the constitution has entrusted it. Furthermore, modern constitutions not only fix the foundations of the state organization in the aforementioned manner, but they also lay down the principles to be observed by further legislation. If this is so, the legislator is obliged, first, to comply with the provisions of the constitution with respect to the manner in which laws are to be carried out, *i. e.*, through the authorities established in the constitution, and, second, to conform to the spirit of the principles set up in the constitution for legislation.

Similar to this relation between the constitution and the law is the relation between the latter and the rules subordinate to them. The legislator, in many instances, owing to the vast field regulated by the law, or owing to the different conditions in various parts of the state, or for some other reason, is either unwilling or unable to make a law so detailed and specific as to be suitable for application in an individual case. For this reason many laws leave the creation of detailed

rules to executive or administrative organs or even to private persons, who may create special rules by their legal transactions; thus the contents of a contract are a rule (*lex contractus*) for the persons bound by the contract. This becomes particularly evident when the conditions of a contract are fixed in advance and when the same contract can be entered into by a great number of persons. In such cases the contract assumes the feature of a law and—in English juridical terminology—is called a by-law; examples are numberless, *e. g.*, the regulations issued by a railway company regarding the use of the railway, the rules of an insurance company, a university, a museum, a theatre, a joint stock company, a club, etc. All these and similar regulations are issued on the basis of a law and they thus make the law applicable for certain purposes; yet, they must keep within its limits (if not, they are invalid) and are, therefore, rightly classed as “subordinate” or “delegated” legislation; but at the same time they are contracts whose conditions are fixed in advance. Regulations issued by a municipal body, *e. g.*, a town council, which in England are also called by-laws, are also “subordinate legislation.” And further, there are certain state authorities which are not law-making organs, but which, within the limits of the constitution and the laws, and in order to carry out the laws and sometimes even the constitution, issue rules of a very important kind, called ordinances. However, to the process of delegation from the constitution to the law and from the law to the ordinance may be added another step; *i. e.*, the power to issue a rule still more detailed than the ordinance (of first degree) and in conformity with it, may be delegated to a subordinate authority, etc. Thus the process is continued until the regulation is so shaped and adapted juridically to local, temporal, and other circumstances that it can be applied in an individual case. This entire scheme of higher and lower rules constitutes a hierarchy of norms just as the state organization appears as a hierarchy of higher and lower authorities.

Each rule has a legal value according to its rank. By principle, the norm is valid if it is in accordance with the norms of higher degree, and, therefore, it can be abrogated only by a norm of a higher or of the same degree. The number of these ranks or classes of rules varies according to the time and the country concerned. There may be several degrees of laws (*e. g.*, in a federal state) as well as several classes of ordinances. The question of examining and controlling the conformity of a lower rule to a higher one may be settled in various ways. However, in the scale of juridical rules, in the modern state, one set

occupies a prominent rank, and that is the law (statute), because independent and especially qualified organs, *i. e.*, judges, are entrusted with the control of whether lower rules are in conformity with the laws or not.

As we already know, the laws and the constitution cannot be differentiated from each other by what they contain (conf., p. 122); the same applies to the possibility of distinguishing ordinances from laws. Here again we see that the juridical essence of a norm is its form and not its contents. The same rule, *i. e.*, the same obligatory regulation, may form part either of a constitution or of a law or of an ordinance, or, as often happens, of an individual administrative act or of a judicial decision or even of a contract, *e. g.*, of an international treaty, and also of a contract between private persons, *e. g.*, a collective labor contract. But, in all these cases, the legal force or the juridical value is different; and the distinguishing mark of the legal force of these acts is the juridical form in which they appear and the legal authority of those who perform them.

General rules issued by administrative organs are called "ordinances," "proclamations," and also "executive orders." It is held that the subject matter of such rules is necessarily of a general character, *i. e.*, not referring to a particular case. But what we have said in this respect about the law applies also to the ordinance, namely, that the "generalness" or "universality" of an ordinance does not of itself confer upon it a special value in contradistinction to an ordinance which regulates an individual case,—unless the higher rule, *e. g.*, the law, disposes otherwise, as it really does, when, as is usual, a scale of authorities is fixed by law for the settlement of individual cases. Under such conditions the higher administrative authority (*e. g.*, the ministry) may, in order to make laws applicable, issue general ordinances only, and not individual ones, for the latter would really amount to a decision in an individual case, which thus would be first decided by an authority of last resort. The higher authority, of course, can not be allowed to give the first decision in a case for which a scale of authorities is provided; if it did so, the party concerned would be deprived of that legal guarantee which provides that a case may be tried by more than one authority; this right to "successive appeal" evidently is effective only if the order is from lower to higher authorities. Furthermore, if, after being decided by the lower authorities, a case comes to the higher authority by appeal, the latter, in giving judgment, is bound not only to observe the law but also its own (gen-

eral) ordinance. If it could disregard this ordinance, which the lower authorities were obliged to observe in rendering their decisions, then the higher authority would be judging not in the higher, *e. g.*, the third instance, but in the first, because it would be the first time that this particular case was not decided according to that rule which the lower authorities were obliged to apply, considering the ordinance then in force; and thus the party again would be deprived of his right to "successive appeal." For this reason alone, *i. e.*, on account of the existence of a scale of legal authorities, it is proper to distinguish between general (abstract) and particular (concrete) orders of the administrative authorities, *i. e.*, between ordinances (the Germans say "Verordnungen") on the one hand, and decrees (German "Verfügungen") on the other.

If ordinances are issued within the limits of a law and in order to facilitate its application, the organs whose duty it would have been to carry out that law alone had no ordinances been issued under it, are thereby restricted in their freedom of action; for part of this is absorbed by the ordinances. The greater the number of ordinances (of different grades) which are placed between the command of law and the command implied in the decision for a particular case, the more restricted becomes the sphere in which the final organ may freely move.

The answer to the question "What are the categories of ordinances?" depends entirely upon what the constitution provides in this respect. As was mentioned above (see p. 156), certain constitutions endow ordinances with the force of law in exceptional cases, *e. g.*, ordinances which the government of some countries is allowed to issue, in times of emergency, without a vote of the parliament. Such an ordinance, if afterwards approved by parliament, continues to be in force as a real law; but if not approved it loses its validity. Thus the ordinance has only a conditional validity; and in this respect it must be noted that the ordinance cannot, before its approval, definitely abrogate laws; it merely suspends them, because there is no assurance that the ordinance will be approved; that is, the laws cannot possibly be abrogated until the ordinance, through the approval of parliament, has been given the force of a law. If, however, it is rejected or simply not approved by parliament, then the suspended laws immediately reënter into force.

Ordinances issued in exceptional circumstances and without constitutional authorization, in the time of a revolution or of a "coup

d'état," are called in French "décrets-lois"; this in particular was the name given them in the time of Napoleon I and Napoleon III.

However, an ordinance is not ordinarily issued instead of a law; rather, it properly serves to effect the application or execution of the law; this is why it is described as "executing." In the "executing clause" ordinarily placed at the end of a law an administrative organ who is to be primarily responsible for the execution of the law is usually designated; thus he is implicitly authorized to issue ordinances. Such an ordinance may not be contrary to any law; it may only facilitate by detailed regulation the application of that law which it is purposed to execute. The extent to which "executive orders" or "executing regulations" need to be issued depends, of course, upon what regulations are contained in the law itself. One extreme case of this is that in which the law provides for all possible details so that no further regulation is needed for the law to be directly applied to individual cases. As a rule, laws are framed in this manner in the United States.<sup>9</sup> The other extreme is the law which is merely a *carte blanche* and which leaves the regulations necessary for its application entirely to the ordinance. It depends upon the constitution whether such a delegation of power by the law is possible and, if it is, what legal force the norm issued under it has. The interpretation of the constitution in this respect may sometimes be difficult, because it often lacks clear and exact provisions determining how far the legislative authority is entitled to transfer its legislative power to administrative organs. When there is a doubt, it must be deemed unconstitutional to delegate by law to an administrative authority the regulation of those matters which the constitution has expressly reserved to the legislative organ. John Locke sharply rejected the delegation of the legislative powers, for, said he, the people established the legislative power to make laws and not to make legislators.<sup>10</sup> However in England, which has no formal constitution by which the ordinary legislature is bound, it is permissible by means of a law to empower administrative authorities to issue rules which ordinarily are passed by the legislature, *e. g.*, very wide powers were conferred upon the executive by the Defense of the Realm Act of November 27, 1914. To draw a sharp line between that which is to be regulated by law alone and that which law can delegate to an ordinance is often as difficult as to judge whether a

<sup>9</sup> Conf. Garner, *Political Science and Government*, p. 716.

<sup>10</sup> *Of Civil Government*, Chap. XI, Sec. 141.

certain ordinance really is only "executing," *i. e.*, whether it merely particularizes and interprets the clauses of the law, or whether, by introducing new rules which are not provided in the law or which are even contradictory to it, it intrudes upon the field reserved to the law. It must be observed that the so-called delegated legislation made by duly and legally empowered administrative organs is not legislation in the true constitutional sense of this word; what derives from the delegated legislation is not a law but an ordinance whose legality is subject to judicial control. This now, as far as the judicial control is concerned, is the view held by the French Council of State, which until 1907 did not exert this jurisdiction because it looked upon such ordinances as a kind of delegated legislation which, like legislation by parliament, could not be controlled.

A theoretical distinction has been made between ordinances which supplement the law and those which merely carry out the law; but this is only a difference of degree, for where, within the limits of the law, does the supplementing end and where does the carrying out begin? It appears that, in this respect, sharp lines can be drawn only by special constitutional provisions.

According to our conception of a juridical norm, we must, further, reject a distinction made by certain German authors between "juridical," or "law" ordinances ("Rechtsverordnungen"), and "administrative" ordinances ("Verwaltungsverordnungen"); the first category is supposed to be made up of juridical norms such as those referred to in the doctrine on "material" (*i. e.*, essential) laws championed by Laband and Jellinek (conf., p. 157), whereas the second category includes those supposed to have importance only within the sphere of the internal state organization. At any rate, many "administrative" ordinances are as important for the public as are some "law" ordinances of the theory just mentioned. In a modern state, it is difficult to distinguish what concerns merely the administrative organization from what concerns the public in general. The organization of a ministry or of other offices, of hospitals, railways, museums and other public institutions is, in many respects, as important for the people who are employed in them as for the people who desire to use them. The further question of whether such ordinances have to be published or not involves necessarily a consideration of their importance for the people; and, in reality, not only "law" ordinances but also certain "administrative" ordinances are published. Finally, even an ordi-

nance which does not concern the public, but only the narrower circle of state officials is a "juridical" one at least for these organs, because it determines and specifies their duties in their official activities; and these certainly are "juridical" duties.

The question, however, of what legal means are at the disposal of an individual who wishes to have ordinance provisions properly applied should, in our opinion, be treated separately and not in connection with a rather problematic classification of ordinances.

## PART IV. THE STATE ORGANS

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### I. THE HEAD OF THE STATE

#### 1) His Legal Status

Every organization, whether it is founded upon inequality or upon extreme equality, must have an organ to represent its legal unity. This organ may be entirely independent or it may be limited by the coöperation of other organs; it may be one man or a body of men.

A certain amount of directing power within the organization is naturally and usually connected with the important office of representing it in its exterior relations. In the section dealing with state forms, we have already pointed out how various are the forms of the directing power; this power, in so far as it is vested, together with the representation just mentioned, in the same organ, gradually decreases as one goes down the scale from the absolute to the parliamentary monarch and from the President of a presidential republic to the President of the Swiss executive, which is a body. However, all these various state forms have this in common: that there is in each of them a highest representative of the state and its unity, whom we call the head or the chief of the state. Leaving apart any other powers he may have, we consider him the "highest" state organ for the one reason that he represents the state externally; because of this fact he is an important figure in international law to which all states are subject, and under this law he enjoys special rights in other states; he has a distinction and privileges accorded to no other organ. But this statement by no means implies that he exerts also within the state all the supreme power as being the most important authority. Since the constitution is the highest norm in the state, then, from one point of view, the "constitution-making" organ is the highest organ in the state. If, however, from yet another point of view, we consider those organs as "highest" which, in their official activity, are independent of other organs and, thus, have no superiors to interfere with their official activities, then, in the modern state, not only its head, but also parliament, sometimes the members of the cabinet, and, in a certain sense, the independent judges must be counted amongst the "highest" organs.

The extent and the character of powers are the usual criteria for distinguishing the monarchical from the republican head of the state; this point is connected with the classification of states according to the number of ruling persons (conf., p. 43). Jellinek, for example, believes that in the monarchy government is conducted by a single physical will, whereas in a republic it is conducted by a juridical will, *i. e.*, by a will made up of several physical wills in a way prescribed by the constitution. But leaving aside the fact that the will of the monarch, in governing, is also a juridical one, it being regarded as legal only when expressed according to the prescribed procedure and in a prescribed form, it must always, in modern monarchies, concur with the will of a minister in order to be valid. And further, in parliamentary monarchies, parliament or its organs have important powers for the conduct of state affairs. On the other hand, the President in certain republics, especially in a presidential republic, is as important as is a monarch in a monarchy. Jellinek also said that, in a monarchy, an amendment of the constitution cannot be made without the monarch's consent; but in spite of the fact that, according to the French constitution of 1791, the King could not, at least finally, prevent a change in the constitution, this constitution was, in our opinion, a monarchical one; the same is now true of Norway.

The distinctive mark of the monarch's right to his position, in comparison with the right of the president of a republic to his position, is that the monarch's right is hereditary; this quality alone endows this right, apparently, with a higher value; it makes it more solid and similar to the hereditary right to property. In line with this the patrimonial theory actually acknowledged ownership, or at least supreme ownership, over the state to the monarch (this ownership embraced the territory, and sometimes even the people); a similar, though more humane conception of the monarch's right, is found in the patriarchal theory, according to which the monarch has paternal power over his subjects. Both these ideas served to justify the absolute monarchy, which, however, is primarily based on the theocratic theory, according to which the monarch is either venerated as a god or, at least, considered to be appointed by God, or to rule in His name. In contradistinction to the monarch the highest organ in the republic does not come into office by heredity, but is elected for a fixed (usually rather short) term and even if, as in certain exceptional cases, he holds his position until death, he cannot transfer it by heredity.

A characteristic feature of the monarchy, owing to the hereditary right, is the dynasty, *i. e.*, the monarch's family in a broader sense. Thus, in our opinion, the so-called "elective" monarchy is not a real monarchy, but rather a republic, for it has no dynasty within which the right to the throne devolves by way of heredity. Bodin did not consider the Roman-German Empire, in which the "peer-electors" chose the emperors, to be a monarchy, but an aristocratic republic (conf., p. 57). The main and essential difference between the monarchy and the republic is that the highest representative of the former is hereditary, whereas that of the latter is elected. It is true that the first monarch, *e. g.*, the one who was raised to the throne after a revolution has often been elected, but he was nevertheless not so elected without being endowed with hereditary rights, for he transferred his power to his successors by way of heredity. He initiated the dynasty, *i. e.*, that family out of which the rulers come to the throne by inheritance. Those states may also be called monarchies in which the head of the state appoints his successor, as was the custom sometimes in the Roman Empire. If, then, we include this method of appointing the head of the state in this study, though it is no longer employed, we can say that any head of a state is a monarch who transfers his power to a successor either by heredity or by his own will. In any case it is not correct to distinguish the monarchy from the republic according to the extent of the powers of the head of the state. We call the latter a monarch when he is a hereditary representative of the state, no matter how restricted his powers may be, as is the case with the Norwegian King, who has only a suspensive veto for legislation and no finally deciding power in matters concerning changes of the constitution. On the other hand, we call the highest elected representative of the state a president and the state of which he is the highest organ a republic, no matter how extensive his powers are and even if they are more far-reaching than those of certain monarchs, as is the case with the President of the United States. (As to the State of the Vatican City see p. 50.)

Theorists, however, have sought for further distinguishing marks; for instance, irresponsibility is often considered as a distinguishing mark of the monarch. In this respect, there is no question nowadays that both monarchs and presidents of republics are responsible civilly, *i. e.*, in law-suits that concern their private property. Criminally, the monarch is, by principle, irresponsible, at least in present times. But in former times it was considered in England as permissible to dethrone

the King; thus Edward II, Richard II, and James II were dethroned; this is a proof of a kind of criminal responsibility. Today, no penalties are provided for the monarch for breaches of law and, therefore, criminal procedure against him is not possible; nevertheless, he is obliged to observe the laws (though some of them are not enforceable against him), and promises to do so in taking his oath. The president of a republic is, as a rule, criminally responsible for serious crimes; but a special court is designated to pass judgment in such cases (see pp. 76 and 78). In the United States this court is the Senate, which, however, if it convicts, can do no more than remove the President and disqualify him for federal office; but after that he may be held responsible before an ordinary court, not as President, of course, but as a private citizen. The political irresponsibility of the monarch is not characteristic of every monarchy. The French constitution of 1870 stated that the Emperor is responsible to the nation, and that he may appeal to it at any time. In a parliamentary monarchy the monarch, as we know, is politically irresponsible; so is the president of a parliamentary republic; however, the members of the cabinet are responsible for the political actions of the monarch or of the president, as the case may be.

So we see that the responsibilities of monarchs, on the one hand, and of presidents of republics, on the other, vary temporally and locally and that they differ from each other in degree but not in essence; the same applies if we look upon the special protection of their persons and their honor. Attacks on the life, liberty, and honor of the head of the state are more severely punished than such attacks on other people; this is particularly the case in monarchies, where not only the monarch but, to a certain degree, also the members of his family, especially the heir to the throne, enjoy this protection; a similar protection is extended even to the deputies of the monarch, who are not members of his family. As far as the honorary rights of the head of the state are concerned, the monarch, by virtue of a tradition going back to the absolute patriarchal state, enjoys them usually in a higher degree than the president of the republic, *e. g.*, special titles, military honors, etc. Both the monarch and the president of a republic receive a special payment; but the monarch usually receives a larger sum, his household (court) and the maintenance of the members of the dynasty requiring more. The sum allowed to the monarch is called the "civil list," an expression preserved from times past when the English King

was obliged to pay the officers of the civil service out of the sum granted to him by parliament.

Thus the essential difference between a monarchy and a republic is not to be found in the responsibility or in the protection of the head of the state, but in the principle applied in determining who will be the head of the state. In the monarchy this question is settled in advance; it is known who will some day be the head of the state, as he is already determined by birth; but in a republic it is not known who this person will be, as he must be elected from time to time. In a monarchy, therefore, the question of who will be the head of the state is removed from the political battlefield, but at the same time the question of his abilities is left for chance to determine. In a republic, the candidates compete, and thus a way is opened for a political struggle; and in this way it is possible to consider the abilities of each candidate. In a republic the term of tenure of the head of the state is almost always fixed and, as a rule, short (tenure for lifetime is a rare exception); in a monarchy this period is not determined and, except in cases of serious illness or resignation, is dependent upon the length of the ruler's life. However, the powers of the head of the state do not depend upon the legal provisions which regulate the way in which he came to occupy his post; they depend upon what authorities the constitution confers upon him. And the powers so conferred vary greatly both in monarchies and in republics. The amount of powers, legislative, judicial, and administrative, which are vested in the head of the state do not show, by difference of degree, whether a state is a monarchy or a republic. A series of examples, some of which have already been mentioned in various passages of this book, may serve to prove this and, at the same time, to allow us to review the most important powers of the heads of states:

a) *Legislation.* The President of the German and of the French Republics have the right (though a conditional one) to dissolve parliament (the lower chamber); the President of the Swiss Confederation and of the United States of America as well as the King of Norway do not possess this right. It has been said that in a monarchy, in contradistinction to a republic, an act of the head of the state is necessary to set a session of parliament in motion; but in the kingdom of Norway parliament assembles of itself at the ordinary session. The head of every state has the right to summon parliament to an extraordinary session; and in many states he has the right to close

sessions of parliament, but in exercising this right he must not disregard any provisions of the constitution fixing the time for parliamentary sessions or requiring parliament to put through certain important business, *e. g.*, the budget. In the modern parliamentary state (monarchy and republic) the head of the state exerts his legislative power always with the coöperation (counter-signature) of ministers responsible to parliament; in fact this coöperation is the really important part of this function. The legislative power of the head of the state is stronger when he has the right of an absolute veto than when he has only a suspensive veto against bills passed in parliament; a veto-power of this latter kind is extended to the President of the United States of America, to the President of the French Republic and to the King of Norway; but, here again, its effect differs in each state. The right of the legislative initiative, *i. e.*, of proposing bills to parliament, constitutes, as a rule, a part of the powers belonging to the head of the state in the field of legislation; the President of the United States, however, has not this right.

b) *Administration of justice.* In this province of state activity also, the President of a republic has essentially the same authority as a monarch. In monarchies, it is true, judgments are passed in the name of the monarch; this is, however, a mere solemnity which has survived the day of absolute monarchies, when either the monarch himself was the sole administrator of justice, or when the judges were directly under his authority. But nowadays the administration of justice has been taken away from the monarch entirely and the judges in monarchies are as independent as in republics; in passing judgment they are under the authority of no one, not even of the monarch. In many republics, as well as monarchies, the judges, it is true, are appointed by the head of the state, who, however, in making such appointments is obliged to observe not only the prescribed legal qualifications of the candidates, but also the requirements of the law concerning the coöperation of other organs, especially of the ministers, sometimes of the parliament and of certain judicial boards. Two important rights in criminal procedure are still retained by the heads of some states: 1) The pardoning power, which is exerted to remit or to reduce the inflicted punishment (the procedure and its result, *i. e.*, the verdict of guilt, remaining valid); and 2) Amnesty, by which the criminal proceedings (usually against a large number of persons) are quashed; this, if effected before the end of the proceed-

ings, is also called "abolition." As a rule, the head of the state has at least the power of pardon. But he has not always the power of granting an amnesty (not in Belgium and Norway). In the German and in the French republics amnesties can be granted only by a law. In Switzerland, pardons and amnesties require resolutions of both houses of the federal parliament.

c) *The Executive.* The head of the state (monarch or president of a republic) as a rule is considered as the chief of the executive. But, in the real sense of this term, he is so only in some states, *e. g.*, in the absolute and the constitutional monarchy and in the presidential republic, where the ministers, entirely or chiefly, depend upon him. However, in parliamentary states, the supreme direction of executive affairs, even in cases in which the acts themselves are formally carried out by the head of the state, has, in great part, passed over to the ministers; thus a joint act of both organs is necessary; and this is, likewise, the case when the above-mentioned legislative and judicial powers of the head of the state are to be exerted. Amongst important powers of the head of the state, which are limited in this way, are the power to sanction laws, to issue ordinances for the carrying out of laws, and, sometimes, even instead of laws; to appoint state officials and to grant distinctions. Yet the most important state acts cannot be done without the head of the state; he, even under parliamentary regime, is able to postpone the administrative and the legislative work by withholding his coöperation. Thus he can bring about the resignation of the cabinet or new elections to parliament; as we know (see p. 74) he must, under parliamentary regime, comply with public opinion as expressed in the result of the elections; but an able and strong personality may, in the way just mentioned, assert his will in legislation and administration.

The military powers of the chief of the state are far-reaching: a monarch is always the supreme commander of the armed force; but this is likewise the case with the president of certain republics; *e. g.*, the United States and France. Heads of states are particularly empowered to make disposition of the armed force if the state happens to be attacked. For example, the President of the French republic, without the consent of parliament, may use the armed force of the country, if it is attacked, for defence and also for making reprisals. Wars of aggression, however, may be undertaken in modern states only with the consent of parliament.

The head of the state, moreover, has important powers in the field of international relations. He receives and appoints ambassadors and ministers and concludes treaties with foreign states in the name of his state; but in many states such treaties, or certain important classes of treaties, must be previously approved by parliament. However, it is worth remarking that the head of the state has the power to rescind treaties without the consent of the parliament, even such treaties as have been concluded with this consent. Owing to these powers and owing to the fact that many foreign affairs are not treated publicly or by large numbers of persons, especially at critical times, the influence of parliament in foreign affairs, even in democratic states, is relatively not very effective; much more important is the influence of the chief of the state and of the minister for foreign affairs. The parliamentary committee for foreign affairs, existing in certain states, acts as a check, but only in a small way, to this condition. Such a parliamentary committee is established by the German constitution; and it can function even at times when parliament is not assembled. An additional reason for the extensiveness of the powers of the head of the state in foreign affairs is that the question of war is in close connection with these affairs, and, as we know, the military powers of the head of the state are, as a rule, very extensive. But with the development of international organizations and with the decreasing probability of wars as a means for the settlement of conflicts between states, a great number of international organs are arising to take over a part of the authority formerly exerted by national organs. And further, in more recent times, not only officials in government service, but also members of parliament, experts, etc., are sent as delegates to international conferences. For all these reasons the influence of heads of states in international affairs is diminishing. But, in spite of all this and in spite of the fact that parliament can exert through its budgetary powers, at least indirectly, an influence upon the conduct of foreign affairs, these affairs and military affairs still form that part of the executive, in which the power of the head of the state has kept its greatest strength.

The legal situation of the head of the state in foreign countries conforms to his powers in international affairs; and, again, no essential differences exist in this respect between monarchs and presidents of republics. The honorary rights which the head of the state enjoys in foreign countries are such as are given to no other state organ. He is considered as the highest representative of his state and enjoys, besides honorary rights, other privileges which are comprehended in the

expression "extritoriality." This term means that he is exempt from any jurisdiction of the foreign state, whether he is living there or not, and that his person is "inviolable"; this applies, to its full extent, to the criminal and police jurisdiction, and, to a great extent, to the civil jurisdiction; however, an exception to this principle is acknowledged for lawsuits concerning real estate in the foreign state, and, further, in cases in which the head of the state voluntarily submits himself to the foreign jurisdiction, *e. g.*, by bringing suit or counter-suit in a foreign court of law. The head of the state is exempt from taxation in foreign countries (with exception of taxes on real estate) and from customs-duties. His inviolability extends to his place of dwelling. If he travels "incognito," *i. e.*, without making himself known as the head of a state, it is sufficient only for him to declare himself as such, if he wishes to enjoy the aforementioned rights.

## 2) The Appointment of the Head of the State—The Succession to the Crown—The Regency—The Deputyship

The procedure by which the president of a republic is elected is in closest connection with the character of that kind of republic; hence we have dealt with this question in the chapter on the forms of the state.

The monarch comes to the throne by inheritance; thus, his appointment depends upon a special regulation concerning the hereditary succession to the crown. It can be said that this succession, which is fixed by the constitution in most modern states, is independent of the type of monarchy, because the hereditary right of only a few persons, members of one family (dynasty) is in question here. It was otherwise in the old patrimonial monarchy, in which the monarch's power was considered to be his private property of which he could dispose at his own will. Consequently, a succession to the crown was possible even by testament; the monarch was at liberty to appoint his successor, to apportion his governmental powers, to sell them and even to pawn them. In times past, the dynasty was considered as a sort of corporation, which established the succession to the crown as part of the corporation rules. In modern monarchies, however, these rules are either embodied in the constitution or established by an ordinary law; so that they may be changed only by an amendment of the constitution or of the law; this applies especially to the regulation of the succession to the crown, which is no longer a private affair of the

monarch or of the dynasty, but, like the election of the president in a republic, a public state affair. If the state was formerly an affair of the King, the King is now an affair of the state. Modern constitutions do not allow transfer of monarchical rights by contract or testament. The succession to the crown is not a private inheritance; the crown is inherited in a special way ("ab intestato") established in the constitution or in a law. Any division of monarchical rights is impossible nowadays; only one person can occupy the throne at a time.

The succession to the crown is dependent, first, upon general conditions. One of these conditions is legitimate birth; thus illegitimate children or children who have been legitimated after their birth or adopted children are excluded from the succession. Another condition usually is that the marriage of which the successor is born must have been concluded with the consent of the monarch or, as is the case in Holland, with the consent of parliament. Another condition is, but only in certain countries, the profession of a certain faith. However, another condition not for the succession to the throne, but for the actual ruling, *i. e.*, the exercise of the monarchical power, is that the successor must have attained to majority; the age required for majority in many monarchies is lower for the monarch and the heir to the throne (*e. g.*, only 18 years) than for other citizens.

Besides the fulfilment of these general conditions a person who is to become monarch must possess the particular right of succeeding to the last ruler according to the special law regulating the succession to the crown. As a rule, the first-born son of the last ruler (primogeniture), and if this son has died, the first-born son of this son succeeds; if the ruler has no male issue, the nearest male relation (*e. g.*, his brother, and thus a collateral line) becomes heir to the throne, unless the succession of a female in direct descent (*e. g.*, the ruler's daughter) is provided for.

The question of female succession to the throne requires a consideration of three systems:

a) The *Salic* system, according to which women and their descendants ("cognates") are excluded from succession. This has its name from the old "lex Salica" of the sixth century of which chapter 59 excluded women from succession to land: *De terra vero nulla in muliere hereditas non pertinebit, sed ad virilem sexum, qui fratres fuerint, tota terra pertineat.* This principle rules the succession to the crown in Sweden, Belgium, Italy, Roumania, and Yugoslavia.

b) The *English* or *Castilian* system, according to which the crown devolves to the line next related to the last ruler, no matter whether it is a male or a female line, so that women of the nearer line have precedence over men of the more remote line. However, within the same line, men have precedence over women. If *e. g.*, the last ruler has a son and a daughter, the son comes to the throne; but if he has only a daughter she inherits the throne to the exclusion of brothers of the last ruler, because they are of the second line. If a woman comes to the throne, the dynasty changes with her marriage or with her progeny. Thus, in England, in the last two centuries, the Hanoverian dynasty succeeded the Orange, and the Coburg (now Windsor) the Hanoverian dynasty. This system exists in England, where we can trace female rulers back to very early times (Tacitus relates in his book *De vita and moribus Julii Agricolaë*, chapter 16, about the Britons: *neque enim sexum in imperiis discernunt*); it existed also in monarchical Spain.

c) The *extraordinary succession of cognates* means this: Female succession is excluded as long as an agnate, *i. e.*, a male of the male descent, is living. Cognates, *i. e.*, women and their descendents, come to the throne if there is no agnate available. However, after the death of a female ruler, their male descendents have preference over their female descendents. Thus, cases of female rulers have been isolated. This system exists in Holland now and was introduced into former Austria-Hungary by a law called "The Pragmatic Sanction," according to which Empress-Queen Maria Theresia came to the throne in the 18th century.

The powers of the president of a republic end either with his death, with the expiration of his term, with his removal (if constitutionally provided for), or with his resignation. The powers of a ruling monarch cease with his death, which is the only normal end of his term, with his abdication of the throne, which, in certain states, has to be embodied in a law, and with his removal, if this is provided in the constitution; but if it is not provided, then the monarch can be removed only through an amendment of the constitution, which, however, in all monarchies (excepting perhaps Norway) requires the sanction of the monarch. Abdication sometimes is presumed by the constitution, *e. g.*, in Norway, in case the King is absent from the state without consent of parliament for more than six months; or if he changes his religious faith (England, Denmark, Sweden, Norway);

or if the Queen marries without consent of parliament (Holland). The heir to the crown may also waive his rights if he chooses, or lose them in certain cases (*e. g.*, in Sweden, if he marries without the King's consent).

*The Regency.* When the monarch is a minor or when he is afflicted either physically or mentally with a chronic and serious illness, and for one or another of these reasons is considered unable to rule, his monarchical powers are entrusted to a regent for as long as these impediments obtain. As a rule, the heir to the throne or another member of the ruler's family is the regent, provided this person is not considered unqualified for any reason cited above. The constitution either determines to whom the right of regency belongs, or it leaves the choice of the regent to the ruler. In certain countries, *e. g.*, in England, the regency is established by a special law whenever the need arises. In some other countries, if the heir to the throne by reason either of minority or of mental or physical illness is unable to take it over, the regency is entrusted to a regency-commission consisting of persons elected by parliament or appointed by the monarch, (*e. g.*, in Yugoslavia). As a rule, the regent has the same powers as the monarch; however, in England and Belgium, any amendment of the constitution is forbidden for the time the regency lasts.

Certain constitutions, in order to safeguard the succession rights of the direct male line, provide a special kind of regency for an expected but unborn ruler. If the monarch dies without a male issue and if the queen is with child at the time of his death, the monarchical rights do not devolve upon a collateral line, but a special regency is established during the interim until the queen's delivery. This is not a regency in the true sense of the word, for it is not established for a minor or incapacitated monarch, but for a monarch who does not yet exist and who is only expected; it is, therefore, a kind of interregnum which may turn into a regency, if the queen gives birth to a male child (posthumous).

The *Deputyship* must be distinguished from the regency; it takes place when the monarch is (temporarily) absent from his state or when he is taken ill and when his illness is not of such a nature as to require that a regency be established. The deputy of the monarch (*e. g.*, the heir to the throne or the council of ministers) is either bound to observe the instructions of the monarch or is restricted by the constitution to the exercise of only certain powers of the monarch. The

deputyship is maintained for only a short and fixed time and the deputy does not exert the monarchical powers to the same extent as the regent is entitled to.

In republics also the powers of the head of the state may temporarily be exerted by the council of ministers; this is for example the case in France when the presidency becomes vacant, until the new President is elected.

According to the Constitution of the United States of America, when the President dies, is removed, resigns, or becomes unable to hold office before the expiration of his four-year term, the presidential powers are exercised for the rest of this term by the Vice-president, who was elected together with the President and who is at the same time President of the Senate. The Presidential Succession Act of 1886 provided, further, in case of the death, removal or disability of both the President and the Vice-president, that the Secretary of State (chief of the department for foreign affairs) should succeed and after him, in established order, the chiefs of the other departments.

## II. PARLIAMENT

### 1) History

The word "parliament" was first used in the Middle Ages to refer to the talk of the monks in their cloister after dinner. Later on, solemn diplomatic conferences and also meetings, which the kings convoked from time to time in England in order to discuss important state affairs, were thus named. This council of the King, made up primarily of the great lords and the high clergy, is the nucleus about which the English parliament developed. But it is probable that parliament was influenced to some extent in the development of its system also by ecclesiastical convocations and by the assemblies (chapters, provincial and general) of religious orders, especially of the Dominicans whose constitution was adopted as early as 1221. These chapters were attended partly by elected members (delegates), and thus had a representative character.<sup>1</sup>

The Magna Carta of 1215 determined that the King might require "aids" (other than regular feudal aids) only with the consent of the

<sup>1</sup> Conf. Ernest Barker "The Dominican Order and Convocation," Oxford, 1913, and M. V. Kelly "What Constitutional Liberty owes to Religious Orders," in the *American Catholic Quarterly Review*, Vol. 43, 1918, p. 613-621.

aforementioned council which was augmented by representatives of the lower nobility and which was called "commune concilium regni." Sometimes, because of financial difficulties of the King, representatives of the counties were also summoned to this national council; thus, in 1254, besides the feudal lords, two knights chosen by the men of the county and representing the whole county were summoned in order to deliberate what aid the counties would grant to the King. A little later in addition two representatives of each city and two of each borough were summoned to parliament. In 1295 the parliament was made up of: 1) the great lords and high ecclesiastical dignitaries; 2) representatives of the lower clergy; 3) two knights from each shire (county), two citizens from each city and two burgesses from each borough. The representatives—categories 2) and 3)—were elected. But this composition did not last long. The lower clergy preferred to determine their contribution to the money needs of the king in their own ecclesiastical assemblies and, thus, withdrew their attendance from the common parliament. The counties, *i. e.*, the free men in them, were represented by the knights, but they did not associate with the high nobility in parliament. The members of this nobility as well as the high ecclesiastical dignitaries were summoned to parliament individually, whereas the lower nobility, together with the freeholders of the county, was represented by knights elected by them; and the population of the cities and the boroughs was likewise represented. Thus parliament was divided, not into different classes like those of the feudal assemblies on the continent (higher clergy, higher nobility, lower nobility, burghers, etc.), but into one category of persons who were summoned individually and into another category which was made up of representatives or deputies. In the first half of the 14th century these two groups held meetings separately, in two houses: 1) the *House of Lords*, the upper chamber, which had a feudal character, and 2) the *House of Commons*, the lower chamber, which was not feudal, because in it the knights who represented the counties and the representatives of the cities and boroughs sat together. The denomination "House of Commons" means, according to some, that the "communes," which are the territorial units of the state, *i. e.*, the counties and the cities, are represented in it, and, according to a statement made as early as the 14th century, the House of Commons represents the whole community of England; but, according to others, the name was taken from the word "commoners," *i. e.*, the people who do not belong either to the clergy or to the higher nobility.

The King ordinarily convoked parliament when he needed money. But the financial question was used more and more by parliament to restrict the rights of the monarch; taxation became dependent entirely upon parliament. As the major part of taxation was borne by those people who were represented in the lower house, it is natural that the share of this house in the power to impose taxes gained steadily over the corresponding right of the upper house. At the end of the 14th century the House of Commons was the money-granting branch of parliament, the Lords merely giving their consent; in the 15th century it was recognized that the House of Commons had the exclusive initiative for grants of money.

In its beginnings the House of Commons had no desire to deal with legislation; it left this to the traditional legislative organ, the King and his council. But, later on, through its right to grant money, this house came to have an ever-increasing share in legislative work. At first, the chambers and particularly the House of Commons presented petitions to the King, which were for the most part simply complaints against breaches of the law committed by officials of the King, or requests for amendments of laws. But the King, if he complied with such requests, issued the law sought, only after the dissolution of parliament and upon the advice of the members of his council. So it often happened that the laws thus issued by the King did not adequately answer the petitions of parliament, and this caused parliament to remonstrate; as a result there was developed during the 15th century a custom whereby parliament, instead of submitting to the King mere petitions, presented the bill itself, which the King might confirm or reject, but could not change. Thus, parliament acquired the right of initiative, which it shared with the King; it became, together with the King, a true legislator. This was a blow which struck the very roots of monarchical absolutism, although attempts to govern absolutistically were afterward, it is true, repeatedly made. The Stuarts issued temporary laws without the consent of parliament; they suspended laws and, in certain particular cases, dispensed from them. But the result was a civil war, during which, for a short period (1649-1660), England even became a republic. The political struggles came to an end with the installation of a new dynasty in 1688; since that time predominant political power has been acquired by parliament, and particularly by the House of Commons (see pp. 70 et seq). The English example of parliamentarianism was more or less imitated, first by the North American countries in their rôle as English colonies and then as

independent states; France did likewise at the time of the great revolution in 1789. This revolution exerted a great influence upon the rest of the European states not only in the question of parliament but in other questions as well. Nevertheless, parliamentarianism developed nowhere so satisfactorily as in England, where it originated.

## 2) The Bicameral System,

as we have seen, evolved quite naturally in England. As a rule, the House of Lords had the same rights in legislation as the House of Commons; but in addition, it had criminal jurisdiction in cases of impeachment and, in civil cases, was the highest court of appeal in the entire kingdom. At an early date in the development of parliament the House of Commons acquired predominant power in financial questions; the House of Lords could reject the budget, but it could not change it. The powers of the Lords in financial and legislative questions were finally limited by the "Parliament Act" of 1911 in this way: Every money bill passed by the House of Commons and presented to the House of Lords at least one month before the end of the session, must be presented to the King for sanction even without the consent of the Lords, if they have not passed it without amendment within one month (unless the House of Commons direct to the contrary). By this provision the Lords have been deprived of any decisive power in matters of finance. All other bills, in order to become laws, have to be passed by both houses. If, however, a public bill (other than a money bill or a bill containing any provision to extend the maximum duration of parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that bill must, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to the King for sanction; but two years must elapse between the date of the second reading, in the first of those sessions, of the bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions. Thus, the House of Lords may postpone, but cannot prevent the enactment of bills passed in the House of Commons if the latter has expressed its will repeatedly.

The bicameral system has been introduced in almost all modern

countries (in France, in 1799 there was even a tricameral one). It appears that the upper chamber is an inevitable institution in federal states, as it provides for the participation of the individual units of the state in the federal legislature and partly, in the federal executive. But even in a great many unitary states besides the chamber of deputies we notice also another chamber established on a different principle. In monarchies, the members of the upper chamber hold their seats either by hereditary right (the membership being inherited within the dynasty or within the families of the high nobility), or by appointment by the monarch, or, in addition, as a legal consequence of appointment to a high rank or dignity in the state or church. However in republics, and to some extent in monarchies also, the members of the upper chamber are elected. In the formation of this chamber special consideration is given to certain groups, which are important from a social, economic, or cultural point of view, to certain local interests, and even to certain individuals, who by reason of their profession, knowledge and experience, would be useful in legislative work. For the same reasons the members of the senate are chosen, in some states, by a different electoral system than are the members of the chamber of deputies; often the suffrage for elections to the senate is more restricted than for elections to the lower chamber, because it is held that the senate should represent the nation from a different viewpoint than does the lower house, especially when this is elected by universal suffrage. The members of the French Senate are all elected, but they are elected by special groups. These are the following: 1) the members of the Chamber of Deputies, who have been elected in the department concerned; 2) the members of the departmental committees (*conseillers généraux*); 3) the members of the district committees (*conseillers d'arrondissement*); 4) the delegates of municipal committees.

But this is not the only means which has been employed in the attempt to constitute the upper chamber differently from the lower one; different conditions for eligibility have been introduced, *e. g.*, a higher age and a longer residence in the state is sometimes required for the first chamber; also the term of membership is sometimes longer, even for life-time; and finally the senate in some countries (*e. g.*, in the United States of America) is partly, and not entirely, reconstituted at brief intervals; similarly the members of the French Senate are elected for nine years, but every three years one third is eliminated and replaced through new elections.

In addition to the legislative powers, which both chambers have in

common, each has its special functions. The French Senate *e. g.*, has (like the Senate of the United States) to pass judgment upon the President of the Republic if he is impeached for high treason by the Chamber of Deputies; and, further, it has to judge (instead of the regular court) in case of the impeachment of any of the ministers by this chamber for crimes which they have committed in performing their functions; and, finally, the President of the Republic may delegate the Senate to act as a tribunal instead of the regular court in cases of criminal attacks upon the security of the state. The lower chamber, however, has the predominant power in matters of finance; and therefore, governments have a greater responsibility to the lower than to the upper chamber; in certain states (*e. g.*, in England, Poland, Czechoslovakia) the upper chamber has only a suspensive veto. This is why, in England, the upper chamber no longer has the power to force the resignation of the cabinet; however, in France, the position of the Senate in this respect is stronger.

Disagreements between both houses are solved in various ways: either by the rule that after repeated discussions the will of the lower chamber or the will of the majority of both houses sitting jointly, prevails; or by the dissolution of the lower house and new elections to it, or by the nomination of new members to the upper house, where this is possible. If nothing is provided for the case of a disagreement between the two chambers and if this disagreement persists the only course is to drop the matter which they failed to agree upon, *i. e.*, the bill does not become a law; the situation is the same as if, in a unicameral system, there was not a majority vote.

The nature of the bicameral system is such that no one can be a member of both houses at the same time.

Much has been said and written about which system deserves preference, the bicameral or the unicameral. Under the influence of Rousseau's ideas on the indivisibility of national sovereignty, two objections have been advanced against the bicameral system: that this sovereignty is split when a conflict arises between the two houses; and that the will of the lower house, which represents the whole nation, is thereby checked by that of a more conservative assembly. But, on the other hand, just this second feature has also been advanced in favor of the bicameral system. It is the part of the upper house, it is said, to delay hasty and ill-considered reforms proposed by the lower chamber; the more universal the suffrage for election to this chamber, the greater is the danger of such reforms. The parliamentary regime,

in particular, is fraught with the danger that parliament may become omnipotent and jeopardize the independence of the executive and of the judiciary; and therefore it is thought wise to divide it into two parts which counterbalance each other. Because many parliaments (the lower house) are elected on the basis of universal suffrage it is alleged that their membership is often of inferior caliber, and that it is thus advantageous to have their legislative resolutions revised by a more competent, more experienced and more prudent assembly, which, in addition, is not so prone to be guided by partial views as the second chamber very often is. A further argument advanced for the utility of two houses in a monarchy is that otherwise the monarch would be the only factor who could check precipitated decisions of the parliament; but that in doing so he could hardly remain above party struggles; and that it is especially necessary in a parliamentary monarchy that the monarch hold himself aloof from contentions of this sort.

### 3) Elections

Elections are an indispensable and basic institution of the modern representative state. In modern times the quality of being a state organ is very rarely acquired by birth, *i. e.*, in a hereditary way; and this occurs even in monarchies only in the case of the head of the state and, sometimes, of members of the upper house of parliament; but here also the hereditary membership is receding into the background in favor of the method of election or nomination. The appointment of state organs by lot has now vanished almost entirely; however, it is still sometimes employed in connection with elections and also in appointing jurors.

Election means to be chosen by a plurality of persons. On account of the fact that a plurality of persons is engaged in this operation the necessity arises of establishing a method of electing and of counting votes, *e. g.*, of determining whether a unanimous or a majority vote is required and whether a simple or qualified majority is necessary for election. Thus, every election presupposes certain organizational rules concerning the methods of election. These rules are usually subjects of animated discussion, for the results of the elections depend to a great extent upon them. Electoral rules include essentially: 1) the conditions of the franchise (electoral right) and of eligibility, and 2) the method and procedure of elections.

## The Voters

The theory of the sovereignty of the people leads to the conclusion that all members of the nation, without distinction, have a right to vote in the election of members to parliament, the representative body of the nation. This was the opinion not only of Rousseau, but also of Robespierre and certain other leaders of the French revolution. In fact the French Constitution of 1793, though it was not carried out, determined that every citizen had the right to vote; but it did not take this to the extreme, for it excluded from this right minors, women, and all who had been sentenced for dishonorable delicts.

But the French Revolution produced still another theory, according to which the right to elect members to parliament is an office and a service performed on behalf of the nation, rather than a personal right. The nation as a whole is sovereign, and not the individuals who make up the nation. According to this doctrine, the electors do not vote in their own interest, but in the interest of the collective body. Therefore they must be independent, irreproachable morally, well educated politically, and sufficiently developed intellectually. This doctrine appeared in the first French Constitution of 1791, which distinguished two categories of citizens,—active and passive; only the active citizens enjoyed the franchise. However, this view does not harmonize with the principle of the sovereignty of the nation which includes *all* the citizens. If the nation (the people) is sovereign, then, at least in its first organization, all its members must have equal rights; for who has authority at that time to determine whether a person is intellectually sufficiently developed, independent, etc.? He who accepts the principle of the sovereignty of the nation must, at least for the purpose of its first organization, when the state is being constituted, accept the assertion of Rousseau<sup>2</sup> that no citizen can be deprived of his right to vote whenever an act of sovereignty is to be performed.

But the sovereignty of the people or of the nation cannot be carried to such an extreme, even though logical, consequence. It is always the physical or intellectual strength either of one person or of several or of the majority, but not of all, which creates the original political body according to whose principles it is later determined how the organization is to be made effective, what elections are to be held for this purpose and who is to be given the electoral right. As a matter of fact, the right

<sup>2</sup> *Contrat Social*, Book IV, "Chap. 1.

to elect members of political bodies, especially of parliament, is now generally restricted to one or several of the following groups: 1) Citizens. Aliens, except in rare cases, have no electoral rights; however, in Soviet Russia, it has been established that every person who has reached the age of eighteen years, no matter of what sex, nationality, citizenship he be, enjoys the right to vote and is eligible to political bodies if he makes his living by working; this right is likewise granted to soldiers; whereas persons living not by their labor, but on capital, persons who employ workers for gainful purposes, private merchants, members of the clergy, and monks have been deprived of it. 2) Persons of a certain age, *e. g.*, those who have attained to majority; the reason alleged is that the choosing of the representatives of the nation requires maturity of mind which cannot be expected of people too young. 3) Persons who are residents for a certain time (*e. g.*, six months) in a certain district (municipality). The reason for this restriction is that people who wander from place to place are not deeply interested in the political society; a certain permanence of residence as a condition for the vote is necessary for the further reason that otherwise the technical preparations for elections (electoral registration) would be rendered very difficult if not impossible. 4) Persons who are mentally fit. Those excluded are insane persons and idiots. 5) Persons who are not considered morally unfit. Thus it happens that persons who have been punished for crimes involving dishonor are at least temporarily excluded. 6) Persons who are considered to be sufficiently independent. Sometimes persons under guardianship and bankrupts, and those who have to be supported by municipal funds, are excluded. In many countries active soldiers and officers are excluded from the electoral right for reasons of discipline and service.

Although it is not quite exact to do so, we still speak of universal suffrage in spite of these restrictions. It has been argued that these exceptions have been made only on the ground of personal disability or disqualification, and that the principle of universal suffrage is violated only if entire social classes are excluded from suffrage, especially if this is done because they are not taxed above a certain limit or because they are not sufficiently educated. The suffrage requirement of being a tax-payer is based on the principle that only those persons should have electoral rights who are not a burden to the society but who, on the contrary, contribute to the needs of society. According to this theory a certain amount of direct taxes is one of the con-

ditions for the electoral right. However, the chief argument against this system is that only direct taxes are taken into consideration and that other burdens, *i. e.*, indirect taxes and military service, which are more oppressive for the poor classes than for the rich, are disregarded. In modern states the condition of tax-paying, chiefly under pressure of the working classes, has almost entirely disappeared; so has the requirement of a certain degree of education, which was necessarily connected with the condition of property, because higher education was, to a great extent, accessible only to the wealthy classes. An educational test, however slight and consisting merely in the ability to read, is still required in some of the southern states of the United States of America (and is said to be applied in order to prevent the Negro from voting); in Brazil and Chile illiterates have no vote, and in Hungary the law of 1925 requires that male voters have three years and female voters six years of elementary school education. Universal suffrage was introduced in France in 1848; it has now been introduced in the vast majority of states for elections of representatives to parliament (especially the lower house). But in very recent times the opposition to universal suffrage has greatly increased, mainly because of the incompetence of parliaments in certain countries where this system is used.

Universal suffrage has not been regarded as inconsistent with itself in excluding from the vote an enormous part of the population, namely women. A frequent objection to woman suffrage is that woman's natural mission is in the home, that her duties are those of the household, marriage, and the rearing of children; were she admitted to public and particularly to political service, for which men are better fitted, she would be inclined to neglect her natural duties. This was the view expressed in the literature of the ancient Romans and of the early Christians. But since that time social conditions have undergone sweeping changes. In many cases women are called upon to do work that was once done only by men. Today women are teachers, merchants, undertakers, officials, etc. It is not strange, then, that during the past century the movement to bestow the electoral right upon women has been steadily growing. In a number of states, women obtained the right to elect representatives first only to local (*e. g.*, municipal) bodies, and then, later on, to parliament also. The World War proved to be a powerful agent in the enfranchisement of women, since during the war women were employed in positions which previously had been occupied only by men.

Women now have the electoral right for parliamentary elections in

Great Britain and in the British Dominions, in Germany (for elections to the national parliament as well as to the parliaments of the federal units), in Soviet Russia, Sweden, Norway, Holland, Czechoslovakia, Austria, Poland, Turkey, the United States of America (for elections to the Federal Congress and to the legislatures of the individual states; this right was defined in an amendment, Art. XIX. of the Federal Constitution adopted in 1920: The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex) and in other countries also. Woman suffrage was adopted in Great Britain in 1918, although it was conditioned by a higher age (30) than for men. In 1928, however, women were placed on a par with men as regards the electoral right, the age of 21 years being required for all voters without distinction. In many countries, women are, moreover, eligible to parliament, *e. g.*, in Great Britain, The United States, Germany, Czechoslovakia. It is alleged as one of the favorable consequences of woman suffrage that women in parliament have had a wholesome influence on social legislation (protection of woman and child workers, anti-alcohol laws). It is noticeable that Anglo-Saxon countries appear to be more in favor of woman suffrage than Latin countries, northern nations more so than southern. Generally speaking, the question of to whom the franchise may be extended depends upon social conditions and political maturity, and this, of course, applies to men and to women alike. In the light of all historical developments it appears that the principle of woman suffrage and eligibility will at last win out in all civilized countries.

Attempts have been made to mitigate the evils of universal suffrage by making it unequal, *i. e.*, by giving the right to vote to everybody not disqualified and at the same time giving to certain persons more than one vote (plural voting). The advocates of this system urge that there are some voters who are worthier or more mature or important for the community than others. Thus, universal suffrage may be combined with the condition of tax-paying and of education; in addition, preference may be given to older persons, to married persons and to married persons who have children. Thus, the franchise can be used as a means of encouraging marriages and of checking depopulation.

In 1893 by an amendment of the Belgian constitution various conditions for the exercise of the plural vote were set up; these were briefly: every male citizen, 25 years of age, had one vote; a supple-

mentary vote (*i. e.*, two in all) was conceded to those who fulfilled certain conditions of age, property (or tax-paying), marriage and offspring; two supplementary votes (three in all) were given to citizens having a higher school-education. No one was allowed more than three votes. After the World War, however, this system was abolished and universal and equal suffrage was introduced.

The chief argument against the plural vote is that the political superiority thereby set up is measured according to certain extrinsic standards which do not always conclusively prove that superiority exists.

A peculiar kind of plural vote (requiring however more than one polling) exists in England where a person (university graduate) may have a vote in the electoral district where he has resided for a certain time, and another vote in another constituency on the basis of a special qualification (university franchise).

Another form of unequal electoral right can be established by separating the voters according to social classes or professions so that the members of each class or profession cast their vote as a separate group. If, then, the number of representatives allotted to each group is not apportioned according to numerical power but according to the presupposed social importance of these groups, an unequal representation can easily result. This system prevailed in the medieval feudal state (see p. 56) and also, though upon a different basis, in the modern corporative state (pp. 81 et seq.).

In this way, certain classes, for a certain period, were privileged in pre-war Austria (until 1907) and in Prussia. These remnants of the feudal system have, it is true, been given up; but in very recent times, inspired by modern social ideas, there is an increasing movement for a revival of the idea that voters must be grouped according to their profession and not, or not merely according to territorial districts. This "professional representation" is expected to foster social pacification and an improvement in parliaments now elected by universal suffrage, which fall short of transacting the increasing political and legislative business of a modern state in a satisfactory way; and, finally, it is expected to effect a more exact representation of the body of the people, which, it is said, is not composed of isolated individuals, but of professionally organized groups. Such representation would make parliament predominantly, or even wholly, an economic body, instead of a political one. But the opponents of this idea object that a parliament of such a make-up would neglect the general interest of the state,

for the representatives of the particular professions would take care of the interests of their own group only, and so group would stand against group (it has already been shown on pp. 82-3 how Italian legislation sought to meet this very serious objection); a further objection is that it is difficult to classify and arrange the entire population according to a professional scale, to determine the particular groups and the number of the mandates for each group (numerical strength not being used as a criterion). For all these reasons it is said to be better not to separate the voters into groups; but, if professional representation is introduced in spite of all this, its parliament may function only as a consultative body along with the political parliament. With the exception of the very radical electoral reform in Italy, there are but few states which in recent times have in one way or another taken steps to introduce professional representation. The Constitution of the Irish Free State declares that parliament "may provide for the establishment of functional or vocational councils representing branches of the social and economic life of the nation." The German Constitution of 1919 contains similar but more detailed clauses and provides for the establishment of a National Economic Council in which all important professional groups may be represented in proportion to their economic and social importance, and which shall not only give its opinion on bills of fundamental importance dealing with social and economic questions but also have the initiative for such bills in the political parliament. The legislature in Soviet Russia is organized according to a particular kind of professional representation, this being limited, however, to certain classes.

*The determination of who is a voter.* Before elections are held it is necessary to establish who has the legal right to vote. The authority which has this duty to perform, makes up the electoral lists or registers in which the names of those persons are entered who have fulfilled the conditions required by law for the electoral right. Anyone who is not entered and who believes that he is entitled to vote may "claim" registration in the list, and eventually appeal to higher authority, if the registration officer does not comply with his desire. In many countries it is the legal right of every voter, moreover, or even of "anybody," on the one hand, to object to names entered and to ask that they be struck out of the list (in which case the answer of the person objected to must be heard) and, on the other, to claim registration of anyone he thinks has the right to vote. The electoral lists are either made up separately for each election or are permanent, *i. e.*, they serve

for several or even for all elections, being, of course, subject to correction and completion at any time except when the lists are closed, *e. g.*, shortly before the elections. In order to make claims possible it is necessary that electoral lists be published or at least be open to public inspection.

### The Mode of Elections

1. *Direct and indirect elections.* Elections are called direct when there is only one degree of electors, and indirect, when the electors of the first degree elect the electors of the second degree and these latter alone elect the individual or the members of the body to be elected; elections may even be carried out through a more than two-degree system. It is advanced in favor of indirect elections that they secure a better choice and that they cool the passion of political struggles. This, however, appears to hold true only if the electors of the second degree are independent of the electors of the first degree; but if they are pledged to elect a person already indicated at the first-degree elections—as is the case with the chosen electors who elect the President of the United States,—then the sense and purpose of indirect elections is lost. Election by proxy, a method employed only rarely in political elections, is not a form of indirect elections. Indirect election, in our opinion, means, it is true, more than one election, but all these elections must be carried out for the same purpose. We would therefore hesitate to call the senatorial elections in France indirect, for, though they are carried out by elected bodies, these bodies are not elected for the sole purpose of electing senators but for other purposes also (see p. 190).

2. *Public and secret elections.* Opinion regarding the advantages of one or the other method has not always been the same. Montesquieu<sup>3</sup> held public voting to be a principal rule of democracy. The French Constitution of 1793 actually decreed public voting. Today public voting, which was advocated by John Stuart Mill as well as by Bismarck, exists in Soviet Russia and in Hungary. However, the spread of democratic principles (extension of the franchise) tended to foster secret voting. For, it appears that as the number of voters increases, so does the number of those who lack independence and who, if voting publicly, would not have the courage to vote according to their convictions and thus even sometimes prefer not to vote. For this reason, secret voting has been introduced almost everywhere. Secrecy is

<sup>3</sup> *Esprit des lois*, Book II, Chapter 2.

secured either by dropping an enclosed ballot paper (which in certain states is filled out by the voters in special voting booths) in an urn, or box, or (if the candidates have been selected previously and if only one vote is to be cast) by dropping a real ballot (small ball) in one of the ballot-boxes labelled with the names of the candidates. In some countries (*e. g.*, in the United States of America) voters, who happen to be absent from their electoral district, may send their ballot papers by mail.

3. *Election of one person or of several persons at the same time.* For elections to the national or state parliament almost all of the larger states are divided into several electoral districts, because it is very difficult and hardly practicable to treat the whole body of the voters within the state as one constituency and to make the whole state one electoral district. This method may be applied when members of smaller bodies, *e. g.*, of municipal councils, are to be elected; in this case each voter may at one time vote for as many candidates as there are members to be elected. The voter then writes on the ballot paper the name of his candidate for each mandate, producing thus a list of names, or, according to another system, he casts his vote for a list which has already been drawn up and proposed by his party. If this method were applied to elections to parliament, each voter would vote for the whole parliament, *i. e.*, for as many candidates as the parliament has members; this indeed, would conform to the doctrine that each deputy represents the whole nation and not the voters of an electoral district only. But voting for such a large list, numbering perhaps several hundred names, would mean very often that many voters were casting votes for candidates from remote districts, of whom they had never even heard. It is true that at present in Italy the whole country forms one constituency and that, at the final elections, each vote is cast for or against a list of candidates, whose number is equal to the total number of members of the Chamber of Deputies; but we must not forget that the candidates are chosen by the professional associations and sifted by the Fascist Grand Council, so that the final vote of "yes" or "no" by the people at large for or against a given list resembles a referendum for a proposal more than it does an election of persons (see p. 83). But a direct election of the parliament, in which election different parties are competing, by one constituency alone, comprising the whole body of voters would cause almost insurmountable difficulties in a large country, not only to the voters

and their parties, but also to the authorities which conduct the elections. For these reasons and also on account of local interests which, in spite of all theories, proved too strong to be disregarded, the territory of the state is, as a rule, divided into electoral districts, the voters of each district forming one constituency. The number of these districts may be just equal to the number of the members of parliament and, in this case, the voters of each electoral district elect one member. But there may be fewer of these districts than members of parliament; in this case the constituency of some districts or of each district elects more than one member, or it elects, as it is called, a "list" containing as many names as there are members to be elected in the district concerned. Elections by lists (the so-called "general ticket system") or elections of one member (the so-called "single-member district system"), *i. e.*, division of the state into large or small electoral districts,—each of these methods has its good and its bad points. If the voters of a small district are to elect only one deputy, he will be better known to them than will a larger number of candidates to the voters of a large district. But this closer personal relationship between the deputy and the voters may promote corruption and may incite him to work only in the interest of his comparatively small electoral district. If, on the other hand, a great number of voters are to elect a relatively large number of deputies, they will hardly know all these candidates for whom they are casting their votes. It therefore often happens that parties place a well-known and prominent personality at the head of the list, and below him weaker and less attractive ones; in this way, as the votes are cast for the entire list, undesirable persons are oftentimes elected because of the star heading the list. It has been advanced in favor of the "general ticket system" that through a large number of voters a wider diversity of interests appear (farming, trading, industrial, national, religious interests, etc.), which must be taken into consideration by the competing parties; thus they are compelled to satisfy opposing interests and this is possible only through moderation and wise and conciliatory politics. The larger the electoral district, the broader must the program of the political parties become and the more readily may public interests be approached. It has also been alleged that electoral corruption can exert a greater influence upon the result of the election when the number of voters is small than when it is large. And, finally, "proportional" elections can be carried out only if more than one member is to be elected in one and the same district.

A great number of small electoral districts, however, may secure the protection of minorities in case the followers of the various political parties are not equally spread over the whole territory. Let us suppose that, in the entire state territory, 100,000 persons have voted for a parliament consisting of 100 members, and that there was a competition between two parties only. One party got 51,000 votes and the other 49,000. If the entire state forms but one constituency so that each vote was cast for a list with 100 names, the first party obtains all the 100 seats, provided, of course, that the majority system is applied. Thus, in the United States of America, for the election in each of the states of the electors who shall elect the President of the United States, a majority, however small, gets all the electoral votes. If, however, the state is divided into several electoral districts, the minority party (having in the hypothetical case altogether 49,000 votes) in some districts may obtain a majority and thus win at least a few seats; in these districts the votes of the majority party are lost. But if the state is not divided into electoral districts all the votes of the minority party are lost. Again the electoral districts can be laid out so that one party is unduly favored and the other discriminated against, *e. g.*, if the same number of seats is allotted to a district with a large population as to a district with a small population. If in a certain electoral district, one deputy is apportioned to a population which yields 10,000 voters, and in another one deputy is apportioned to a population yielding only 5,000 voters, then the votes of the latter are twice as strong as the votes of the former. Thus the minority of voters can obtain a majority of seats. As the population does not increase or diminish equally in all electoral units, the parliamentary seats, even if justly apportioned, must be reapportioned from time to time according to changes in the population as apparent in the census; otherwise, an apportionment equitable at a certain time may yield, at a later time, an unequal representation. A fair division of the state into electoral districts and an equitable apportionment of a fixed number of seats amongst them is by no means easy; for not only is the entire population of each district constantly fluctuating, but also the ratio between the population and the enfranchised part of it (if this be the basis of apportionment) is subject to change; also, in so far as the number of people who actually vote is usually smaller than the total number of the enfranchised, it may easily happen, whatever the basis of previous apportionment be, that a majority of members is returned by a minority of the people entitled to vote. In addition, it appears necessary, because of the official business

connected with elections, to make electoral districts coincide as far as possible with administrative districts or with circuits which, however, are often shaped to conform to other than electoral considerations.

Even in the case of a perfectly just apportionment the electoral districts can be set out so as to favor certain parties and to weaken others. If, *e. g.*, an industrial town has industrialized areas on its north and an agricultural area lying to the south, it is easy either to favor or to circumvent the industrial (*e. g.*, labor) party according as the town is united either with its northern or with its southern neighbors as one electoral district. Such practices in laying out electoral districts, by which certain parties are unjustly favored, are called "gerrymandering."

4. *Majority and Minority.* If one speaks about a majority one usually thinks of the so-called absolute majority, which means more than half of the total; according to this principle, that candidate, or those candidates on a list, are elected who obtained at least one vote more than half of all the votes cast. According to another principle, that person is considered elected who gets more votes than any other; this is called a relative majority or "plurality majority." If only two parties compete, the relative majority coincides with the absolute; but if there are more than two parties, the relative majority might be smaller than the absolute one, as the following example shows: 10,000 votes have been cast; the absolute majority is 5001. Now A has obtained 4000 votes, B 3500 and C 2500. If the relative majority rules, A is elected; but if the absolute majority rules, nobody is elected and the election must be repeated ("second ballot") until one person gets more than half of the votes cast. But if the votes are divided as in our example, and if the competing parties are solidly arrayed, an absolute majority can be reached only by way of a compromise between two parties (who may have perhaps very different political programs); a compromise is sometimes likewise necessary if at the second voting (polling) votes may be cast only for one or the other of the two candidates (A and B) who obtained the highest number of votes in the first election. If at the second voting party C votes for A or does not vote at all, A will be elected; but if its votes are given to B, the latter will be elected.

The second election can be avoided by the so-called "alternative vote" or "preferential voting" system. To take the simplest example in which one member is to be elected and three candidates compete ("three-cornered" contest), the voter writes or marks on his ballot

under the name of his first choice the name of his "second preference." First the names on the top of the ballots are counted; if at this counting no one gets an absolute majority, the candidate with the lowest number of votes is eliminated, but the ballots cast as first choice for him and bearing, as second preference, the names of those two candidates who scored the highest number of votes at the first counting are added to the total already in their favor; then the higher number of votes decides between these two.

Under the relative or "plurality majority" system the first election yields the conclusive result, except in the rare case when two or more candidates obtain an equal number of votes; then, either lots are drawn or preference is given to the older of the two, etc. The method of relative majority, which is the simplest, implies the possibility of a minority rule, for under it, a party which obtains less than half of the votes cast may take the prize and, consequently, it is possible for a minor part of the voters to have a majority of the seats in parliament. The relative majority system is, at present, rather rarely applied, but it rules in the elections to the British House of Commons (except the elections of the representatives of the universities who are elected by a proportional system) and is applied in many states of the United States of America. In England, the relative majority system has, so far, been able to maintain itself as the electoral method mainly for the following reasons: because this method has long been traditional there, because the political parties are few but strong, because this method is favorable to shifts of majority power (and thus of government) among the parties (and this is held to be politically advantageous), and because the minority in parliament is not entirely pushed into the background but has, as the opposition faction, the important function of helping the progress of national politics through constructive criticism.

To the systems of absolute as well as of relative majority it has been objected that the minority, whether small or great, is at the mercy of the majority, however small the latter may be. It may happen that a small absolute majority, in the extreme case half of the votes  $+ 1$ , obtains all the seats, while a numerically strong minority, in the extreme case, half of the votes  $- 1$ , gets none. This is easily comprehensible. Much more astonishing is a reversed result of the majority system, namely when the absolute majority of votes gets a lesser number of representatives than the minority; and this even without any "gerrymandering," *i. e.*, if the electoral districts are shaped with complete equality, and even if an equal number of voters cast their votes in each

district. Let us say that 10,000 voters cast their votes in each of 20 electoral districts, and that in 15 districts party A is victorious with a scant majority; that it secures in each district 5,100 votes, whereas party B gets 4,900 votes in each district and thus, being in the minority, returns no member. Let us, further, say that in the remaining five districts party B wins by an overwhelming majority; obtaining in each district 9,500 votes, whereas party A secures the very small minority of 500 votes in each of these districts. The result is that party A gets 15 seats and party B, 5. But if we count all the votes cast, we see that party A obtained

$$\begin{array}{r} \text{in 15 districts } 5,100 \times 15 = 76,500 \\ \text{in 5 districts } 500 \times 5 = 2,500 \\ \hline \text{total } 79,000 \text{ votes,} \end{array}$$

and that party B obtained

$$\begin{array}{r} \text{in 15 districts } 4,900 \times 15 = 73,500 \\ \text{in 5 districts } 9,500 \times 5 = 47,500 \\ \hline \text{total } 121,000 \text{ votes.} \end{array}$$

Thus, party A, with 79,000 votes secured 15 seats, and party B with 121,000 votes only 5 seats! This example explains itself by the fact that one party won with a scant majority in a large number of districts, whereas the other party was victorious with an overwhelming majority in a small number of districts; this example is by no means far-fetched and can easily happen if the voters of one party are massed in only a few districts, whereas the voters of the other party are uniformly spread over all the other districts forming in each a slight majority. If, in the instance cited, the state were not divided into electoral districts, but formed one constituency only, party B would have obtained all the seats. Indeed, under the majority system, the minority, as a rule, runs the risk of not obtaining any representation at all; the prospect of this encourages abstinence from voting, since the voters of the minority (perhaps of a wrongly calculated minority) may be inclined beforehand to consider their voting of no avail. And so it may happen, and has actually happened, that, under the rule of the majority system, only the minor part of the people possessing electoral rights is represented by the majority in the elected body. It has been stated that in France in 1905 the law on the separation of church and state was

passed by the votes of 341 deputies who represented 2,647,315 voters, whereas the number of all the people who had the right to vote amounted to 10,967,000.

For this and still other reasons (*e. g.*, strained and unfair compromises between the parties concerned) a movement arose about the middle of the 19th century which has developed up to our days an increasing propaganda for the protection of minorities.

It is clear that two or more opinions (namely that of the majority and that of the minority or of several minorities) expressed at the polls, can be given positive effect only if the system of elections is such as to permit several opinions to have a share in the result. If but one member is to be elected, there is no other choice but to consider either the majority (or the minority), because one member (one mandate, one seat) cannot be divided into a greater and a smaller part; the same applies, if there is a question of voting for or against a proposal (*e. g.*, a bill). In such cases a majority only (perhaps even a special one) can decide. It is, of course, impossible to bring the principle of majority decisions in harmony with the absoluteness (unlimitedness) of everybody's will. Yet Rousseau attempted even this. But what arguments he used! He said that the general will is the permanent will of all the members of the state, and, further, that from the counting of votes the declaration of the general will is drawn (*du calcul des voix se tire la déclaration de la volonté générale*); he whose opinion happens to be disapproved simply committed an error! and the general will proved not to be what he thought it to be. If his opinion had prevailed he would have done some other thing than what he wanted to do; it is then that he would not have been at liberty.<sup>4</sup> It is not difficult to discern that this reasoning is forced. In reality, the majority principle is only a compromise between the existence of society and the liberty of the individual; this liberty, in so far as it is possible for it to coexist with society, can be realized to the greatest possible extent, only if the will of the absolute majority of its members is, on the one hand, necessary, but, on the other, sufficient to make the will of the community. This statement explains itself thus: The complete liberty of each member would mean that he is at liberty to withdraw from the community whenever he disagrees with other members whose wills being in accord determine the law of the society, *i. e.*, when there is not unanimity. Under such cir-

<sup>4</sup> *Contrat Social*, Book IV, Chapter 2.

cumstances, however, obligations of the members and hence society itself could not exist. In view of the fact that unanimity of all the members in every case (requiring everyone to agree always) practically is impossible, the principle of liberty, within society, appears to be best safeguarded when the minimum of members whose will is to constitute the will (law) of the community is as large as possible. And the number which equals this minimum is exactly a half + one, neither more nor less. A half cannot prevail, for there are two halves. If, however, a number less than half should prevail, then the general will (the law) would conform, at its very source, to the opinion of the minor, and not of the major, part of the members of the community, so that those whose wills were not taken into account would be more numerous than those whose wills were considered. If, on the other hand, the opinion of only a special kind of majority (which is larger than a half + one, *i. e.*, a qualified majority) should prevail, then the minor part of the community could prevent the rule of the will of the greater part; and, again, those whose wills are not considered would be more numerous than those whose wills are considered. In fact, a majority greater than a half + one (a qualified or special majority) is a means of protecting the will of the minority. If, for example, a two-thirds majority is prescribed, the motion is passed or the person elected only if at least two-thirds of all the voters vote for the motion or the person, *e. g.*, at least 67 out of 100. Here the minority is taken into consideration, because 34 votes are enough to prevent the acceptance of the majority's opinion. Thus, only a large majority can prevail. At any rate, however, under this system also, only one opinion can assert itself: either that of the great majority in a positive way (in which case its proposal is accepted or its candidate elected) or that of the minority of more than one-third in a negative way (in which case no bill is passed and no candidate elected; and accordingly the majority is obliged to negotiate with the minority in order to create a two-thirds majority).

But if, in an election, we wish to take into consideration both the opinion of the majority and the opinion of the minority at the same time, we can do so only if several persons are to be elected by the same constituency (in the same electoral district) and if then, after the polling, the greater number of members is allotted to the majority of votes and the smaller number to the minority. Many methods have been devised in order to help the minority to get its share in the representation. From among these methods, first setting aside the pro-

portional system, we choose now for consideration what are known as the limited vote and the cumulative vote.

The limited vote means that each voter is allowed to cast his vote only for a smaller number of candidates than the total to be elected. For example: Six members must be elected in a given electoral district, but each voter may vote only for four, so that the majority, even if its followers vote solidly for the same candidates, cannot secure more than four seats. The minority (or the minorities) obtains the other two seats. As under this method the distribution of mandates seems to be anticipated, this method is merely an artificial limitation or standardization of the majority principle.

What is called the cumulative vote can best be explained by the following example: Six persons are to be elected; each voter has six votes and may vote either for six candidates A, B, C, D, E, F, or he may give all of his votes to one candidate, or some of his six votes to each of several candidates, *e. g.*, he may cast all of his six votes for candidate E, or three votes for candidate E and three for candidate D, etc. Hence, one-sixth of all the voters can attain the same strength with respect to one candidate as can five-sixths of the totality of voters with respect to five candidates. If a party, numbering one-sixth of the voters, is well organized, it can secure one seat. The cumulative vote is thus an artificial strengthening of the minority.

But these two systems do not always yield a result which exactly reflects the numerical strength of the competing parties, because the distribution of the mandates (seats) between the majority and the minority is established, or at least suggested, in advance, *i. e.*, prior to the elections and, thus, before the numerical strength of the parties as reflected in the election, is known. In the first example (illustrating the limited vote) two out of six seats (one-third) are reserved to the minority, though it is possible that this minority may secure less than one-third of all the votes. If the majority party is very strong and if it is well aware of its numerical strength it may, in the case of some particular election, instruct one part of its followers to vote for the same four candidates, and the other part to concentrate its vote upon other candidates so as to overcome the competing minority party. As to the second example (illustrating the cumulative vote), the minority might have obtained more than one seat, had it known how many votes would be cast in its favor. Instead of concentrating all the six votes of each of its voters upon a single person it might have given orders to all of them to cast three votes for one person and three for

another; or it might have ordered half of its members to cast all their votes for one person and, the other half, to cast all their votes for another person.

Thus, both systems presuppose solidly organized parties and a knowledge of the voting strength such as is necessary to permit a reliable forecast of the voting. However, as this is usually difficult when a large number of voters is concerned, these two systems are to be recommended for small electorates only. And this has actually been their application in many cases. The limited vote was introduced for municipal elections in Lausanne in 1872, in Spain in 1876 and in Italy in 1889. The cumulative vote was introduced in England in 1870 for elections to school boards, and in the same year, in Pennsylvania for municipal elections. Under the cumulative vote system, as it was applied in Illinois for elections to the House of Representatives, the majority repeatedly obtained less seats than the minority.

The proportional system attempts to establish an equal proportion between the numbers of votes which each party gets in the elections, on the one hand, and the numbers of members of each party in the elected body, on the other; its ideal is that the political convictions of the voters be reflected exactly in the political alignment of this body. To effect this, the number of votes necessary for the election of one deputy must first be fixed. This number called a quota (quotient), as established by an older method, was equal to the total number of votes cast, divided by the number of members to be elected; such a quota was used about the middle of the 19th century by the Danish minister Andræ and theoretically explained by the Englishman Thomas Hare. This division shows the numerical proportion between the votes cast and the number of members to be elected, or the proportion according to which the number of voters has been reduced to the number of deputies. If 1,000 votes have been cast and if 10 deputies are to be elected, 100 votes are sufficient for the election of one deputy. But all the deputies will be elected only if the entire number of voters is distributed into 10 groups of 100 each and if all the voters of one group vote for the same candidate. In practice, however, such a repartition is not very likely to occur. For some candidates probably will obtain more than 100 votes, and others less, so that all the seats will not be filled. Every vote cast, above 100, for a candidate, is lost because he already is elected when he has received 100 votes.

This loss can be avoided to a certain extent, if the vote may be cast not for one candidate alone, but also for still another "possible"

one whose name the voter writes under the name of his first choice in the second place on the ballot. The ballots count, it is true, for the first named candidate, but only until he has got 100 votes; thenceforth ballots bearing this candidate's name first, are counted for the second named. However, as it might happen that the second named also, in this way, or as first choice on other ballots, might attain 100 votes and be elected, and that ballots might still be available which bear the names of two persons already elected, a third candidate may be marked in the third place on the ballot in order to avoid further losses of ballots, etc.; finally, to have as few losses as possible, as many names of candidates may be written on the ballot as there are deputies to be elected in the district concerned. The voter, according to this system, can elect only one member, but his vote is transferable; if it does not attain its aim in securing the election of the first candidate it is, successively and in the order of preference indicated by the voter himself, transferred to another candidate whose election it may be able to bring about (single transferable vote). Votes which are cast for the person named as first choice and which are sufficiently numerous to fill up the quota, have gained their purpose; but votes which would be of no use to anyone if not diverted from the candidate named first on the ballot, are transferred. Such votes are of two types: those cast for a particular candidate over and above the quota, and those cast for a candidate whose total "firsts" did not reach the quota. We may remark, however, that under this system the element of chance enters, for the first transfer is made from amongst those ballots which have the same name as first choice, though they may differ from each other regarding the names given as second, third choice, etc.; thus it is not a matter of indifference for the second, third, etc., candidate which of these ballots are used in favor of the first candidate and which are transferred.

This hazard can be avoided if the ballots which conform with respect to the first name, conform also with respect to the second and third names, etc. This, of course, presupposes agreement and organization amongst the voters, who then act jointly, *i. e.*, as a party with a common list. This list is then no longer an indication of the preferences of the individual voter, but it shows the candidates of the party. Instead of the voter voting for one person only (allowing for the eventual transfer of his vote to another single person), he now votes for several persons at the same time.

Because they are important in the matter of the electoral proceed-

ings themselves and in the returns of the election, the lists of candidates are usually subject to confirmation by the proper authority whose duty it is to inspect them, but, of course, only with respect to the formal requirements of the law. This system, furthermore, is convenient only in case a certain minimum number of voters is expected to cast its votes for the same list. Hence the electoral laws prescribe that only a certain minimum number of voters may validly propose a list of candidates. This group of voters is legally considered as a party and its list is confirmed if it fulfills the formal requirements of the law. According to many electoral laws, voting is allowed only for duly submitted and confirmed lists of candidates (obligatory lists); this becomes absolutely necessary if the votes are cast by really dropping a "ballot" in a box. In some countries, in order to frustrate unfair stratagems, political parties are forbidden to include in their lists candidates already on the lists of other parties. The system of obligatory lists is conditioned by party discipline, which limits the liberty of the individual voter, because if voting for his party he must vote for all candidates proposed by it. But the parties in this way have a better chance to elect their candidates, for otherwise their votes might easily be split. And finally, this system facilitates election returns, because when a great number of identical ballots is cast, it is not necessary to examine them for each candidate on the list to discover whether he has reached the quota; this operation is performed only once and for all the candidates on a list at the same time by counting how many times the number fixed as the quota goes into the total number of votes cast for this list; the result equals the number of candidates on the list who are elected. Thus, the votes cast for each list (party) must first be added up; this sum is then divided by the number of votes which are necessary for the election of one member, *i. e.*, by the quota (in the aforementioned example 100); the quotient resulting from this operation shows how many seats the list has obtained. It very rarely happens that a party obtains such a great number of votes that all its candidates are elected; the normal case is that one list gains one part, and another list another part, etc., of all the seats to be filled.

The question then arises: To whom of the candidates on the same list are the seats won to be allotted. This may be decided according to the order in which the candidates were placed on the list by their party before the election; thus, if the list gained but one seat, this

is allotted to the candidate named on the top; if it gained two seats they are allotted to the candidates named in the first and second place, etc.; in these cases, of course the list of candidates is also a list of the preferences of the party. But, according to another system, the voter may have a greater liberty and a certain choice between the party's candidates, *e. g.*, if in voting for the list he may mark out in particular one or more persons of his choice from among the candidates, or strike out persons he dislikes, or if he himself determines on his ballot the order of succession of the party's candidates. Such a vote counts, in the first place, for the list as such, *i. e.*, with respect to the question of how many seats shall be allotted to the entire list; in the second place it counts for the candidates marked out on the list by the voter, for the seats won by the list are then distributed amongst the candidates on it, according to the number of votes which have been polled for each candidate in the manner described. If in the aforementioned case, for example, one party got 600, and the other 400 votes, the first obtains  $600 \div 100 = 6$ , and the second  $400 \div 100 = 4$  seats. If the order determined by the parties decides, then the first six candidates on the first list, and the first four candidates on the second list are elected. According to the other method mentioned above, however, by which the choice or the preference of the voters is considered, those six of the ten candidates on the first list, and those four of the ten candidates on the second list would be elected who got the highest number of votes on their respective lists. If in voting for a list of names the voting is done with real "ballots," then votes can be cast, as we know, only for lists determined in advance. But even with this method it is also possible to take into account, in distributing among the candidates on the list the seats won by the party, at least to a certain extent, the preferences of individual voters within the same party. It can be done in this way: The electoral district which is the unit for which the lists of candidates are proposed, is divided in as many electoral departments as there are deputies to be elected in the entire district; each department is allowed one candidate for each list, as its departmental candidate. The vote cast for him counts, first of all, for the entire list to which he belongs; thus his personality, as well as the program of his party, can attract votes for the latter; for this reason parties are anxious to see that all their candidates nominated for the various departments (and that means for the entire list) are persons who will attract votes by their personal qualifications. But the votes

cast count not only for the list as such, but also for the departmental candidate himself. For the seats gained by a list in an entire electoral district are distributed amongst its departmental candidates not according to an order of succession established in advance, but (with a possible exception for the "head" of the list) according to the number of votes each of them has obtained. Thus, the success of a departmental candidate in the elections depends, first upon the total votes his party gets in the whole electoral district—for this number decides how many seats the party gets—and, second, upon the number of votes he himself drew for his party in his department—for this number determines his place among the candidates of his party in the entire district when the seats won by the party are distributed.

The proportional electoral system is sometimes confronted with the difficulty of distributing all the seats which according to law must be filled. Division of the total votes cast for each party by the quota may give a number less than the total number of seats that are required to be filled. In the aforementioned example (in which there were 10 seats to be filled, and 1,000 votes cast, of which one party got 600 and the other 400) the allotment of all the seats was possible, because both parties had a number of votes such that it could be divided by the quota, 100, and not leave any remainder. But let us say that one party got 560 and the other 440 votes; then,  $560 \div 100 = 5$  seats are allotted to the first party, and  $440 \div 100 = 4$  seats to the second; thus only nine seats altogether. It has been suggested that in such cases the remaining seat be given to that party which has the highest remainder after the division has been made; this would be the first party in our example as its remainder is 60, whereas the remainder of the other party is only 40. But the question arises whether such a distribution is still "proportional," as all the deputies of one party were elected with 100 votes each, whereas one deputy of the other party was elected with only 60 votes; thus the quota would not be equal with regard to all the seats. The reason why division by the quota of 100 effected a distribution of only nine, and not 10 seats, is apparently that, in this case, the quota 100 was too high. It was too high because the total number of votes, 1,000, into which 10 is contained exactly 100 times, was divided into two numbers (560 and 440) which are not multiples of 100; therefore, in dividing these numbers by 100, fractions appear; a seat (or a mandate) however, is an indivisible unity which cannot be divided so as to give a part to one party and a part to another party.

An attempt has therefore been made to reduce the quota so that the number of the votes cast is divided, not by the number of seats to be filled, but by this number plus one (Hagenbach-Bischoff system). The division by this increased number results in a smaller quota. If, in the aforementioned example, 1,000 is divided by  $10 + 1$  (instead of by 10) we get 90 as the quota; in dividing the number of votes won by each party by this quota we get for the first party,  $560 \div 90 = 6$ , and for the second party  $440 \div 90 = 4$ . All the seats are immediately filled and we need not consider remainders. We can see the reason of this kind of quota in the following example: If two deputies are to be elected by the same constituency at the same time, it is not necessary for each to obtain half of all the votes, but only for each to obtain more than one-third, *i. e.*, for two together to get more than two-thirds of all the votes, for then obviously the third candidate has less than one-third. Thus, if we have to calculate the quota for the election of two deputies we do not divide the total votes by the number of members to be elected, *i. e.*, by 2, but by 3 ( $= 2 + 1$ ), and, if three are to be elected, not by 3, but by 4 ( $= 3 + 1$ ), etc. This diminished quota shows clearly that the proportional method is simply the application of the principle of relative or plurality majority to the elections of several persons at the same time. (Yet, even this quota did not always prove entirely satisfactory; and so the quota was sometimes increased by one, thus, in the aforementioned example it would be 91, *e. g.*, in the elections of members of parliament by the universities in Great Britain according to the "single transferable vote system").

However, not even these systems allow us to dispense entirely with the consideration of the remainders. Let us say that, in the above-mentioned case, not two but four parties were competing, and that party A secured 530; B, 170; C, 160; and D, 140 votes. The quota is 90, *i. e.*,  $1,000 \div 11$  (*i. e.*,  $10 + 1$ ). Party A, then, gets  $530 \div 90 = 5$  (surplus 80); party B,  $170 \div 90 = 1$  (surplus 80); party C,  $160 \div 90 = 1$  (surplus 70); and party D,  $140 \div 90 = 1$  (surplus 50). Now we see that only 8 seats instead of 10 are filled. According to the principle of the highest remainders, one additional seat would be allotted to party A and one to party B; or according to another method which has been suggested, the remaining seats would be allotted to the strongest party without regard to remainders, a procedure which, of course, would correspond still less to a proportional distribution. How can we adjust these shortcomings? Evidently the

cause of the remainders is the distribution by means of a quota which has been fixed in advance.

But, perhaps it is possible, without employing the quota, to compare directly the total number of votes of one party with the total number of votes of another party. Let us try this example: Party A obtains 88, and party B 54 votes. If one seat is at issue, we shall give it to party A and not to party B, because party A is numerically stronger and it is more just that a party of 88 voters have one representative and a party of 54 voters none, than vice versa. But how shall we proceed in this case if two seats are to be allotted? If we give both seats to party A, 88 voters are represented by two deputies or 44 by one, whereas 54 (*i. e.*, the entire number of party B) are represented by none. Therefore it is more equitable to allot one representative to the 88 voters of party A and one representative to the 54 voters of party B, than it is to allot one representative to each 44 voters of party A, (*i. e.*, two to the total of 88 voters). Thus, after comparing the numerical strength of both parties in this way, we are led to assign one seat to each party. But what if we wish to distribute three seats under these same conditions? Two have already been assigned as described above. Which party shall have the third? If we give it to party A, which would then have two seats, one representative would be apportioned to 44 voters ( $88 \div 2$ ); if, however, we give it to party B, which in this case would have two seats, one representative would be apportioned to 27 voters ( $54 \div 2$ ). Since it is more equitable that the greater number of one party, rather than the smaller number of another party, be represented by one deputy, it is thus in keeping with the numerical strength of the parties in question to assign, out of a total of three seats, two to party A and one to party B. Going one step further in this same case, let us suppose there are four seats to be assigned. If then we were to give party A an additional seat (three seats in all), party A would have one representative for each 29 voters ( $88 \div 3$ ) and party B one for its total of 54 voters; but if we should assign two seats to party A and two likewise to party B, then party A would have one representative to every 44 voters, and party B one to every 27, and thus to a lesser number than if three seats were allotted to party A (or one to every 29 voters). Thus, if four seats are to be assigned, it seems to be more equitable to give three to party A and one to party B.

All of this can be tabulated as follows:

<i>Party A</i>	<i>Party B</i>
88 votes $\div$ 1 = 88	54 votes $\div$ 1 = 54
88 votes $\div$ 2 = 44	54 votes $\div$ 2 = 27
88 votes $\div$ 3 = 29	54 votes $\div$ 3 = 18
etc.	etc.

We then look for the highest numbers without regard to party, taking first the highest, then the second highest, the third highest, etc., depending upon the number of seats to be allotted. These numbers are: for one seat, 88; for two seats, 88 and 54; for three seats, 88, 54, and 44; for four seats, 88, 54, 44, and 29; for five seats, 88, 54, 44, 29, and 27, etc. If the seats were not allotted successively according to the amount of the numbers in the diminishing order of their succession, a seat might be assigned to a smaller number of votes of one party in preference to a larger number of votes of another party, leaving this latter number perhaps no available seat. And just to show in a comparataive way the numerical strength of the competing parties with regard to each one of the seats which are successively allotted one by one, we divide the total votes of each party, beginning with the divisor one and increasing it by one at each successive division, *i. e.*, by 1, then by  $1 + 1 = 2$ , then by  $2 + 1 = 3$ , and so on, consecutively. The seats then are allotted according to the highest quotients resulting from these divisions. In distributing the seats in this way, the "quota" appears only in the final stage of this operation, for the quota appears as the lowest of the highest figures, *i. e.*, the smallest which is taken into consideration for the allotment of one (the last) seat; hence, in connection with this method, the quota has no practical value.

This ingenious method, according to which the seats can be distributed directly amongst the competing parties in exact proportion to their numerical strength, was invented by a Belgian, d'Hondt. It can be applied to any number of parties and seats. For example: Six seats are to be distributed amongst three parties, of which party A has obtained 34,000, party B 19,000, and party C 7,000 votes. The number of votes of each party is divided successively

A	B	C
by 1 = 34,000	19,000	7,000
by 2 = 17,000	9,500	3,500
by 3 = 11,333	6,333	2,333
by 4 = 8,500	4,750	1,750

Party A has four of the six highest numbers, party B two, and party C none. Consequently party A gets four seats, party B two, and party C none.

Both systems (Hare and d'Hondt) may be combined so that, first, the lists which did not get the quota according to the Hare-system, are eliminated from the competition, and so that, second, the seats are distributed amongst the remaining lists according to the d'Hondt system.

But as long as the state territory is divided into a number of electoral units (districts), no proportional system, however carefully devised, will show in the result of the elections, *i. e.*, in the elected body, an exact picture of the political alignment of the voters; for, under these conditions, the result of the elections will reflect only the political strength of the parties in the particular districts, and not in the entire state. A party, let us say, which, if the total of its adherents in the whole state is considered, appears very strong, but whose adherents happen to be spread over a great many electoral districts, with the result that it is defeated in all of them, remains without a seat; whereas another party, which is numerically much weaker in the state as a whole, but whose adherents are concentrated in a certain few districts, may prevail in these districts and thus secure a number of seats. A real proportional representation of all the parties in parliament could be reached only, if the entire state formed but one constituency; this single constituency, however, as we have already mentioned, gives rise in the larger states to great difficulties, and is practicable only under certain conditions. Yet, a combination of both ideas, namely of the division into districts and of the formation of the entire state as one (supplementary) electoral district can be realized in this way: Each party makes up, besides the lists (tickets) of candidates for the particular districts, an additional list for the entire state (state or general list). The seats are then distributed in the particular districts according to the proportional method; but votes which were ineffective in the particular districts either because in the aggregate they did not reach the quota or because they represent surpluses, are counted on the general state list of the party concerned; the general lists of all the parties then compete with each other for the allotment of the remaining seats. This idea was carried out in the constitution of Baden (a country in Germany) in 1919. It may be noted as an interesting peculiarity that there the quota is established in advance by law; it consequently is not calculated after the votes

have been cast. This is possible because the number of deputies is not fixed in advance but depends upon the number of voters actually polling. One deputy is allotted to each 10,000 actual voters (in the general list to any surplus exceeding 7,500 votes). The heavier the poll the greater the number of members in parliament. This system was introduced in the German Republic in 1920 with an additional provision, namely that any party may link its lists for certain territories comprising several electoral districts. The surpluses of the lists in these districts are added up and the party gets (for the lists which have the highest surpluses) an additional number of seats equal to the number of times the quota (which is fixed by law at 60,000) is contained in the sum of the surpluses. If there still remains a surplus, it is transferred to the general (state) list of the party. The surpluses of the lists which have not been linked in the manner just mentioned are added directly to the general list of the party. But it appears that even under this system the parties whose voters are concentrated in certain districts are favored in comparison with other parties who have their voters dispersed over many districts; for, according to the law, a party may, by linking its district lists, gain an additional seat only when one of the lists has obtained at least 30,000 votes; and, further, no party may fill more seats from its general list than it has gained by its district lists.

The proportional electoral system attempts to secure representation to minority parties. This, however, is possible only up to a certain limit. If every party, even the smallest one—and that would be finally a party having but one voter—were to be taken into consideration, then this smallest party also would have to have one representative and if then the proportional system were strictly followed out, every party would get as many representatives as it had voters; in that case, however, we could no longer speak of the representation of the nation, and the indirect or representative democracy would have turned into a direct democracy (see p. 48).

In recent times, "proportional representation" has been and still is a subject of earnest consideration, and of political dispute and theoretical controversy. It is advanced against this method of election that the proportional principle, even when applied at the elections, can not be considered at precisely the decisive moment, *i. e.*, at the voting in the elected body itself, where motions and proposals can only be passed or rejected by a majority, no matter how strictly the proportional system has been applied in the election of this body.

This deficiency can be, to some extent, obviated if a special majority is required for the vote, and particularly, if the committees of parliament in which the most important part of parliamentary work, especially of legislative work, is done, are elected out of the entire parliament proportionally to the numerical strength of the parties, so that, in the committees also not only the majority is represented but the minorities as well, proportionally. But the main objection against proportional elections is that they pave the way for the entrance of many minor parties into parliament, and this hampers the efficiency of the parliamentary system by robbing it of a strong majority, which is the very thing most necessary to the democratic principle. For this reason, in spite of the introduction of proportional elections, the majority has been favored in certain countries, *e. g.*, by attributing remaining seats (which could not be allotted according to the quota) to the strongest party; or, when it turns out that one party gains an absolute majority in an electoral district, by giving all the seats in this district to this party, in which case it appears that proportional representation is considered merely as a substitute if no absolute majority is secured, etc.

The main argument in favor of proportional elections is that they make a representation of minority parties possible; the advocates of this system maintain that real democracy and liberty is only reached if as many citizens as possible are represented according to their political orientation.

Whatever the pros and cons may be, it is a fact that the principle of proportional representation has been proudly vindicated in this age. It was introduced in many countries before the World War, *e. g.*, in Belgium, Serbia, Bulgaria, in many Swiss cantons, in Denmark, Sweden and gained ground, after the war, in Germany, in Switzerland (for the elections in the National Council) in Italy (see p. 83), and in the newly organized states of Central Europe. It is, however, significant that the two mighty Anglo-Saxon states, Great Britain and the United States of America, have so far not accepted the principle of proportional representation (except for the elections of members of parliament in certain universities in Great Britain and for municipal elections in a few cities in the United States); though there is a very active movement on foot in both these countries in favor of the proportional system, it seems that the old tradition of the "two-party" system, which, in the main, is still maintained, is rather reluctant to undertake an experiment with proportional elections. In France, by

the law of 1919, the proportional system was applied in the case that no list of candidates for the electoral district (which was the department, a comparatively large area) obtained an absolute majority; but by a law enacted in 1927, the French returned to their previous system of the absolute majority vote in a single-member constituency.

The question of which electoral system is preferable cannot be answered in the light of strictly juridical and mathematical views alone; rather this problem must be studied for each country individually; for its satisfactory solution involves considerations not only of the level of civilization, the degree of political maturity and tradition, but also of the organization of the state, its ethnical, religious and social make-up, its administrative system, and especially of the jurisdiction of the national parliament and of the self-governing (or autonomous) bodies.

#### The Nature of the Franchise—Its Protection—Compulsory Voting

The question whether the right of electing to public bodies, especially to parliament, is a real subjective right or the performance of a public service, has frequently been discussed. This question appears to be connected with a problem we have already treated, namely, universal suffrage. If the principle of the sovereignty of the nation is recognized (a principle under which, in reality, the sovereignty of each particular individual is hidden), then this sovereignty is expressed chiefly in the act of voting, which, consequently, must be classified as a subjective right of the individual. But if it is held that not everybody, but only capable and mature persons, *i. e.*, those who have an understanding of public interests, ought to vote then it is recognized at the same time that elections are held not so much in the interests of the individual voter as in the interests of the community or the state. It is true that elections are always carried out in the public interest also, for without elections the public organ in question, *e. g.*, the parliament, could not be created at all. It is for this reason that the members of public bodies and institutions whose officers, *e. g.*, the president, are elected by the members often are in duty bound to vote in their election. As far as elections to political bodies, especially to parliament, are concerned, sometimes the subjective interests of the voters and sometimes the objective interests of the public good receive the greater emphasis. Behind the theory that it is a duty to vote (compulsory voting) is the belief that parliamentary elections are carried out mainly in the public interest.

Compulsory voting has now been put into practice in some countries, *e. g.*, in Belgium, Czechoslovakia, Hungary, Denmark and in certain Swiss cantons. However, it might be questioned whether effective sanctions for the enforcement of compulsory voting have been found: penalties are rather light, valid excuses can easily be offered, and, finally, if voting is written and secret one can cast a blank ballot. Further, if the franchise is very generally extended and if canvassing is permitted, there is little cause to fear that the elections will have no result at all. Thus it is not generally considered necessary that compulsory voting be invoked as a means of insuring actual elections. An additional question seems also to justify some attention. It is this: at what moment does the duty, implying voting, begin—at the time when preparations are being made for elections (*i. e.*, registration of the voters) or only at the time the actual voting is to occur. Strictly speaking, a person who knows that he fulfills all the conditions required by law for the franchise and who, because he does not care to vote, permits his name not to be included in the electoral registers by not claiming his registration, violates the electoral duty no less than a person who is registered but who does not vote. However, to establish it as a duty to claim registration as a voter would be to meet with even greater difficulties than compulsory voting has met. Jellinek, in connection with elections, endeavored to distinguish the subjective right from the public service by stating that it is a subjective right to be recognized as a voter, but that the act of voting itself is a public function or service. However, we may say that the chief purpose of the recognition of the capacity of voting is the performance of the act of voting. If it is considered that the voter acts as a state organ while he is voting, for the reason that in doing so he participates in the appointment of other state organs (deputies), then consequently any person who participates in determining who is a voter acts likewise as a state organ; and this applies to any claimant. In some countries, as we have already mentioned, claims are granted not only to the claimant when he himself is demanding his own right to vote, but also when he demands that other persons be entered on or struck off the register. There are countries where the right to claim is conceded to "everybody," and so also to a person who himself has no right to vote; in such a case the action of claiming is a kind of *actio popularis* of the Roman law; the claimant, in such a case, appears to assume the character of a public or state organ even more than the voter does, for he helps to correct the register not for himself, but for others.

Of course, claiming is of another juridical character than voting. The purpose of a claim, in so far as it concerns electoral rights, is to have certain legal capacities determined. The purpose of elections is an appointment conferring new legal capacities. The answer to the question whether claimants and voters are to be classified as organs depends upon whether their action is considered a legal duty performed in the public interest, or whether it is considered a matter of private interest and, consequently, an exercise of their subjective right.

The legal purpose of parliamentary elections is, of course, to serve the public interest by creating a parliament. To effect this it is not necessary that every voter actually votes. If, however, the public interest is conceived more broadly as being best served when as many voters as possible really vote, then this latter aim must be expressed in the law itself through prescriptions for compulsory voting, for the qualification of an action as public function or duty must come out of legislation. If personal interest in a certain affair (*e. g.*, elections) may be presumed to furnish the incentive to a sufficient number of persons so that they may be expected to carry out this affair voluntarily—which, at least in general, is the case with the parliamentary franchise, which was an object of similar struggles such as were in former times fought for personal and religious freedom—then it is not necessary to impose the action involved (voting) as a duty; it suffices to give it the character of a right. Indeed, by the actual exercise of such a right the public interest also is often served. As, however, it is true that a public function does not become a private right by the mere fact that, through its performance, a private interest may be satisfied, so also it is true that a subjective right does not become a public function if the exercise of this right happens to be in harmony with the public interest. If voting is made dependent entirely upon the good will of the voter, then his voting is only an act allowed, and not imposed by law, and therefore has the character of a subjective right and not of a public service or function, which latter is conceivable only in connection with the notion of legal duty. Thus, where voting is legally dependent upon the voter alone, we may speak of an electoral right; but when voting is made compulsory, we are justified in regarding the electoral "right" as a public service, similar to military or jury service.

Freedom of voting, secrecy in elections and accuracy in ascertaining their results are protected and secured by various legal prescriptions and penalties as well as by the coöperation of representatives of the



voters themselves (the parties) in the electoral preparations and in the polling. Violence, threats, and bribery brought to bear on the voters for the purpose of influencing them to vote one way or another or not at all are punishable; so are breaches of electoral secrecy, falsification of results, etc. The liberty of the voter is further assured by the provision that he is not answerable to anyone for his vote, *i. e.*, that nobody has the right to make him legally responsible for the vote he has cast.

Hardly less important with regard to the liberty of the voter than the election itself is, especially in our times, the choice of candidates, particularly if we take into account, on the one hand, party discipline, and on the other the complicated machinery of modern elections. Now, the nomination of candidates for elections in many countries is an internal affair of the parties. The minimum number of voters which is sometimes required under the "general ticket system" in order to present the list of candidates to the electoral authorities (see p. 211) is, in most cases, little more than a mere formality, since the nomination of candidates thus presented is not decided upon by these voters but by the party organization (in committees and political conventions).

But for the most part in the United States of America a real nomination of the candidates by the voters takes place in the so-called "primaries" (also called direct primaries), *i. e.*, preliminary elections previous to the final ones. Primary elections are now prescribed by law in almost all the states of the United States, though the laws differ among themselves in various respects, *e. g.*, as to which offices primaries must be held for and as to whether all or only those parties which polled a certain minimum of votes at the last elections are subject to the primary procedure. This procedure was introduced in order to give the voters the freedom of choosing their candidates and to prevent abuses. But at the primaries the question again necessarily arises of which candidates shall be put up for these preliminary elections; and to determine this there are again various methods, *e. g.*, the petition, the convention, and self-presentation. The primaries are either "open," *i. e.*, attended by a combined assembly of all parties, or they are "closed," *i. e.*, each party meets separately, in which case primary voting means or presupposes declaring oneself as an adherent of a certain party. But in so far as primaries are only a means of selecting nominees (candidates) and in so far as they leave the choice of the person to be sent up to the elected body to the final elections,

they afford little more than a moral guarantee that the voter will vote for the candidates of the same party in the final elections that he voted for in the primaries. In most states of the U. S. A. the candidate who gets the highest number of votes in the primaries is nominated; and thus the same method is applied as in the final elections. A candidate who is defeated in the primaries may run in the final elections as an "independent."

#### The Elected

The capacity of being elected, *i. e.*, the eligibility, depends upon certain personal qualifications. The qualifications demanded of those to be elected to parliament are usually higher than those demanded of the voter. For to actually perform the duties of a member of parliament and to say who that member of parliament shall be are two entirely different functions. Therefore not all who have the right to vote are eligible. But, on the other hand, as a rule one cannot be eligible without being a voter. There are besides this requirement (electoral right) a number of others, *e. g.*, a higher age than that prescribed as a condition for the franchise, a special citizenship, *i. e.*, either citizenship by birth or, in the case of a naturalized citizen, the lapse of a certain time between his naturalization and his becoming eligible, or even his continued residence within the state; otherwise he is not considered to be sufficiently attached to the state to act as a member of a political body. A further requirement in some states is residence in the electoral district. In the United States of America the constitution prescribes that the members of the House of Representatives must be inhabitants of the state in which they are elected. A higher moral standard is regularly required for the elected than for the voter. The number of delicts which cause the loss of eligibility to persons convicted for them is larger than the number of delicts for which one is disqualified to vote. In some countries persons in active military service are not eligible for the same reason that the franchise is not granted to them and, further, for the sake of independence of parliament. In Great Britain the clergy of the Church of England and of the Roman Catholic Church are ineligible to the House of Commons. In certain countries women are ineligible, though they enjoy the franchise. And finally there is sometimes a higher educational requirement for eligibility than for the franchise, *e. g.*, literacy (capacity of reading and writing) or even university education; this latter requirement was prescribed in several countries for at least a certain

percentage of the deputies. In addition to this there exist in certain countries provisions according to which the holders of certain state offices may not be elected to parliament at all, or may not be elected within the territory of their jurisdiction, and that not only during their tenure of office but also for a time after its expiration. The reason therefore is to avoid the exertion of any undesirable influence upon the voters.

Different from this is what is called incompatibility, *i. e.*, the legal inconsistency of practicing the profession of a parliamentary deputy and at the same time also a certain other profession. This applies usually to the profession of a public (state) officer; and that not only because of the difficulty of carrying on both professions properly, but also on account of the principle of the separation of powers: the state functionary who carries out the laws must not be the same person who is engaged in creating them. Therefore we find in the laws and constitutions of many countries provisions requiring the official who happened to be elected to declare whether he accepts the seat in parliament. If he accepts, then he is considered unable to carry on his duty as an official and, as such, he gets a leave of absence for as long as he holds his seat in parliament. But in certain parliamentary states members of the cabinet are exempt from this rule, because the combination of membership in parliament with membership in the cabinet happens to be a distinctive feature of the parliamentary regime. Certain other state functionaries, *e. g.*, university professors, have at times also been exempt from this rule.

These reasons and, particularly, the motive of keeping the members of parliament independent of the government are sufficient to explain the rule that a member of parliament who accepts a state office (even one which is compatible with membership in parliament) loses his seat (although he may be reelected). In England, a member of parliament who "within nine months of the issue of the proclamation summoning a new parliament," *i. e.*, after a general election, accepts a political office (an office of profit under the Crown) does not vacate his seat, provided that that office is one whose holder is eligible for election; but if he accepts such an office after that time he must be reelected in order to sit in parliament.

There are still other examples of incompatibility, *e. g.*, in the case of merchants and business enterprisers who have commercial relations with the state administration; this exists in order to prevent private interests from exerting an undue influence upon legislation and from

weakening parliament's control over the administration. French law went so far as to establish incompatibility between membership in parliament and managership of certain big transport and financial institutions.

Membership in parliament is acquired upon official declaration of the result of the election; it ends with the death of the member, with his (or her) resignation, with loss of eligibility, with the end of the term of the legislature, with the dissolution of parliament, with the acceptance of an office which is incompatible with membership in parliament or compatible only after reëlection, and with the invalidation of the election. In this latter case membership, so to speak, is not acquired at all, nevertheless it is considered as acquired until it is invalidated, for up to the time the election is invalidated the person in question may exercise all the rights of his office in parliament; or, to use juridical terms: membership is acquired not under the "suspensive" condition of its recognition (verification), but under the "resolutive" condition of its invalidation. In certain parliaments, a member loses his seat if he does not take the prescribed oath or make an affirmation, and when for unjustifiable reasons he fails to attend the sittings of the house for a certain length of time.

#### 4) Parliamentary Procedure

The principal functions of modern parliaments are legislation and control of the state administration; the participation of parliament in these activities is, like suffrage, most important in determining the form of the state. But the study of the functions of parliament must be augmented by a study of how it carries out these functions. The demand that the opinion of the nation, *i. e.*, of the voters, be reflected in parliament can only be realized if parliament is from time to time elected anew. The time, after the lapse of which the parliament must be dissolved and a new one must be elected, is fixed by law and is called the legislative tenure or term. Parliament comes to an end at the expiration of this period, which does not exceed several years, but which can be shortened by dissolution of parliament; elections must be held again within a legally fixed period of time after the end of parliament; there is also a time fixed within which parliament must assemble after it has been newly elected. Each parliament having one single tenure is a unity by itself; it is one parliament. Houses which are not elected, such as the British House of Lords, or which are

renewed only partly, and at definite intervals, through new elections, as is the Senate in the United States of America and in France, have, as such, an indefinite period of existence.

During the period one parliament lasts its business may be, and usually is, interrupted at intervals. The constitutions of France at the time of the Revolution, under the influence of the theory of the sovereignty of the nation (which is represented by parliament), gave the parliament alone the right to discontinue its activity. In England, however, the old prerogative of the King to close a parliament and to summon it when he deems it necessary, which he now, of course, exerts with the advice and under the responsibility of parliamentary ministers, has always been maintained. In spite of his theory of the separation of powers, Montesquieu advocated this right of the executive, mainly for the reason that a parliament permanently assembled may become a menace to the executive power; and he argued that this power should decide upon when and how long parliament should be assembled. But in order to avoid any undesirable dependence of the work of parliament upon the executive power modern constitutions provide that parliament must assemble every year, on a fixed date, to an ordinary session and that this session must last for a definite time, *e. g.*, at least until the year's budget is passed. A session which is thus prescribed in the constitution cannot, of course, be changed by the executive power. But, apart from that, the head of the state has the right to summon parliament to an extraordinary (or special) session; and in certain cases, *e. g.*, in France, if the majority of the members of parliament desire it, he is obliged to do so.

The session of parliament, which in some states can be closed by order of the head of the state ("prorogation" of parliament, as it is called in England), is a matter of considerable importance for the work of parliament in many states, for, with the end of the session, all work of parliament initiated and left unfinished in that session is voided; bills, *e. g.*, which came up in one session but which were not finally passed in it, can be debated in another session as new bills only and must be presented as such; no previous procedure on these bills can be continued. This principle, which evolved in English parliamentary law and is called discontinuity of parliamentary sessions, is not, however, applied in all countries, *e. g.*, not in France. Sometimes it affects only the work of parliament's plenary meeting, but not that of its committees.

The work of parliament can, in addition, be interrupted by an "adjournment," which can be brought about either by parliament alone (by each house alone) or, as in certain states, by the head of the state, who, however, in such a case, is bound to observe the time fixed for the assemblage of parliament. Adjournment in contradistinction to the closing of the session (effected by dissolution and prorogation) does not void the unfinished work of parliament; it merely suspends or postpones the sittings. Parliament, when assembled again, continues all its work at that point at which it left it at the moment of adjournment; the officers, especially the president, and the committees are not elected anew, as must be done in certain countries when a new session begins.

Generally, under the bicameral system, the sessions of both houses are held contemporaneously; this principle, of course, cannot be applied when such business as one house or the other has exclusive jurisdiction over is to be taken up, *e. g.*, when the upper house acts as a court for impeachments. In the United States of America, the principle of both houses sitting at the same time restricts even the liberty of adjournment by the prescription of the constitution that neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days.

The organization of parliamentary work, and especially its procedure, throughout the world, we venture to say, has been largely fashioned after the practice of the oldest parliament, namely, England's. The procedure of the English parliament is based, in the main, upon custom; as recently as during the last century this customary law was partly collected, developed, supplemented, explained and completed in the so-called "standing orders"; but even with these orders at hand (they were not intended to be a codification) custom still rules the English parliament. In other parliaments the rules of procedure are codified in special regulations (orders) set up by the parliaments themselves (parliamentary autonomy). But the more important rules are usually embodied in laws, while some of them are written even into the constitution, *e. g.*, the principles of the procedure concerning bills, the majority required to pass them, the minimum number of members who must be present for debate and voting, *i. e.*, the "quorum," etc. Thus procedure in parliament, in most countries, is ruled by the constitution, by laws, and by autonomous regulations.

In modern states the autonomous rules concerning procedure in parliament, as is the case with all other regulations, must be based upon a law or directly upon the constitution. Law or the constitution must

authorize parliament to regulate its procedure in so far as this is not regulated by laws or by the constitution. Thus autonomous orders (regulations) of parliament might be classified as a kind of "executing ordinances" (see p. 171) issued for the application or execution of a law or of the constitution; these orders, however, have a special legal authority, for they can be altered only by parliament itself, or, where two chambers exist, by the chamber concerned, and not by an administrative authority. Of course, the autonomous "orders of proceeding" can be altered by a law if they are based upon a law; but if they are based directly upon the constitution they can be amended only by an autonomous act of parliament or by an amendment to the constitution. Autonomous parliamentary orders of procedure, serving to carry out the prescriptions of a law or of the constitution, upon which they are based, should strictly observe the limits drawn by the law or the constitution; and this is especially important if the authorization is extended in brief terms and in a general way, for "orders of proceeding," in which case the regulations must concern only the interior proceeding of parliament and nothing else. However, autonomous parliamentary orders have not always kept within these limits. In such cases effective control has been very difficult. [It is true, however, that, as far as procedure in legislation is concerned, a remedy against illegal or unconstitutional acts of parliament, *e. g.*, against the passing of a bill with a lower number of votes than required, is to be found in the refusal of the head of the state to sanction such a bill or, where an upper chamber exists and if the illegality is committed by the lower chamber, in the rejection of the bill by the upper chamber by reason of the illegal procedure of the lower house.] Ordinarily, the interior proceeding of a parliamentary chamber is considered its own autonomous affair and is not controlled by other organs. It is different, however, with those autonomous prescriptions which do not concern interior proceeding only, but whose purpose it is to impose obligations upon persons outside of parliament, *e. g.*, the obligation to appear before a parliamentary committee if summoned by it and to testify there. Strictly speaking, parliament should have additional special authorization by a law or by the constitution in order to issue any rules which are not covered by the term "orders of proceedings," particularly if they are intended to impose an obligation not only upon its members, but also upon other persons. (It must be observed that, by virtue of the old "custom" or "law" of parliament, the English parliament has singular privileges in this

respect, as we shall see later on). The same applies to the matter of payment (compensation) of members of parliament. If this payment is established by law and not left to be established by parliamentary orders, no member can be deprived of his legal compensation by a provision of an autonomous order authorizing, *e. g.*, the withholding of the compensation as a disciplinary punishment; and if such a punishment were inflicted, solely upon the basis of the autonomous "orders of proceeding," the compensation in question could be claimed before the law courts by bringing an action against the state (such cases have really happened). In such instances property rights not only of the member, but also of his heirs and creditors may be at stake. Also, if either a law or the constitution (and not only an autonomous parliamentary rule) states that the deputy must be present at the sittings of parliament, he can not, as a matter of discipline, either be temporarily excluded from the sittings of that body, or be unseated, unless the law allows such measures. Absence of clear definition with respect to what belongs to the sphere of law and what to the sphere of autonomous rules of parliament has caused various juridical controversies. The Constitution of the United States of America provides in its Article I, section 5, that "each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

In the autonomous parliamentary rules, the election of the officers of the house (president, vice-president, clerks, etc.) and their duties usually are regulated. The main duties of the president (speaker) are to represent parliament; to outline its agenda (the so-called "order of the day"), the important items of which, however, are as a rule agreed upon by parties in parliament and the government; to direct the debates; to exercise disciplinary authority over the officials and employees of parliament, and, during the sittings, also over the members and visitors. Disciplinary punishments for members are: the "call to order," the reproof, to be "ruled out of order," suspension from the deliberations (regularly inflicted by the house on proposal of the speaker) with loss of compensation, and, sometimes, even this loss alone as a punishment by itself.

The sittings are public unless parliament itself decides otherwise. Publicity of parliamentary sittings implies that the records of them are published in official papers and that a true report, in the newspapers, of public sittings of parliament is allowed. That means that the responsible editors of these papers cannot be prosecuted for what these

reports contain (*e. g.*, a slander in a speech) and that such a report in the paper cannot be confiscated (immunity of parliamentary reports).

Bills are subject to a special procedure (prescribed sometimes even in the constitution) which provides for an exhaustive discussion in several stages. These are: debate and vote in committee, a general and a detailed debate in the plenary meeting, a vote on the general principles of the bill and then on its particular articles or paragraphs, and finally a vote on the bill as a whole; thus, a bill regularly passes through three "readings" in the house. In certain cases, however, a quicker procedure is provided for, and parliament itself may pass a resolution to hasten the procedure for such matters as it deems urgent. Government proposals regularly have precedence; and so, likewise, members of the government take precedence over other speakers. There are different methods of curtailing the procedure: by a vote on "passing to the order of the day," or by a vote on the "previous question" (question préalable) by which the discussion of a proposal may be tabled. A debate already begun may be shortened by the "closure" (clôture), *i. e.*, a vote that the debate is closed; then only orators who are already on the list, or a definite number for each party are allowed to speak. The duration of the speeches also is sometimes limited. This helps not only to hasten the debates, but also to frustrate "obstruction," *i. e.*, the deliberate use of means which in themselves are not illegal by the minority in order to stop or to delay the carrying on of the business of parliament (filibustering), *e. g.*, through long and irrelevant speeches, through making numerous and inconsequential motions, through leaving the room where parliament is sitting, thus destroying the "quorum," etc. The minority has the right, and even the duty, to "oppose," *i. e.*, to combat the purposes of the majority, to criticize and to control it; hence the name "opposition." But it is a question whether it is lawful for the minority to obstruct the business of parliament at all by resorting to the aforementioned more or less vexatious means. However, if such a course of action is not forbidden by law and by the parliamentary rule of proceedings there can be, from a legal point of view, no objection to it. Attempts to throttle obstruction are not without danger to the liberty and the exhaustiveness of parliamentary discussion.

The main work of parliament is not done, however, in the assembly itself, but in committees, which are elected or appointed by and from

among the members of the assembly for certain purposes, *e. g.*, for financial affairs, for commerce, for foreign affairs, etc. Some of these are standing committees, *i. e.*, they are elected for the entire session, while others are chosen when an emergency arises. In certain parliaments there are also some committees which continue their work after the session is closed and even after parliament is dissolved; but, in this latter case, we cannot properly speak of a parliamentary committee; for just after a dissolution there is no parliament and, hence, no members who could be members of parliamentary committees; we could perhaps label such a committee as a commission of experts having rights and duties conferred upon it by law. Committees are created in various ways. For this purpose, the French parliament is divided by lot into divisions, each of which has an equal number of members; but the ordinary method there, as well as in other countries, is to have the political groups in parliament elect committees according to the proportional system, so that minorities also may have a chance of being represented. The English House of Commons has, in addition to its other committees, a "committee of the whole house" which is composed of all the members of the house, but which exhibits this peculiarity, namely that it is presided over not by the speaker, but by the chairman of this committee and that its procedure is less formal. In the United States of America also, the House of Representatives often sits as "the committee of the whole."

In recent times, there has been a tendency to transfer parliamentary work, in great part, to committees. This is explained by the fact that the membership of parliament is very large, and hence that this body is too unwieldy to engage, as an entity, in productive and detailed debate. The institution of committees, further, helps to preserve continuity during the intervals between the regular parliamentary sittings; and so supplies a need which at one time and in certain countries was occasionally filled by absolutistic legislation. As an example we cite the Czechoslovak Constitution of 1920 which provides for a "standing committee" made up of members of both houses and possessing, at a time when parliament is not assembled or even when it is dissolved, and if urgent cases arise, approximately the same legislative, administrative and controlling power as parliament; this, however, with certain exceptions of important matters, *e. g.*, amendment of the constitution, and with the limitation that resolutions of this committee have only temporary validity, being subject to subsequent approval of both chambers of parliament. An adequate limitation of such committees

is necessary to keep them from becoming absolutistic, as happened at the time of the English Revolution in the 17th century and the French Revolution in the 18th century, when parliamentary committees acquired wide powers and assumed governmental authority, with the result that the state administration came to be under the sway of what was sometimes a tyrannical rule exercised by these committees. The influence parliamentary committees have gained in the United States of America has been mentioned in a previous chapter (see p. 76).

To the business which parliament carries out alone and without the collaboration of other authorities, belongs in many countries the control over the qualifications of its own members, especially the determination whether the members have been lawfully elected (verification or confirmation of membership). Regularly these questions are discussed by a parliamentary committee whose resolutions are subject to approval by the house. Sometimes, this investigation requires the solution of difficult and intricate legal questions concerning *e. g.*, interpretation of the constitution, of the electoral law, and of other laws. For this reason it has been insistently urged that this important and delicate business be intrusted to a high tribunal whose members are better fitted for dealing with such legal questions than the members of parliament. This proposal is supported by good reasons: for it has been questioned not only whether parliament is fitted to decide on the qualifications of its own members, but also whether it is sufficiently impartial to do so (*e. g.*, in the case in which, by a lawful decision, a majority might be turned into a minority!) And, indeed, in some states, the judiciary is in charge of this business, *e. g.*, in England where the question of contested elections is decided upon by two judges of the high court (election judges). In present-day Germany, a special court composed of members of parliament and of administrative judges has jurisdiction over the validity of elections; in Czechoslovakia, this is entrusted to a court whose members are the president of the highest administrative tribunal and 12 judges elected by parliament. However, in the United States of America, as in many other countries, each house decides, by itself, upon the validity of the elections and the qualifications of its members.

Under the parliamentary regime, it is the duty of members of the cabinet to make answer to questions and interpellations addressed to them by members of parliament; this is an application of the principle that the government is responsible to parliament. In parliamentary terminology a question means either the oral or written expression of

the desire of a member to get information from the government in a certain matter or affair; the question must be brief and is not scheduled in the "order of the day"; the member of the cabinet is ordinarily obliged to give a written or, if this is required, an oral answer within a definite time and that at the beginning of the sitting and before the house passes to the order of the day; but he may, as *e. g.*, in England, for reasons of public interest, decline to give an answer. A "question" never entails either a general debate or a vote; only a short discussion between a member of the government and a deputy is allowed; the latter may reply briefly to the answer of the government. The term interpellation, as it is used in many parliaments and especially in the French chambers, means a challenge by one or by a number of members of parliament addressed to the entire cabinet or to one of its members to explain or to justify an action or an attitude of the government. The interpellation must be presented to the chair of the house in writing; notice of it is given to all the members of parliament. The government (*i. e.*, one of its members) must then, within a certain definite time, give an answer to the interpellation. The discussion of the interpellation is scheduled on the "order of the day"; besides the member of the government and the interpellator any other member of the house is allowed to speak also, so that a general debate may ensue, which, usually, is closed with a vote "to pass to the other items of the order of the day." The motion presented for this purpose and the vote taken on it may be to pass to the order of the day either "pur et simple" or "motiv ," *i. e.*, with certain considerations; in these considerations approval or disapproval may be expressed to the government; customarily, the latter declares which of the motions, if passed, it will consider as implying a vote of confidence. Under the parliamentary regime, resignation of the cabinet is the usual consequence of a vote expressing want of confidence, and in this way political responsibility of the government is enforced. Another right which many parliaments have is the right to make, through their own committees, inquiries and investigations in special cases and thus to control the actions of the state administration.

##### 5) Special Rights of Members of Parliament

Parliament needs liberty in order to carry out its duties properly. This liberty is protected in various ways, *e. g.*, through the prohibition against any use of armed force in the building in which parliament

sits, or of holding of public meetings in the vicinity of this building, etc. The members of parliament are very effectively safeguarded in their liberty of action as long as they are not liable at law for their parliamentary activities, which means that no one can prosecute them or hold them responsible for any such act.

In regard to this we must first mention the principle that members of parliament are entirely free and not legally responsible for the way they vote in the house. And parliamentary work executed in any manner whatsoever, *e. g.*, through speeches, presentation of motions, cannot if it is to be free, lay the members of parliament open to any legal action, either criminal or civil; they are subject only to disciplinary measures provided for in parliamentary regulations. This privilege of parliament grew up in England, largely as a result of the fact that, from the 14th to the 16th century, the kings persecuted certain members of parliament whom they did not like. And therefore, as we have already mentioned (p. 117), Art. 9 of the Bill of Rights of 1689 stated "that the freedom of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament." In all modern states the principle is accepted that members of parliament (of the lower and of the upper house) ought not to be prosecuted for actions which they performed in the exercise of their parliamentary profession, not even for such actions as would otherwise be considered as delicts, *e. g.*, high treason committed in a speech or by presentation of a motion; those actions are punishable only according to the regulation of proceedings, and, thus, only by a decision of the president or by a resolution of the house. This irresponsibility of the members of parliament is permanent; they can never, not even after they have ceased to be members, be prosecuted for actions performed in exercising their functions as members. However, in interpreting the provisions of the constitutions or of the laws concerned with this subject one must not overlook the fact that this privilege protects only actions entailed in the performance of parliamentary functions, and, thus only those actions which enter into the field of these functions, such as voting, speeches, interpellations, motions; therefore the French law of 1875, in dealing with this question, mentions only "opinions or votes sent forth." And the Constitution of the United States, Art. 1, sect. 6, states that "for any speech or debate in either house they (*i. e.*, senators and representatives) shall not be questioned in any other place." An action which exhibits not even the outward features of a parliamentary function cannot be

exempted from the provisions of the general criminal law; *e. g.*, a murder committed by a member of parliament in a sitting of the house could not be considered as a performance of parliamentary functions. And further, it must be observed, that only members of parliament are immune to punishment for the aforementioned actions; yet another person who is not a deputy, but whose action is connected with the latter's deed, may be punished; *e. g.*, a member of parliament who makes a speech in parliament containing a slander is not responsible before the criminal court; but another person who is not a member of parliament and who praises this declaration may be tried before the regular courts and punished.

This privilege which protects the member of parliament against prosecution for actions performed in connection with his parliamentary duty is sometimes called professional immunity or irresponsibility. Besides that, he enjoys the so-called unprofessional immunity. The liberty of parliament requires that members of parliament be not prevented from coming to the house. Since the time of the French Revolution the principle has been carried out that without the approval of parliament no one of its members may be prosecuted or deprived of liberty, not even on suspicion of a criminal deed. The main reason therefore is to prevent other state authorities, especially administrative ones, from imprisoning, on fictitious pretexts, deputies who are displeasing to the government or from intimidating them by threats of prosecution. It is not the aim of this principle to make the deputy irresponsible under and to exempt him from the provisions of criminal law; its real purpose is to protect him and parliament against unjustified prosecution. And it is in harmony with this purpose that, as an exception to this principle, a member of parliament may be prosecuted and also arrested if he is caught committing the punishable action itself (*in flagranti*); for, in that case, it is considered that the real perpetration of the offense is, to a certain extent, proved or, at least, that prosecution is justifiable. But, even in this case, parliament must be notified and has the right either to allow or to disallow further prosecution of its member. According to the purpose of this privilege, parliament when asked to allow the prosecution of certain of its members should consider only whether or not the demand is a vexatious attempt to thwart the liberty of the member and, thus, to hamper the business of parliament; but it ought not to withhold its consent when it deems the prosecution is justified; neither ought it to enter upon the determination of the member's guilt; for, in doing so, parliament

would intrude upon a jurisdiction which belongs to the authority of the judiciary and not of the legislature. The courts, on the other hand, may proceed against a member of parliament for only such deeds as parliament allows prosecution for.

However, this privilege is not the same in each country, particularly with respect to the length of its duration as well as with respect to the offences it concerns. In France the immunity in question lasts only for the time of the session and affects "criminal and correctional" cases but not contraventions of "simple police"; in other countries, the privilege extends to the entire period of membership and applies to all punishable acts even those for which merely disciplinary punishment is provided. Civil suits, of course, in so far as they do not entail arrest, can be carried on against a member of parliament without permission of the house. In England immunity of the members of parliament extends throughout the time of the session and to a period of 40 days before it and 40 days after it; now, this privilege exempts only from imprisonment in civil cases and, in criminal proceedings, from imprisonment for minor offences; but it does not affect other more serious delicts; in the latter case, parliament must be notified only of the imprisonment of its member. The sense of justice and the idea of equality of all before the law as well as a confidence in the courts prevail over admitting parliamentary privileges to apply in cases of grave crimes. And in the Constitution of the United States it is set forth (Art. I, sect. 6) that senators and representatives "shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same."

But after the expiration of the period of immunity any legal proceeding may be carried on against a member of parliament, and that also for deeds committed during this period and for which prosecution has not been allowed by parliament, provided, of course, that prosecution is, then, not obviated through lapse of time set by the statute of limitations. This immunity does not mean that the member is irresponsible, but only that his responsibility cannot, for a certain period, be enforced without consent of parliament; hence this period of immunity, strictly speaking, ought not to be included in the period of the operation of the statute of limitations.

Both kinds of immunity being established for the sake of the liberty of the working of parliament and not for the private interests of its members, the latter, as a rule, cannot renounce this privilege.

In certain countries, members of parliament and parliament itself enjoy a special protection against offences, and particularly against offences committed in the public press. In England, both houses of parliament have the right to try anyone (be he member of parliament or not) who commits the offence of "contempt of court" against parliament; any kind of disregard is considered as such an offence, *e. g.*, if a person who is summoned before parliament as a witness refuses to appear, etc. This can be explained by the English view which holds parliament to be a court also.

The members of parliament usually have a special right to a monetary compensation. The changes of the legal and political aspect of membership in parliament can be traced in the different ways in which this financial question has been regulated. During the earlier period of the feudal state when no representatives were elected, there was no need to give any compensation to the lords, who came to parliament in their own name, representing only themselves. The same applied to the representatives of towns, ecclesiastical corporations, and rural communes, for, even though these representatives happened to be elected, they were not elected expressly and solely for the purpose of attending diets or parliaments; they were organs of these corporations, such as mayors, abbots, etc.; attendance at the assemblies of the estates belonged to the sphere of their official duties or powers.

However, in the feudal state of later times the number of persons who enjoyed feudal rights increased to such an extent that it was hardly possible for all of them to come to the diet; and even if they came all of them could not always remain until the end of the assembly, for its powers had gradually been enlarged and its sessions prolonged. Representation by elected deputies was now inevitable. But those deputies, being mandataries of their electors, were not only obliged to fulfill the mandates (instructions) of the latter, but were also, accordingly, compensated by them for the expenses incurred in carrying out the mandate. Traces of such monetary compensation which every estate gave to its mandataries (though the payments were not uniform), have been found in France as early as the fifteenth century and in the German countries as early as the seventeenth. Those persons, however, who came to the diets of the estates by their own right and in their own name (the higher nobility and clergy) paid their own expenses themselves. Sometimes even a person was considered to be a member of the higher estates or of the lower estates depending on

whether he paid his own expenses in coming to the assembly or whether others paid the costs.

England, at the outset, abided by the same custom as other feudal countries; yet in very early times it became customary there for the entire population (and not only the electors) of a county or of a town in which deputies were elected, to pay them an expense compensation for attending parliament. In the chapter on "Representation" (pp. 59-60) we tried to show how, in England, the development in the status of the deputy from a mandatary of his electors to a state organ can be traced by following the history of the compensation paid him.

In England the compensation of members of parliament was regulated in a detailed and elaborate way; but after the fifteenth century these regulations gradually fell into desuetude. The amounts in some cases such as for the travelling expenses of those deputies who came to London from distant parts of the country were so high that some localities at times preferred not to send deputies to parliament at all. And when it became desirable to accept seats in parliament even without payment, the deputies themselves ceased to claim compensation. Thus, by the middle of the seventeenth century members of parliament were no longer compensated. In very recent times, however, salaries were again granted to them.

The United States of America was among the first countries to grant compensation on a modern basis to the members of parliament (the particular states of the American Union, it is believed, generally paid members of parliament even when they were yet British colonies). Art. I, sect. 6, of the Constitution of the United States declares that "the senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States." The same principle was accepted in France at the time of the Revolution, and afterwards in a great number of other countries, though it was not adopted until comparatively recent times in England (1911) and Italy (1912).

The character of membership in modern parliaments, in contradistinction to feudal representation, requires equal compensation for all members, which must be paid out of government funds. Members of parliament are now compensated according to the calculation of the average of such expenses as they are supposed to incur in connection with their services in parliament; or else some of these expenses are eliminated by gratis services, such as free transportation on railways.

They are given compensation primarily in the public interest; hence, according to regulations in certain countries, members of parliament are not permitted to waive their right to compensation; neither can it be transferred or distrained; in some countries it is exempt from the income tax.

The advisability or necessity of compensation for members of parliament has frequently been a subject of lengthy debate. The arguments brought against compensation are chiefly these: The establishment of salaries would breed a special class of professional politicians made up of men who have failed in other professions or who are seeking a seat in parliament primarily for the sake of the financial return. And it is to be feared that such deputies would try to prolong the sessions of parliament; this would tend to lower its level. Moreover, compensation of the deputies would make them unduly dependent, on the one hand, upon their electors, (for it is advanced that the deputies would do everything their electors wished in order to be reëlected) and, on the other, upon the government (for the government could deprive the deputies of compensation either by the dissolution of parliament or by the closure of its sessions, in countries where such actions of the government are provided for and where they entail the loss of the compensation).

The chief arguments which have been urged in favor of compensation are: If no salary is established, the deputies (especially those living at a distance from the place where parliament is held) do not attend the sittings regularly, with the result that a quorum is often lacking. If members are not compensated out of public state funds, it will be necessary for those who elect them to compensate them. Failure to give any compensation at all would mean that only wealthy persons could afford to be elected; and in the end this would amount to an eligibility requirement of owning property or paying taxes. Thus the free working of universal suffrage would be thwarted, for the very idea of universal suffrage implies that the voters shall be free and in no way restricted in their choice of candidates to one (the wealthy) class of people. This was perhaps the strongest argument of those who brought about compensation for members of parliament. But, of course, it does not apply to assemblies like the English House of Lords, which is made up of hereditary and appointed, and not elected, members.

As an interesting fact it may be noted that the same arguments have been advanced in favor of compensation for the voters as for the

deputies. In fact, some French laws of the time of the great revolution, granted such a compensation; this corresponded to the idea that voting is a public service and not an exercise of a personal (subjective) right. However, this compensation has almost entirely vanished, one trace of it being the compensation for traveling expenses allowed to one of the four groups of electors who elect the French Senate; but voting is compulsory for these electors (under a penalty).

The compensation of members of parliament is paid in various ways: sometimes as a "per diem" allowance, and sometimes in a lump sum for a larger period, *e. g.*, a month or a year or for the time of the session. On consideration of its purpose which is to provide for the deputy while he is performing his parliamentary business it appears that the right to this compensation need not begin with the acquisition of the seat; it can begin later, *e. g.*, with the opening of the session, and under certain conditions, *e. g.*, that of registering in the house office. As a rule, this right ends with the expiration of membership. However, certain deputies to whom, as functionaries of the previous parliament, after it has ended, certain functions are entrusted, *e. g.*, members of the chair, continue to draw payment. The members of the chair, as such, receive additional remuneration.

In some countries the right to compensation can be ended for various reasons even while the holder is still a member of the parliament; that is, it expires when the session closes, or it is withheld for unauthorized absence from the sittings, or for a long leave of absence, or when a member is arrested for a crime not entailing the loss of the seat (France), or in consequence of the exclusion of the member from the sitting, or finally as a purely disciplinary punishment in itself.

In certain countries, the coupling of this compensation with other payments to be made out of the public treasury, *e. g.*, with the member's emoluments he may be entitled to draw out of state funds, is limited.

The amount set aside for the compensation of members of parliament must figure in the state budget, since it is an expense to be met with state money.

The question of this compensation which the deputy can claim from the state as a pecuniary right and for which he can bring civil action before the court, does not enter into the sphere of parliamentary autonomy alone. It is desirable therefore that the principal features of regulations concerned with this right, such as when it comes into existence, when it ends, whether it can be transferred, attached or distrained, etc.,

be contained in laws (statutes). In England, in 1911, compensation of the members of the House of Commons was adopted without detailed regulation, simply by a resolution of this house, which, it is true, was inserted in the appropriation act of that year. In spite of the fact that resolutions of the English parliament bear great weight, this procedure was severely criticized in parliament itself. Even at present, the compensation of the members of the House of Commons has its legal basis in an annual vote which is inserted in the appropriation act.

### III. THE MINISTERS (CHIEFS OF THE EXECUTIVE DEPARTMENTS) AND THE ORGANS UNDER THEIR AUTHORITY (STATE ADMINISTRATION)

The Latin word "minister" means servant or assistant, and in the time of absolute monarchies was employed to designate the persons who assisted the monarch in carrying out the affairs of the state. As counselors of the monarch and as the highest state officials they were directly subject to him.

In recent times, and prior to the French Revolution, the state administration was organized chiefly according to the "board" system, *i. e.*, the most important offices were headed by several persons who deliberated and decided together as a "board." In its place another principle was introduced about the end of the 18th century (particularly under Napoleon I) called the "bureaucratic" system, according to which every office is headed by one person only, who is responsible for the work of his office. There was also at first, the "provincial" system, according to which the central offices were distinguished from each other by their territorial jurisdiction, each of them supervising and controlling the entire administration of a single territorial unit (province). This was replaced by the "departmental" system which distributed the entire state administration among a number of branches or departments, each of which had jurisdiction in a particular sphere of state administration and was centralized in a supreme administrative office (commission, ministry, department) which had jurisdiction over the whole state territory in matters pertaining to this branch. A minister was placed at the head of each branch of the administration.

At first, the administration was divided into the following branches: foreign affairs, finance, war, justice, and interior affairs; to the last-mentioned belonged the "police," *i. e.*, the function of preserving

order, and, in addition, everything else that was not assigned to other departments. However, as the amount of state business increased, certain administrative branches belonging to the department of the interior, became separated and were placed under special ministries; such branches were: education, transportation, trade, health, public welfare, public works, labor, etc.

The minister is the supreme deciding and supervising authority in his department; and to him also primarily is entrusted the issuance of ordinances which are necessary to carry out the laws in the sphere of his jurisdiction. But when very important matters are at issue (*e. g.*, important ordinances) and whenever the unity of the administration is involved, the custom usually followed is for all the ministers to deliberate and decide at a joint meeting or council over which the prime minister presides. Besides, in some countries, a resolution of the cabinet is also necessary for certain designated matters; and in some monarchies the cabinet is in certain cases called upon to exert the powers of the monarch, *e. g.*, if the latter is abroad or ill, though not so seriously that a regency must be established (see p. 185). The minister's council (the cabinet) sometimes deliberates under the chairmanship of the head of the state; in monarchies such a council is called a "crown council"; in France, when the head of the state presides, they speak of a council of the ministers (*conseil des ministres*); otherwise, they speak of a council of the cabinet (*conseil de cabinet*).

The number of the ministers is not fixed by the constitution; neither is there always a law by which a new ministry is created; for the necessity of a new ministry may arise suddenly; moreover, the task of forming a cabinet, especially in parliamentary states, is such a difficult one sometimes that it would not be advisable to restrict the number of ministries too vigorously by law. However, the necessary appropriation must be provided for all the cabinet posts in the annual budget; thus, parliament exerts at least an indirect influence upon the establishment of ministries and their organization.

The organs subordinate to the minister are bound to carry out his orders, which sometimes are implied in general rules set up by him for the conduct of the administration. To govern means to establish such general principles as these, within the limits of the free and usually broad discretion which the laws allow. Thus we can call government that part of the supreme administration which is carried out by the head of the state and the ministers and which involves the

political, social and other ideas appearing in the direction of the entire state administration.

In the period during which the absolute monarchy was transformed into a parliamentary one, the opinion asserted itself that the minister is responsible to parliament not only for actions which he himself performed, but also for actions of the "irresponsible" monarch, which have no legal validity unless they are countersigned by a responsible minister. The minister is also subject to responsibility for omission of actions which should have been performed, but which were not performed by the head of the state or by the minister. For all these reasons the minister is not a mere official; he is not required to prove that he has the qualifications which are prescribed for an official; his position, salary and retiring pension are regulated in a special manner; he is, in parliamentary states a kind of liegeman both of the head of the state and of the parliament and a mediator between them. He is therefore a politically important person, even regardless of the fact that in parliamentary states the prime minister is usually the leader of the strongest party in parliament, and that the other ministers are also prominent party members. The question of the rôle played by the prime minister as head of the government has been treated in the chapter dealing with the parliamentary monarchy and republic (see p. 75). The better the parliamentary regime is established the greater is the responsibility of the minister to parliament; and at the same time his responsibility to the head of the state, who is narrowly limited in his choice of the ministers, recedes into the background.

This is otherwise in non-parliamentary states, in those of the old type, such as the United States of America, as well as in those of very recent date, *e. g.*, Italy (see pp. 82 et seq.). According to the Italian law of 1925 the prime minister who is called the head of the government (*capo del governo*) is responsible only to the king. He presents the other ministers to the king for nomination and for recall; they are responsible to the king and to him. It is further stated in this law that no item may be placed on the order of the day of the sittings of parliament without consent of the prime minister. Three months after a bill has been rejected in one house of parliament, the prime minister may cause it to be put to another, and this time a secret, vote, without debate; he may also demand that a bill which has been rejected in one house be debated and voted upon in the other house. Attacks against his life, integrity and liberty and also insults committed against his person are punished with great severity.

Legislation, under the parliamentary system, is centered in the cabinet (which as we know conducts the administration), and not in the head of the state or in parliament, for the overwhelming majority of bills are presented to parliament as proposals of the government, whose staff of experts is quite familiar with the technique of modern legislation and is, in general, better qualified than anyone else to deal with legislative problems.

Ordinarily ministers are both officials and political personalities; only rarely is a minister appointed who has no administrative department and whose functions are merely political; such a one (called a "minister without portfolio") is merely a member of the cabinet and a counselor of the head of the state; but he shares equally in the joint responsibility of all the ministers. The prime minister himself sometimes has an administrative department to conduct and sometimes not.

The responsibility of the minister to parliament, especially to its lower house, is sanctioned by the necessity of his resignation if he loses the confidence of the parliamentary majority, and is called his political responsibility (see pp. 71-2-6). This responsibility, which extends to the entire activity of the minister and his subordinate organs, does not depend upon whether the action for which he lost the confidence of parliament was legal or not; accordingly, the sanction of his responsibility is merely resignation of his position and nothing else.

There exists, besides the political, a criminal responsibility of the minister for violation of the constitution or of other laws committed either by him in his official capacity or by the irresponsible head of the state; in both cases the minister is responsible for the commission of forbidden acts as well as for the omission of obligatory acts. The minister is criminally responsible not only for those illegal acts of the head of the state which he has countersigned, but also for those which he has not countersigned. For, if he does not wish to assume responsibility for such acts, it is his duty to try to prevent them by tendering his resignation. Again, he can free himself from the responsibility for acts of the head of the state, about which he had no knowledge whatever, only through resignation; because by not resigning he shows that he is willing to assume responsibility for these acts also. All this is in consequence of the principle of the irresponsibility of the head of the state. The criminal responsibility of the ministers is not collective as is their political responsibility, each minister being liable for his personal guilt only and not for the guilt of his colleagues or

for punishable acts committed by his subordinate organs. The criminal responsibility of the ministers today, in comparison with their political responsibility, has become less important. Nevertheless, its existence, if only a preventive means, is valuable even in parliamentary states. During the period before parliamentary government came into operation its importance was much greater, especially in England, where, in centuries past, ministers were tried and punished not only for breaches of the law, but also for acts, which though legal, were considered to be prejudicial to the state. To this latter end, in certain cases special laws having retroactive force were passed; by means of such "bills of attainder" (see pp. 152-3) the minister was convicted for an action which was not punishable according to the laws in force at the time the action was performed.

In the United States of America, according to Article I, Section 3 and Article II, Section 4 of the Constitution, the President, Vice-President and all civil officers of the United States if impeached for treason, bribery, or other high crimes and misdemeanors (see p. 78) must stand trial before the Senate sitting as a court. But the punishment, if in such a case the impeached is convicted, is merely removal from office and disqualification "to hold and enjoy any office of honor, trust or profit under the United States" *i. e.*, federal offices; but after the proceedings of the Senate "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law" *i. e.*, before the ordinary courts.

In France, the lower house of parliament may impeach the ministers for crimes committed in the exercise of their office; in such cases the Senate is the court. It is, however, disputed whether the ministers can be tried only for crimes punishable by the existing laws or, generally, for actions prejudicial to the state; in favor of the first opinion the principle is advanced that any punishment must be previously determined by a law (*nulla poena sine lege*), and in favor of the second that the Senate is a kind of political court and that the jurisdiction of the ordinary courts obtains in cases of ordinary crimes committed by ministers. It appears, however, that the opinion affirming the criminal liability of the ministers for acts which are not illegal but only politically prejudicial is a survival of the time when real political responsibility did not exist. More recent constitutions established criminal responsibility of the ministers only for breaches of the constitution and of the laws committed in the exercise of their office. The right to impeach is vested in parliament and, in certain mon-

archies, in the monarch. The upper house, of course, cannot impeach if it is the court for trial of impeachment. Either house can impeach in case the impeachment is to be tried by the ordinary supreme court or by a special court, which as a rule is made up of members of ordinary and administrative courts or of persons chosen by parliament and the head of the state. Sometimes it is the law that the minister, if convicted, cannot be pardoned without the consent of parliament.

The civil responsibility of the minister means that he is obliged to make restitution for damages caused by an illegal action of his. The problem of this responsibility belongs to the wider question of the civil responsibility of officials for the consequences of their official acts. Whereas the English law maintains that the reparation for damage caused by an official may be claimed from him before the ordinary courts just as any other damage which has been caused by an unlawful act can be claimed from the author of the damage, the French law takes a different view. Influenced evidently by the theory of the separation of powers it does not recognize the jurisdiction of the ordinary courts in all cases in which acts of the administration are involved. Since 1872 (or 1873), in France, the administrative authority has been able to protest against the jurisdiction of the civil court in case an administrative official (also a minister) is sued before this court. The "tribunal of conflicts" then decides whether the case enters into the jurisdiction of the civil court or not; the decision will be in favor of this jurisdiction, when, in the opinion of the tribunal, the illegality by which the damage was caused must be considered as a personal fault (*faute personnelle*) of the official. In other cases, however, it is held that the official is not liable and that the administrative and not the civil court has proper jurisdiction, the illegality being attributed to the state (*faute de service*). This discrimination is not always clear. But, in the main, the following appears to be the French view: The more closely the unlawful action which caused the damage is connected with the service and can be explained by the existence and working of the state institution concerned, the more the French are inclined to hold the treasury responsible for restitution for the damage; and the administrative courts alone have jurisdiction in such cases. If, however, the damage was caused by an illegal action which, though committed by an official exercising his official authority, is not in essential connection with the service but can be separated from it, the official in so acting having pursued another end than the state had in view

in establishing this service—then it is held that the damage was caused by personal fault of the official who is civilly responsible for it before the ordinary civil courts.

In certain other states a civil action against the minister is allowed only in connection with criminal action and has to be brought either before the court which judges his criminal responsibility or before the ordinary civil court. Also it might be noted that, according to one method, the action for damages caused by an illegal act of a minister or of another functionary in performing his official business, is allowed against the state only, which, however, may in turn recover the damage from the minister or functionary; according to another method, this action may be brought first against the official and then, only in case he lacks sufficient means, against the state; finally it may be that the official and the state are jointly responsible, *i. e.*, that the plaintiff may sue either the official, or the state or both for damages.

The minister, finally, is civilly responsible to the state in case he has exceeded any amount set in the appropriation act or if he has spent it for other purposes than were determined in this act; of course, an action against him is possible only, if his conduct has not subsequently been approved either by the law on "the balance of accounts" or by a special law.

In certain countries undersecretaries of state are frequently appointed, directly under the ministers (in England some of the ministers are called secretaries of state, and in the United States for the most part simply "secretaries" for a special department). The legal position of the undersecretaries is not quite clear everywhere (*e. g.*, in France) and is not the same in all states. But, in the main, this appears to be true—that the undersecretaries of state differ, on the one hand, from the ministers in not being subject to the special ministerial responsibility and, consequently, in not countersigning the acts of the head of the state, though they share the political destiny of the cabinet. On the other hand, they differ from the assistants of ministers chiefly in that they are able to act as a minister's deputy in parliament; this is especially the case in England, where the minister is represented in that house of which he is not a member by an undersecretary of state who is a member of it. In England "parliamentary" undersecretaries are political personalities and thus stand and fall with the cabinet; "permanent" undersecretaries are officials and therefore independent of change of political power.

Subordinate to the ministers is the whole body of state officials, which again is divided into different ranks. State officials are persons who have voluntarily engaged themselves to serve the state in some particular and more or less permanent way. Whereas the duties of citizens are established by law and are not conditioned by any special declaration or action on the part of the citizens, by which they submit themselves to these duties—the duties of an official become incumbent upon that particular citizen only who voluntarily submits himself to special duties through entering into the state's service. These duties and, in general, all the rules and terms of service are established in a general way and not for each official separately. Thus, the latter can not negotiate with the state administration about these terms, but must accept them as they are—or not enter the service. In this respect the state does not differ from other large organizations (*e. g.*, industrial concerns) which also have their service regulations applicable in a general way to all the employees.

The coming into effect of the terms of service is conditioned by a bilateral legal act, *i. e.*, an agreement, between that person who wishes to enter the service and the representative of the state administration. The terms of this agreement (qualification, salary, retiring pension, other rights and duties), it is true, are determined in advance by the law for the official as well as for the administration—but the person who desires to enter the service, on the one hand, and the representative of the state administration on the other, are both at liberty to conclude this agreement whose terms are already fixed in advance. It is, therefore, in our opinion, quite proper to consider this agreement as a contract (at least in the broader sense of this word), though it is true that the agreement is usually made by means of an application for a position in the service on the one side, and of appointment on the other. The terms of this contract are certainly exceptional in so far as the incoming official submits to all the regulations of the service, not only to those which are in force at the moment of his entering the service, but also to future regulations, which may alter his position in a considerable way.

However, in both theory and practice, a distinction is made between "pragmatic" officials, *i. e.*, those whose rights and duties are determined in detail by a law (which itself is sometimes called "pragmatic") and "contractual" officials or employees; the terms of the contract concerning the latter group are not so exhaustively determined by law as are the terms for the first group, so that they may be stipu-

lated, at least to a certain degree, by the persons in question and by the state administration. Thus, the characteristics of a "contract" in this case are more evident than in the former case. Often the position of "contractual" officials is not permanent, and usually is limited to a certain time; furthermore, the amount of their salary may be a matter of agreement, and the regular qualifications, *e. g.*, the requirement of citizenship, may be dispensed with. Yet there are in the field between these two categories many intermediate forms of employment having in part both "pragmatic" and "contractual" features.

The point of entrance into state service is, as we have stated, a bilateral legal act; but the appointment of a person to a certain post is very often a unilateral act of the state administration. It is also possible for the official to have no definite post at all, as is the case in some countries with officials who are, under certain circumstances and for a limited time, assigned to the "disposability" of the government.

A condition required almost everywhere for entrance into state service is citizenship. An important right which is almost always connected with the position of an official is that to his salary which should be such as to permit him to live as befits his station in life, for, ordinarily, his service is his sole or, at least, his chief occupation. In many countries, after the termination of his service, the official (provided that he has served for at least a certain time) is entitled to draw a retiring pension, part of which may revert after his death to his family (his wife and minor children).

Because of his special duties, the official is subject to the authority of his superiors, and that according to special disciplinary regulations which are sanctioned by disciplinary punishments. But the authority of superiors over their subordinates is not the same in all branches of the service. Judges, as will be explained later, in exercising their judicial functions, are under no other authority whatever than the law. But administrative officials, as a rule, must obey the orders of superiors who hold proper authority over them; (yet, certain exceptions to this principle must be admitted, at least in so far as orders are concerned which involve the performance of acts forbidden by criminal law); the superiors who give the orders are themselves responsible for the actions of subordinates performed according to their orders.

The difference between punishments established in general criminal

law and disciplinary punishments is, in the main, that the latter concern only those rights and duties which are implied in the official's special status; hence the severest disciplinary punishment is the withdrawal of this status and the annulment of all the rights which attached to it, *i. e.*, dismissal from the service. In modern states the rights of the official are protected by independent courts; all disciplinary proceedings brought against him are similarly under judicial control. Notwithstanding these proceedings the officials are criminally responsible for actions which they have committed while performing their service and which are punishable according to the general criminal law. Limitations concerning this, which obtained in certain countries in past times, have now, by and large, been abandoned. On the other hand, persons, who commit punishable acts (*e. g.*, offences, insults) against officials in service, are liable to special punishment.

The official may terminate his relations with the state administration by withdrawal from the service, *i. e.*, by resignation which, however, in order to become effective, must first be accepted by the administration. But the latter, for its part, is allowed to terminate the service of the official only in certain cases, which are determined by law. Guarantees for the security of his position and for fair disciplinary procedure as well as a salary befitting the official's station in life—are amongst the main features of the regulations of the service which are expected to be found in a modern state.

#### IV. SELF-GOVERNING BODIES AND THEIR ORGANS

As was stated in the chapter on the unity of the state there are organizations within the state whose powers are more or less independent, *i. e.*, made effective otherwise than through agents or orders or instruction of the supreme state administration and without any reservation with respect to a final decision of this administration, *i. e.*, that administration which is headed by ministers whose jurisdiction extends over the entire state territory. In this category belong various associations; they are based upon the common interests of men of the same profession, or the same faith, or the same social, economic or artistic aspirations (professional associations); here too belong those associations of men which are based on the single common interest of their dwelling together on a certain territory (territorial associations); of these one of the most important is the municipality. The legal situation of these associations varies widely and depends much

upon the form of government and the historical past of the country concerned (see p. 138 on the liberty of association).

In the time of the French Revolution it was emphasized that as the individual has his natural rights, so has the municipality. The French law of 1789 recognized a special "municipal power" (*pouvoir municipal*). This is the municipality's "natural" or "proper" jurisdiction, which comprises the free administration of its own property and the election of its own organs and its own police. The other powers exerted by the municipality are supposed to belong properly to the state, the latter having merely delegated them to the municipality (the delegated jurisdiction). Later legislation, however, especially under Napoleon, restricted the local self-government of the municipalities considerably; but towards the middle of the 19th century the idea of the natural rights of the municipality was revived. The Belgian Constitution of 1831, Article 31, speaks of "exclusively municipal and provincial interests"; and the principles concerned are enumerated in Article 108. The liberal constitutions of 1848-49 of Germany and Austria also spoke of the "fundamental" rights of the municipality.

Today the idea of natural municipal rights which cannot be altered by law or even by the constitution, has vanished; municipalities have only such powers as are granted to them by laws, and these laws themselves can be altered or even abolished. Yet, in the text of certain laws there has been maintained the conception of a "proper" or independent jurisdiction of the municipality as comprehending all matters which according to the very purpose and idea of the municipality belong to it. The "purpose" of the municipality is expressed by the view that the municipal community is better fitted to carry out certain business than any other organization, especially the state organization. According to the text of certain laws this business comprises everything that directly concerns the interests of the municipality and which the latter can carry out within its own limits and by its own means. As is the case with almost every association, these rights or powers have to do, in the main, with the administration of the common property, whether it be gainful (*e. g.*, investments) or not gainful (*e. g.*, public roads, bridges, parks, etc.). This jurisdiction has been extended to other local needs of the members and residents of the municipality, *e. g.*, water-supply, fire-protection, relief of the poor, protection of personal safety, etc.

It appears from what has just been said that within its territory

the municipality is engaged partly in the same public concerns as is the state organization itself (*e. g.*, in caring for the safety of persons and property) though not over such a wide territory. Thus, the "proper" jurisdiction of the municipality is public administration, as is also the state administration itself; both of them draw all their powers from the laws of the state. The difference, however, between them is, that the latter is managed by organs which are subordinate to the central state government, whereas the former is carried out by organs which are independent of it.

This distinction is the characteristic legal mark not only of municipalities, but also of many other bodies or units which enjoy "self-government" (or, as in the case of territorial units, "local government" or "home rule"), or "autonomy" or "self-administration." All these terms, which are often employed interchangeably, have a common meaning, namely that certain business is carried out by the members of that organization which is directly interested in this business, and not by the central government or the administration under its authority; and that, accordingly, the question of what persons shall be the administrators (administrative officials) is settled within the self-governing body. (In certain countries, however, the approval of some elected autonomous organs, *e. g.*, of the mayors of large cities, is reserved to the central government or to the head of the state). Yet, self-government may go beyond this in a number of ways. First, the elected organs may be under no disciplinary authority whatever of the central government; this may apply to certain bodies as a whole, *e. g.*, the town-council, as well as to persons individually, *e. g.*, the mayor. These self-governing organs usually head a body of officials responsible to them and for whom a set of regulations, similar to regulations applicable to state officials, are in force. Second, administrative acts of the organs of a self-governing body may be independent of the central government so that no minister can give instructions as to how these acts are to be performed; he may neither change nor annul them, provided these acts do not transgress the limits drawn by law. He has power to annul them only on the ground of illegality; he cannot annul them on grounds of inexpediency. This has been compressed into the statement that the central government has only a "formal" supervision over self-governing bodies. The latter may defend their powers, namely the independent exercise of them up to the aforementioned limits, before the courts (in certain countries,

the administrative courts), if these powers have been encroached upon by the central government, or an organ under its authority.

Usually, organizations which enjoy self-government not only have the right to perform administrative and even judicial acts (as *e. g.*, the municipal courts), which have the same legal force as acts performed by the state authorities, but they have also the right to issue ordinances, which are obligatory for their members; such ordinances, if issued by self-governing territorial organizations, are very often obligatory, not only for their members, but also for all persons dwelling on the territory under the jurisdiction of this organization, *e. g.*, the municipality. In such cases self-government approaches the notion of territorial autonomy. But if, furthermore, even the state courts are bound to observe resolutions passed by the board of a territorial self-governing body, so that these resolutions assume the character of provincial laws; if a special court is established to decide, whether, in cases of conflict, these laws are in harmony with the general state laws; if, moreover, the self-governing organization is endowed with an extensive jurisdiction, detached from the central administration; if it is itself divided into various higher and lower authorities (*e. g.*, township, county, province); and if, finally, even the judicial organs for the territory in question are either elected by the people or appointed by organs of this self-governing territorial organization—then the latter is so far advanced in governing itself that it approaches the notion of a particular unit of a federal state and coincides with it entirely, if it participates, in addition, in the legislation and administration of the whole federal state (see pp. 97 et seq.).

The notions "self-government" and "autonomy" are very comprehensive. They comprise various sorts of government, more or less independent, contingent upon the amount of powers granted to the organization concerned. But with regard to the notion "decentralization" we must first have clearly in mind what is decentralized and what relation exists between the center and the "decentralized" part. If an administration is decentralized and is independent of the central administration in the above-mentioned manner, as far as the organs and their jurisdiction are concerned, then we speak of self-government (perhaps, for such cases, a better expression would be "self-administration"). But if a part of the legislative power is vested in the self-governing body and not in the central legislature, then we speak of "legislative autonomy"; which is, in a sense, a pleonasm, the Greek word "autonomy" itself meaning "legislation of one's own." If the central legis-

lative assembly which has authority over the entire state, is composed of some members who are directly interested in the regulation of special conditions in a particular part of the state, and of a greater number of members who are not, then the former are likely to be outvoted by the latter; and hence, even in states which have a democratic central legislature, local legislative autonomy for peculiarly local needs and matters has been claimed in the name of democratic self-determination. In contradistinction to the word "decentralization" a new, though not very euphonious expression has recently been coined: it is "deconcentration"; it means that within the body of the "state administration" itself which is, with respect to personnel and discipline, subject to the central government, some of its inferior authorities have, in certain matters, independent and final jurisdiction.

However, there is certain business which, as a matter of principle, is considered to belong to the jurisdiction of the central government and the organs under its authority, but which for various reasons (*i. e.*, for disburdening the central administration, rousing the interest of the people directly concerned, etc.) has been delegated either to an organization especially established for this purpose (various charities organizations) or to a self-governing organization already existing, *e. g.*, the municipality; this jurisdiction of the municipality is therefore called a delegated jurisdiction. Since the idea of "natural rights" of the municipality (commune) has been abandoned, the "proper" and the "delegated" jurisdiction of the municipality are, in substance, not always easy to distinguish; the laws are not always in accord in determining what belongs to the proper and what to the delegated jurisdiction. To the English all these distinctions would seem very strange.

But the "proper" jurisdiction of a self-governing body, especially a municipality, if it is, and in so far as it is, determined by law, is important for the legal situation of this body towards the state administration. For the organs of the latter may exert control over the self-governing body whenever it acts outside of its "proper" jurisdiction, not only as far as legality is concerned, but also in other respects; they may, at their own discretion, and for mere reasons of expediency, alter and abolish even lawful acts of the self-government organ. In this respect the latter is subject to the central government in the same way that, within the state administration, the lower authority is subject to the higher; for it must obey its instructions and orders, sometimes, if necessary, even under discipline. This applies, *e. g.*,

to the part municipal organs take in the administration of certain financial and military business. A consequence of this subordination is that the "state administration," in certain countries and under certain conditions, is entitled to withdraw from the self-governing bodies the jurisdiction "delegated" to them, and to exert it by its own organs.

But, in its "proper" jurisdiction, the municipality as well as other self-governing organizations is under no control other than a mere "formal" one (as explained above) which may, however, in certain cases prove to be very important. For this supervision includes the question of the legality (sometimes even when the legality is not challenged) not only of positive but also of negative acts, *i. e.*, the omission of acts which, by law, must be performed. It is true that within the sphere of their proper jurisdiction the organs of self-governing bodies decide independently, but at the same time it is also their duty to make some decision, for self-government is allowed them in order to permit them to administer their own affairs; they must not leave them unsettled. And so it is that, if the municipal organs do not make the necessary appropriations in the municipal budget, the central government may insert in it the sum for, let us say, construction which the municipality, by law, is bound to have done, or for the repayment of a loan. The central authorities, furthermore, may suspend the execution of illegal resolutions of self-governing bodies; they may attend the assemblies of the latter, dissolve them, order new elections and carry on the business of the body concerned through central organs (commissioners) until the new assembly is formed. And, in addition, approval by the "state" authorities is sometimes required for certain acts of the organs of self-governing bodies in order to secure them legal validity; this is the case especially in financial affairs, such as obtaining a loan, levying taxes, selling real property.

Though it sometimes happens to be the case it is not an essential characteristic of the self-governing body that its organs serve in an honorary capacity only and receive no pay.

Besides the business of the "state" administration and that of self-government, there is yet another kind of business administered by both jointly, or, as it is customary to say, by the "bureaucratic" and the "laical" element together. Among the forms such administration takes are these: that in which a board, composed of organs (representatives) of the self-governing body, is presided over by a state organ; and that in which the lower jurisdiction is exerted by

organs of the self-government and the higher by state authorities. Some such combined administration exists, in some countries, for educational affairs.

In many countries self-government and local government developed earlier than central government. In the medieval states, in contrast to the strictly centralized state of antiquity, self-government was very far developed and widespread. In the German countries the modern commune was evolved from a rural community ("Markgenossenschaft"). Merchants and tradesmen had their self-governing organizations (guilds), endowed with extensive powers; the universities governed themselves; the towns enjoyed very extensive self-government. But during the period of monarchical absolutism, when the European countries were rapidly becoming centralized, self-government became narrowly restricted. Nevertheless, certain self-governmental powers, especially in the towns were successful in asserting themselves; and, as we have mentioned above, a new period of prosperity for self-government came in the 19th century. In France, in general, a system of strictly centralized administration, introduced by Napoleon I, still rules, in spite of elected representation in the departments and in the communes.

In England, also, local self-government existed earlier than the central administration; and, notwithstanding various reforms, it did not lose its independence to such a degree as in the continental states. The attempts of the Stuarts to abolish independent self-government ended with the fall of their dynasty. Up to comparatively recent times, the business of administration in the counties was carried on by justices of the peace who held, in addition to their judicial powers, also extensive administrative powers. They were appointed by the King; but he usually chose them from among the members of the landed gentry in the counties and, thus, from that class which represented the people in parliament. The justices of the peace were not professional officials; they were simply prominent men of the county itself, with which they were intimately connected by reason of their landed property. And so the organs of self-government in the counties, although belonging to the aristocracy, were not strangers to the people. The central government (the cabinet) had no jurisdiction over the local government; the latter did not work under the regulations and orders of the former, but directly under the law. Whenever it appeared necessary for a self-governing unit to have a special regulation different from the general laws, parliament passed a special law (local,

private acts). Decisions of the local governments were not appealable to the central government but to the courts, and then only in case of violation of a law. This administration was not costly, for the justices of the peace served gratis.

In view of the close connection between local government and parliament it is comprehensible that when, in the 19th century, the latter was reformed in a democratic sense, local government also had to be changed in the same sense. Most of the administrative powers of the justices of the peace have now been transferred to elected boards, *i. e.*, to borough councils and to county councils (to which, under the Local Government Act of 1929, amongst others, the functions of the Poor Law authorities were also transferred). The counties are divided into districts and the districts into parishes; these smaller administrative units have likewise their elected councils.

In spite of the fact that local government in England has now also been to some extent subjected to the control of the central administration (as for example in certain financial matters), it was not possible, owing largely to the strict parliamentary regime, for any such sharp conflict to arise there, as arose between local government and the central offices of the monarchs (ministries) on the continent during the period of administrative centralization. As evidence of this it may be mentioned that, up to a few years ago, there existed in England even a special ministry for local government (Local Government Board) which evolved out of the central authority administering the Poor Law, and which is now united with the ministry of health. Another interesting fact has already been mentioned, namely that the usual continental distinction between the "proper" and the "delegated" jurisdiction of self-governing bodies is unknown in England. The election of the above-mentioned councils and of their organs does not require any confirmation by the central government. There are no intermediate authorities between the local government and the central government. But for all that, the latter (chiefly the ministry of health) can exert in certain important matters a rather telling influence upon the activity of the local government authorities, which is made effective also in an indirect way, by means of conditional grants for various purposes and services. This method has been maintained by the afore-mentioned Local Government Act of 1929 in so far as the new annual consolidated grant may be reduced by the central government if the local government authority concerned has

failed, for example, to achieve a reasonable standard of efficiency and progress in the discharge of its functions relating to public health services, or if the roads have not been maintained in a satisfactory condition. In such ways as these the English attempt to harmonize as far as possible the independence of self-government and the guarantee of its satisfactory functioning.

The old institution of the justices of the peace who are now either appointed by the government or hold this office by virtue of their being at the same time the heads of self-governing units is still maintained; but their powers have been greatly reduced, until now they include in the main only minor cases of criminal justice. This justice is administered either by a single judge or, as is more usual, by a court of at least two judges (petty sessions). When sitting in larger numbers (in special session or quarter session) the justices of the peace function either as an appellate court in cases of appeals against judgments of the aforementioned courts (*e. g.* petty sessions) or, as a court of original jurisdiction in cases of more serious infractions of the law, or, finally, as an administrative authority in those rare matters which have not yet been passed over to elected self-government boards.

Local Government in the United States of America is, to a large extent, after the pattern of English institutions; nevertheless, in recent times, it has developed some special features, *e. g.*, regarding the administration of cities, for which various systems have been worked out: 1) the mayor and council plan; 2) the commission plan; 3) the city manager plan.<sup>5</sup>

## V. THE JUDICIARY

It is of the essence of all acts of state organs that they be determined by some juridical rule; for otherwise we could not recognize them as acts of the state. Even in cases in which the state organ is allowed to act at his own discretion to the greatest conceivable extent, so that his act appears to be the expression of his will only, it is still necessary to consider whether he has proper jurisdiction and whether and how far he is legally allowed to use his discretion. This applies also to the legislative organ, who is often imagined to legislate freely and independently; for this organ like all others is bound by the constitution and, therefore, its legislation must be in harmony with it. Whether state

<sup>5</sup> Conf. Munro, *The Government of the United States*, Revised Edition, Macmillan, New York, 1930, p. 585-615.

organs always actually contemplate their own actions in the light of legal prescriptions is another question, which has nothing in common with the problem now under discussion, for this problem has to do only with logical, and not with the psychological relations. It is important in considering these logical relations to note: 1) That every state organ, in his official activity, is bound by some juridical rule, even though this rule be the most general imaginable; and 2) that the fact of thus being bound does not entail a mechanical, automatic dependence for the very reason that the interpretation of the rule by which he is bound is left to the state organ himself. It must, moreover, be observed that the application of a rule is always connected with some degree of free discretion on the part of the organ applying it. For it would be hard to conceive of a rule which would make provision within itself for all the possible ways in which it might be applied, describing them in minutest detail. Hence it follows that all state organs are, on one hand, bound by the law, but that they are, on the other hand, more or less free in their action, *i. e.*, within the limits of the law. The revolutionary legislator alone is not legally bound; and precisely for this reason his acts are not legal but revolutionary; yet in so far as his acts are perhaps judged by some rules, *e. g.*, by international law, to that extent they cannot be considered to be unbound.

Not only state organs but other people also perform juridical acts. The difference, however, is that such acts of "private" people lack full authoritative force until they are examined and confirmed by state organs; it is this confirmation which confers upon them the character of real law, *i. e.*, the capacity of eventually being executed by force. Even within the state organization itself it happens that juridical acts are performed which have no authoritative character in this sense (*actes de gestion*); to this category belong contracts and other legal deeds of the state administration concerning state enterprises (railways, mines, factories) and, likewise, civil acts of the same kind performed by self-governing organizations, *e. g.*, municipalities. But, owing to the fact that they lack authoritative character, such acts, in contested cases, are subject to the examination and control of those state organs whose duty it is, and who have the power, to decide authoritatively what is lawful by giving it the sanction of enforcement. In the following pages we shall treat only of authoritative acts (*actes d'autorité*); and we shall see that, regarding such acts, there is no essential difference between the administration and the judiciary.

It is evident that an authoritative and obligatory decision or declaration concerning the existence of particular rights and duties must be in some logical connection with what is ordained by that juridical rule which is the source of these rights and duties. The contents of this rule reappear in the judgment that the particular case is ruled by it, and the obligatory force of this rule is reproduced in the command to comply with this judgment. This applies equally to those state acts which we call "judicial acts" or "acts of the judiciary" and to those which we call "administrative acts." Acts belonging to either category serve for the application of law (*i. e.*, of juridical rules in general); in both of them the two aforementioned elements become manifest; the difference between them lies merely in the degree to which one or the other of these elements is stressed. In the idea represented in the phrase "execution of the law," the more the idea execution (*i. e.*, the fact of ordering or commanding, through which it is sought to bring about a certain course of conduct, either active or passive) is stressed, the more one is inclined to think of something which is in itself creative and to speak of an order; but the more the idea law, and thus conformity to law, is stressed, the more the dependence upon law, and thus the element of "judging" (*i. e.*, comparing of acts and facts with legal norms) comes to the foreground. We call a judgment the express declaration, oral or written, of the conformity or nonconformity of the facts of a case to a norm; such a pronouncement is deemed necessary particularly when the facts themselves, or the meaning of the norm applicable to them, or both, are disputed, or when the state authority, in disputed or undisputed cases, is about to encroach upon important human interests, as *e. g.*, through severe penalties affecting property, liberty, or life.

However, "judgments" in the aforementioned sense are pronounced not only by organs described as "judicial" but also by administrative authorities; and, on the other hand, "orders" are issued not only by administrative authorities, but also by courts. Yet, it is true, that, in the work of the judiciary, a particular stress is laid upon judging explicitly, which appears in pronouncements of the judgment,—and that, in the work of the executive, stress is laid rather upon the "ordering," which, of course, must likewise be based on juridical norms; however, in this latter instance the conformity to law need not always be determined in such a careful way and this need not be declared explicitly in a pronouncement as is the case with a judgment of a court. The main reason therefore is, that, in many cases, admin-

istrative organs are permitted or even obligated by law to do, according to their own discretion, whatever they deem to be in the public interest; this applies to the higher executive, the "government" (*e. g.*, when it directs commercial politics) as well as to the lower one (*e. g.*, when it secures order and peace). It may seem that the official action in these cases derives its authority from the will of the organ alone, particularly if the latter is at liberty to choose between two possible acts contrary to each other, *e. g.*, to allow or to forbid a meeting. But in reality, in this case, as in others, the action of the organ derives its authority from the law which permits this liberty of action and sets bounds to it, which are indicated at least by the notion of the public interest. If the organ's will, in reality, were the source of the authority of his act, then he could act against what he considered to be the public interest.

In contradistinction to these cases in which the action of "judging according to law" is eclipsed by the action of "issuing an order," there are certain judicial acts in which the reverse can be observed; such are judgments which contain no enforceable order, but which simply consider facts in the light of the law and which, consequently, merely ascertain the existence of rights. Thus, under the Scotch Law, a "declaratory action" may be brought before the court, and a "declaratory judgment" passed which "simply declares the right of the parties or expresses the opinion of the court in a question of law, without ordering anything to be done." Yet, the final purpose of such a judgment is not merely the ascertainment of rights and nothing more, but rather it is the establishment of a legal basis for eventual orders which may become necessary if the rights ascertained by the judicial declaration should not be respected. As this judgment is not an end in itself, so also the later issuance of a corresponding order is not to be considered as something independent but as a legal consequence of the foregoing "declaratory judgment," which, thus, was merely a preparatory act. It may be further remarked in this context that an acquittal pronounced by a criminal court is not only such a judgment as is that of a private person who finds the accused guiltless in the eye of the law, but that it also implies an authoritative order, namely the forbiddance of his further prosecution. Something similar is to be said of official certificates, which imply, besides the mere attestation, the order to take what is attested as formal truth.

Thus, some connection between the "judgment" and the "order" is essential to any authoritative act of a state organ, though sometimes

the one and sometimes the other element is emphasized more. Ages ago, Plato recognized that the activity of the state organs is essentially the same, no matter whether this activity was a "judging" or an "ordering"; in either case judging according to the law, κρίνειν, and ordering according to this judgment, ἄρχειν, are involved. In his work on "The Laws" (Nomoi, 767) Plato said that every ἄρχων is also necessarily a judge, and that the judge also becomes an ἄρχων whenever he terminates a law-suit by rendering a judgment.

The opinion that the activity of all state authorities, whether judicial or administrative, is essentially the same, appears in the rejection of the prevailing theory of the existence of three powers (legislative, executive and judicial) and in the doctrine that there are only two powers: one which gives the laws and the other which executes them, the latter comprising the executive as well as the judiciary. This opinion was held by Rousseau.<sup>6</sup> We can trace both theories in the numerous French constitutions of the 18th and the 19th century. If one has in view merely the logical relation between the norm and its execution or application, then nothing can be advanced against the two-power theory. A differentiation of three powers, however, could be justified under an additional condition, if, namely, essential differences could be found in the ways of executing the law, or in the guarantees that the activity of the state organs be really in execution of the law.

One such guarantee exists when it is the required procedure for the state organ to examine the legality of his act, not only because he is obliged to ascertain this legality for himself, but also because he must declare it, write it down and, together with a statement of the grounds for the decision, make it known to the parties. And so the judgment (in its logical meaning as the result of deliberations and as conclusions reached under the law) is not identified solely with a process of the mind of the organ and is not merely presupposed as a necessary condition of an act of the state, but—being pronounced and written down with an explanation of how the facts of the case were determined and of their subsumption under the law—turns itself into a state act, which is thus severed from the person of the organ and gains individuality as a written documentary record. Such an explicit ascertainment, made under the law, of a legal situation carries, under certain conditions, the authority of "a judged cause" (res judicata), so that the parties may rely upon and refer to it whenever this becomes necessary.

<sup>6</sup> *Contrat Social*, Book III, Chap. 1.

The standard of legality, obviously, is improved through a procedure which secures exactness in the establishment of the facts, correctness in their subsumption under the law, and a proper interpretation of the law. The provisions for a careful and exact procedure are proportionate to the importance which is attributed to the interests protected. But this applies to matters entering into the fields of the judiciary as well as to those belonging to the sphere of the administration; in fact, administrative procedure sometimes does not essentially differ from judicial procedure.

Thus, as to the methods by which administrative and judicial business is carried out, we are not able to find thoroughly essential differences between them. We can only notice a disparity of degree in the sense that, at present, the work of the judiciary is in many cases subjected to a stricter procedure than is the activity of the administration, and that, judicial decrees are regularly preceded by an explicit judgment. Even the fact that, usually, administrative authorities proceed upon their own initiative, *i. e.*, whenever they deem it fit, and judicial authorities upon the initiative of private persons, does not constitute a sharp line of demarcation between the two activities; for in many cases the administrative authorities are allowed to proceed only upon the initiative of private persons, and, in certain cases, even courts may take the initiative in the proceeding, *e. g.*, when they appoint guardians and trustees. Moreover, it happens that in some countries certain business is entrusted to administrative authorities, whereas in other countries it is entrusted to courts. And concerning the use of free discretion in the above-mentioned sense, it can be stated, that though used very frequently by the administrative authorities, the courts also use it to a considerable extent in some fields of their activity, *e. g.*, in inflicting punishment in criminal, and in adjudging compensation in civil cases.

There is, it is true, one kind of work of the administration which shows a greater similarity to the legislative than to the judicial business, namely the issuing of general rules (ordinances), whereas the judiciary is primarily concerned with the settlement of individual cases. Yet such court rulings often become tantamount to general rules at least in the Anglo-Saxon countries where a great part of the law is judge-made law built up by authoritative precedents and where the doctrine "stare decisis" is an acknowledged principle giving to precedents the authority of established law.

Although we are, thus, unable to find a distinction *a priori* between

administrative and judicial business, we can nevertheless distinguish judicial organs from administrative ones; and this distinction once established, we may say that the business entrusted to the courts is judicial, and the business entrusted to the executive is administrative. Apart from that, we may only say in a general way that to the courts is confided that which it is desired to protect with greater legal security; *i. e.*, when it is desired to have a strict conformity of human conduct (as regards private persons as well as state organs) to that distinct set of juridical rules which are called laws (see pp. 150 et seq.), the matter is placed in the hands of the court.

This protection, consequently, should be confided only to persons who are not only morally and intellectually qualified by good behavior, professional studies, examinations and training (these qualifications being now required to an increasingly greater extent also for administrative functionaries), but who are also independent, *i. e.*, who in extending this protection will not be influenced by anyone, either by parliament or especially by the executive (forbiddance of "cabinet justice" which judges at the behest of the government, see p. 47). Judges must proceed according to the command of the law solely; they must be independent of any other command, even if this should be given in order to secure the legality of the judicial procedure. And consequently they themselves must not be responsible for illegal and punishable procedure to anyone but an equal, *i. e.*, to organs who are equally qualified and who are endowed with equal guarantees of independence. Such, in our times, are the characteristics of those state organs called judges. The legality of judicial procedure and the independence of the judges are correlative principles, the former being guaranteed by the latter, and the latter meaning that the judges, being dependent exclusively upon law, are independent in all other respects.

There are many means employed to secure this kind of independence. Among these are: the special organization of the courts; the legal status and the salary of the judges; the principle (often embodied in the constitution) that a judge cannot be transferred to another post without his consent; also that he cannot be removed "during good behavior" and that he can be removed, as a rule, only by a tribunal (in England, the members of the High Court of Justice can be removed only through a vote of both houses of Parliament, and, in the United States the members of the Supreme Court only through impeachment before the Senate); that he may not be retired (pensioned) except upon his request, unless he has reached the age

fixed by law or unless he has become physically or mentally unable to carry on his service; that he cannot be indicted (impeachment) for his judicial activity without the consent of a higher court; independence is also guaranteed by requiring that a judge must not practice any other profession during his tenure of office. In some countries, irremovability of the judges is now, as a matter of course, considered essential for the judicial service; although the present constitutional laws of the French Republic of 1875 do not mention it, this principle is recognized as fundamental in France.

All of these institutions serve as guarantees of the independence of the judicial activity in general. Still other provisions aim to prevent partiality, *i. e.*, any moral or intellectual dependence of the judges in individual cases; besides the prohibition against setting up extraordinary tribunals we may mention that those judges whose complete impartiality in a particular case may, for reasons determined in the law, be open to doubt are either excluded (disqualified) or, at least, they are liable to challenge; reasonable grounds as thus determined are, for example, consanguinity or affinity with a party (litigant), or interest in the trial as a party or as a witness; and also friendship or enmity toward the parties. In order to prevent the appointment of judges for particular cases the divisions of the courts (which are collegiately organized) are made up to sit for long periods, and the judges are sometimes assigned to them even by lot; and in keeping with the purpose of these measures, when it falls to one single judge to administer justice, the field of his jurisdiction is determined in advance.

The method by which judges are chosen or appointed is closely connected with the independence of the judges. It is again interesting to notice that, for Plato, this method and not the activity of "judging" or "administering" (ordering) was the principle upon which he based the classification of the authorities. In order to avoid any undesirable influence of the executive upon the judiciary, it has been recommended that the judiciary itself, and not the executive, elect, or at least nominate, new judges (*e. g.*, that the members of higher courts elect the members of lower courts), or that the judges be elected either by the people themselves or by the people's representatives, the parliament. The system of election of the judges by the people is employed, at least to some extent, in the United States of America, in Russia and in Switzerland. It is true that this method shields the judges from the influence of the executive, but at the same time it subjects them

to the influence of the voters, particularly (and this is just the point stressed by the democratic principle) if they are elected for a short period and if they are reëligible, as is necessary for the sake of having experienced judges. Moreover, this method renders the choice of the men best qualified very precarious. It is worth while noticing that, even in the aforementioned states, the highest judges are appointed by the chief of the executive or by parliament; thus the members of the supreme court of the United States are appointed by the President of that republic with the consent of the Senate but, according to Garner,<sup>7</sup> in thirty-eight states of the Union the judges of the highest courts are elected by the people; and the members of the Swiss federal court are appointed by the parliament. The fact that in some federal units of the United States and of Switzerland a protection of minorities in the election of the judges is provided for, is a test of the real danger of political influence in these elections.

In the great majority of European countries almost all the judges are appointed by the supreme chief of the executive who, however, in some countries is bound to make his choice out of a list of candidates presented by judicial bodies. The executive is in a position not only through the appointment but also through the promotion of the judges to higher ranks, to exert a certain influence upon the judiciary, and that notwithstanding the principle of irremovability and the independence of the judges. The appointment of judges by the executive, is strictly speaking, inconsistent with the principle of the separation of the three powers; but this principle is also inconsistent with the fact that, in the major number of criminal cases the courts are legally enabled to proceed only upon action of the public prosecutor (the prosecuting attorney) who is an officer of the government and is thus bound to obey its instructions; it is however true that, in another way, the office of the public prosecutor serves the independence of the judge, who, not being judge and prosecutor at the same time is not biassed in deciding the case by advocating only the public, *i. e.*, the state's, interest against the accused. A deviation from the principle of the separation of the judicial power from the other powers appears also in the right of granting pardons and amnesties, which belongs to the executive or the legislative power.

For the purpose of mitigating legal severity and of admitting of liberal and humane considerations the administration of justice is, in

<sup>7</sup> *Political Science and Government*, 1930, p. 794.

certain cases, confided also to non-professional (lay) judges, who act together with professional judges. The body of lay judges (jurors), which in many countries has jurisdiction in criminal cases only, is called a jury. The jurors are citizens, of whom (as a rule, with certain exceptions) the only requirements are good moral qualifications and normal mental capacities. In some countries the jurors for a particular trial are drawn by lot from a list of qualified citizens, this list having been sifted several times according to a set procedure; in addition, the parties have a limited right to challenge jurors; and the latter, like judges, may be disqualified by law to judge in cases in which their impartiality is doubtful. A jury, properly speaking, can decide only upon questions of fact, including that of guilt (*Ad quaestionem facti respondent iuratores, ad quaestionem iuris respondent iudices*). The members of the jury are supposed to judge according to common sense and to be uninfluenced by theoretical views, which professional judges might perhaps be too much inclined to stress. Yet, on the other hand, the jury sometimes appears to be susceptible to emotional impressions as well as to the influence of public opinion; and this last is particularly true when, as in certain countries, the jurisdiction of the jury extends only to grave and to political crimes, the intention being precisely to leave the question of guilt to be decided by popular opinion as represented in the jury. In many countries, after the verdict of the jury professional judges of the court pronounce either an acquittal or a conviction and, in the latter case, determine the punishment. Such a division of judging between two different groups of judges is practicable in criminal cases; for the question of guilt, the determination of which is a conclusion reached through a psychological consideration of the facts of the case, can, in general, easily be severed from strict questions of law, such as the determination of punishment. Nevertheless, in certain countries, the work of professional and non-professional judges in criminal procedure has been completely equalized, and a similar evolution in this respect can be noticed in other countries also.

In Great Britain and in the United States juries have jurisdiction not only in criminal but also in certain civil cases; the Seventh Amendment of the Constitution of the United States reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." In other countries also civil procedure has evolved a coöperation of lay "assessors" (referees) on an equal footing with the judges in such cases as

require not only a knowledge of the law but also of other professional or technical matters. Thus the assessors in commercial courts, trade courts, courts of mines, and others, are chosen from amongst members of the profession concerned.

As was explained above, the difference between judicial authorities and administrative authorities lies ultimately in certain special guarantees whose purpose it is to secure strict legality in the work of the judiciary; these guarantees are concerned with the legality of the procedure in the courts and the independence of the judges. Consequently, the more the activity of the state organs is in itself judicial (in the sense just mentioned) or controlled by judges, the more the working of the state organization becomes legal. Historically, the jurisdiction of the courts first took hold of the procedure in cases of civil and criminal law, both of which affect the most important human interests, *i. e.*, life, liberty and property; then steadily and as early as the period of absolutism, this jurisdiction extended to the property of the ruler, and subsequently to the property of the state (*fisc*); then it went over to the use made of public means within the various branches of the state administration (courts of accounts); next, in the 19th century in certain states this jurisdiction took under its control almost the entire public administration (administrative courts) and sometimes even the legislative business in the ordinary or in the special "constitutional" courts as well as conflicts of jurisdiction arising between the administrative authorities and the courts (tribunals of conflicts); and, finally, the major part of the courts themselves are (on account of the existence of appellate courts) subject to some judicial control. It is, moreover, again worth while mentioning in this context that in certain countries the contested legality of elections to parliament is decided by special electoral courts; and that either some other kind of special court or the upper house of parliament judges in cases of impeachment.

The efforts initiated on the European continent towards the end of the 18th century and continued with increasing energy during the 19th century to secure the legality of the entire activity of the state administration, can be traced in the development of the "administrative jurisdiction," *i. e.*, the control exerted by independent organs over the acts of administrative organs, *i. e.*, such executive organs as do not enjoy judicial independence. These efforts, however, were not strictly consistent with the principle of the separation of powers which came into vogue about the same time. In England there was no such move-

ment; for, after the breakdown of absolutism, the principle prevailed that the courts which pass on the legality of acts of private persons have like jurisdiction over acts performed by state organs. Thus, in England, the ordinary courts, both civil and criminal, decide upon the legality of acts of all state organs except the King. Every state official is personally responsible, not only for his private acts, but also for those performed by him in discharging his official duties; and no order from a superior can free him from that responsibility; any one can sue him before the ordinary courts. The same doctrine is applied in the United States.<sup>8</sup> In England, there is only one proceeding, by which the "Crown" (*i. e.*, the state) can be sued; this is called the "petition of right"; and it can be initiated only for breach of contract (not for tort). The English have no special "administrative" courts; the administration of justice by other than the regular judicial courts (and not according to the ordinary law of the land) is inconsistent with English and American doctrine; this doctrine is commonly referred to as "The Rule of Law." Yet, according to Garner<sup>9</sup> there exist, both in England and in America, certain boards, commissions and authorities which decide upon claims of employees against employers, even when the state is the employer, and which, thus, exert a kind of "administrative" jurisdiction.

The problem of how to control the legality of the work of the administrative authorities was solved in a different way on the European continent, especially in France. There, after the collapse of monarchical absolutism, the idea of the separation of the three powers—the legislative, the executive, and the judicial—and of their independence of each other, triumphed. The French looked upon this principle as a guarantee of political freedom, which, in their opinion, would be endangered, if the three powers (or even two of them) should be united. A strict separation, further, does not permit one power to be controlled by either of the other powers; and that was held especially to apply to the relation between the judicial and the administrative authority. The decree of August 16th 1790 stated: "The judicial functions are distinct, and will always be separated from the administrative functions." The judges were forbidden under a severe penalty (*à peine de forfaiture*) to interfere in the work of the administrative authorities in any way whatsoever, or to call administrative officers to account for their acts. In this injunction and in

<sup>8</sup> See Garner, *loc. cit.*, p. 788.

<sup>9</sup> *Loc. cit.*, p. 788.

others as well, there is revealed not only the principle of the separation of powers, but also the general mentality characteristic of revolutionary periods in which the reformers abhor being dependent upon judicial control. The French held that such a control was dangerous to their newly-won liberty and they believe even now that the judiciary, if it were to decide upon administrative acts, would hamper the work of the administration. It is clear that the problem of how to protect the individual against illegal acts of the executive cannot be solved in this way. It is true that to a certain extent a protection of the individual can be secured by perfecting the organization of the administrative authorities, especially through the establishment of a scale of such authorities, so that any one who believes he has been wronged by a lower authority may appeal to a higher one. This guarantee of protection through successive appeal must not be undervalued; still, as experience has shown, it is not sufficient. For, owing to their dependence upon the the most potent political factors, *i. e.*, either the head of the state or the parliament, the executive authorities, in safeguarding "public interests" (under which political motives of persons or parties are often hidden), are liable to be partial, in administering the laws, to individuals; and this can be so much the more grievous for the simple reason that these authorities have at their disposal all the enforcement powers of the state.

However, the French found in their administrative machinery itself, a remedy against arbitrariness and illegality on the part of the administration. The French administration is divided into three categories: 1) The active administration (administration active) which is the executive in the proper sense of the word; it is strictly centralized and graduated: first the government (the head of the state and the ministers); under them are the prefects, and under the prefects the mayors. 2) The deliberative administration (administration délibérante) which deliberates in councils, *e. g.*, the municipal councils; however, its resolutions are carried out by the active administration. 3) The consultative or advisory administration (administration consultative) which gives advice to the chiefs of the active state administration; it consists of a council of state (Conseil d'Etat) and of the councils of prefecture (Conseils de préfecture). Napoleon I divested the active and the deliberative administrations of the power of deciding disputes arising between the administration and individuals, and vested this power in the advisory administration solely (especially the council of state). And thus, the foundation was laid for the development of

a special administrative judiciary. Yet the council of state was not a court properly speaking. Besides its jurisdiction to decide administrative disputes, it maintained its original business of giving advice to the active administration. And even its decisions in administrative disputes were, for a long time, formally, merely advices (*avis*) which did not bind the chief of the executive legally; nevertheless the latter, in the face of the high authority of the council of state, very rarely dared to decide contrary to such advice.

It was not until the year 1872 that the resolutions of the council of state in matters of disputes (conflicts) were endowed by a law with the authority of conclusive and enforceable judgments. Formally, the members of the French council of state, even at present, do not enjoy the privilege of irremovability which the ordinary judges enjoy. The influence of the principle of the separation of powers is so strong that the French still include the council of state in the category of administrative authorities because they are not willing to admit that any "court" can decide on acts of the administration. However, the council of state, when deciding upon administrative disputes, does not differ in reality from a court, and it does not particularly for the reason that its members, on account of the high reputation they enjoy are in reality as independent as other judges in passing judgment. The exactness of this statement is proved by the fact that the decisions of the court of accounts (*cour des comptes*) whose members are irremovable as judges, are subject, with regard to their legality, to the control of the council of state whose members, strictly speaking, are not irremovable. At present, the French council of state accomplishes its duty of protecting individuals against illegal acts of administrative state organs perhaps better than ordinary courts would; some of the reasons therefore are the excellent personnel of this council, its thorough knowledge of administrative law, and—strange to say—the absence of fear of a possible violation of the principle of the separation of powers, since it is considered to be an administrative authority. It decides upon all claims against administrative authorities for overstepping their jurisdictions ("excès de pouvoir" or, as the English would say, "acting *ultra vires*"), and pushes its investigations of legality even so far as to annul administrative acts, which, though formally legal, were actuated by other motives than those for which the law permits such acts ("détournement de pouvoir"). Thus this body quashed an order of a mayor, by which a horse-fair run by a private person had been closed allegedly for hygienic reasons, whereas the real motive

was to force people to attend the municipal fair in order to enable the municipality to make money thereon. It is no wonder that the French have so much confidence in the council of state, and no wonder that they value it as one of the chief pillars of personal liberty.

On the European continent for the most part the French doctrine concerning control of the legality of the work of the public administration has been accepted. Administrative courts were established in the German countries in the second half of the 19th century; later they sprang up in other countries also; the members of these courts, at least of the tribunals of last resort, enjoy the same legal status as the members of the ordinary courts (irremovability, etc.). The organization and jurisdiction of the administrative courts, however, show great variety: in one country there is only one such court for the entire state, in another there is a scale of administrative tribunals; in some countries, laymen cooperate as judges in the lower courts; in certain states, there are a set of administrative courts with different jurisdictions, *e. g.*, courts for administrative affairs in general, and, in addition, a special court for the control of accounts; in some countries the jurisdiction of the administrative court is given just as soon as the administrative dispute arises; in other countries this dispute (conflict) must first pass through the entire scale of administrative authorities so that an appeal to the administrative court can be made only against the decision of the administrative authority of last resort; some administrative courts have authority to decide on disputes only; others perform, in addition, according to the French model, truly administrative functions, especially in an advisory capacity (in Yugoslavia, the jurisdiction in cases of disciplinary infractions of state officials has been confided to the administrative courts).

The foremost business, however, of the administrative courts, wherever they exist, is to decide upon the legality of acts of administrative authorities whenever this legality becomes a matter of dispute, namely, when a person alleges that some right of his has been violated by an illegal act of an administrative authority. Such a dispute between an individual and an administrative authority is called an administrative conflict (*contentieux administratif*). According to the law of certain countries it is even possible for one state authority to sue another state authority in the administrative court for violation of the law, particularly when the state finances have been damaged. The difference between the jurisdiction of an administrative court and that of an administrative authority is that the first has power to inquire

only into the legality of administrative acts, whereas a higher administrative authority may inquire not only into the legality but also into the expediency of acts of a lower authority. There can be no dispute about legality when an administrative authority has kept within the limits of the law, even when using its own discretion in cases in which the law allows this use. The authorization, given by law to an organ, to choose amongst various possible acts that act which he deems to be the best, is called "free discretion." Thus, a real administrative conflict cannot arise in matters in which free discretion is allowed; consequently, in such cases the jurisdiction of the administrative courts is excluded by principle, unless positive legislation disposes otherwise. As, however, what can be decided by "free discretion" of the organ depends upon the law, it falls within the sphere of the administrative courts to examine if and how far such a discretion is permitted by the law and to decide accordingly. In this respect the interpretation of the laws by the administrative courts may be very extensive.

As we mentioned above, the French council of state succeeded in extending the idea of legality even to the motives of the authorities in performing administrative acts. But, regarding the question of legality, the facts in a case, *i. e.*, the facts which determine the application of the law, are no less important than the norm of the law applied. Hence, these facts must be established with precision and clearness; otherwise the matter to which the law is applied remains undetermined, and, consequently, the correctness of the application of the law and the legality of the administrative act are doubtful. Although this can be inferred from the notion of legality alone, certain laws nevertheless provide expressly that the administrative courts must annul those administrative acts which, by reason of some defective proceeding, are not based upon accurately established facts. And finally, the notion of an "administrative conflict" has been widened in so far as, in certain countries, an action before the administrative court may be allowed not only to a person whose rights, properly speaking, have been violated but also to a person merely whose "interests" have been more or less affected by an illegal administrative act. Thus, the number of persons who are entitled to seek protection before the administrative courts has been increased and a further step has been taken toward making the "Rule of Law" universal by permitting anyone to make an appeal against illegal acts of the administration whether he is personally affected by them or not; such a claim would

have the same character as the Roman "actio popularis" whose purpose was not to safeguard a subjective right of the plaintiff (who acted "procuratorio nomine populi") but to uphold the authority of objective law, *i. e.*, lawful behavior in general.

The development of the administrative judiciary up to our time and the tendencies in its evolution show an inclination to extend the controlling power of this judiciary to the entire administration. In France *e. g.*, the opinion that there are special governmental acts (*actes de gouvernement*) which should be exempt from the control of administrative courts, is waning; this category includes chiefly political acts performed by the government under extraordinary conditions in the interest of the state. To admit of exceptions to this control in cases in which the conditions required for it by law are given would amount to a reversion to the theory of the "raison d'Etat" (see p. 14), which is out of harmony with the "Rule of Law."

Conflicts of jurisdiction between courts and administrative authorities are due to the difficulties of drawing hard and fast lines of separation between their jurisdictions, and thus may easily arise. When both the judicial and the administrative powers claim jurisdiction in the same case the conflict is called positive, and when both authorities decline jurisdiction in the same case the conflict is called negative. An action to obtain a decision in a negative conflict may be brought by any of the parties concerned which believes it to be to its interest to have the matter settled. In the case of a positive conflict, ordinarily, only the highest administrative authority claiming proper jurisdiction, is allowed to ask any judicial proceedings already under way to be stopped and the conflict settled. In earlier periods either the chief of the executive (the ruler) or the legislative authority had power to decide such conflicts; later on, in France, they were decided by the council of state. To the system which gives preference to the executive power another system is opposed which gives preference to the judicial power; according to it, the supreme ordinary court decides conflicts of jurisdiction between the executive and the judiciary, and also conflicts arising between courts of different character, *e. g.*, ordinary and administrative courts. This system has been adopted in some countries, whereas in others a special court (tribunal of conflicts), made up of members of ordinary and administrative courts, has been established. In England, and also in the United States, such conflicts are unknown; the courts themselves always decide upon their jurisdiction.

As was demonstrated above, it is a characteristic of the judiciary in modern states that its work must be ultimately determined solely by the law; this, however, does not prevent courts from applying other norms also, *e. g.*, ordinances. The courts are obliged to take cognizance of all valid acts of other state authorities; they may ignore them only on grounds of illegality, into which they have a right to inquire; thus, courts have the power to inquire into the conformity of ordinances to law. The court, may, in a particular case, treat an ordinance issued by an administrative authority as invalid if, in its opinion, this ordinance does not conform to law, but it must apply an ordinance which it considers legal. In general, then, the courts have merely the right of not applying ordinances which they hold to be illegal, but certain courts may, at the same time, be empowered to annul such ordinances (*e. g.*, the "constitutional court" in Austria).

As we know, there may be within the whole body of the law of a certain state laws of different authority; such is the case in those federal states in which, according to the federal constitution, federal laws prevail over state or provincial laws. In such cases, as a rule, the supreme federal court has jurisdiction to decide upon discrepancies between these two categories of laws.

However, still greater difficulties than these have at times presented themselves in connection with the question of the validity of those laws which are contrary to the provisions of the constitution; *e. g.*, a law which prescribes capital punishment for a crime in a state whose constitution forbids such punishment altogether. In certain states which have written constitutions the opinion prevails that the law is not an unquestionable, absolute rule for the judge, but that it is subject to judicial control as far as its conformity to the constitution is concerned. It appears that in France such a control was considered contradictory to the principle of separation of the legislative from the judicial power. The decree of August 16th 1790 stated: "The courts may take no part, either directly or indirectly, in the exercise of the legislative power, nor may they, under penalty of 'forfeiture,' prevent or suspend the execution of the decrees of the legislative body which have been sanctioned by the King. They are bound to have transcribed, purely and simply, in a special register, and to publish within a week, whatever laws are sent to them." Evidently, the purpose of this was to bind the courts absolutely to the laws and to prevent them from inquiring into their validity in any way whatsoever. But it is possible to infer also another conclusion, just opposite to this, from the principle of the

separation of powers; namely, that the courts have the right to inquire into the constitutionality of laws for the reason that unconstitutional laws are not laws at all; thus both powers, *i. e.*, the legislative and the judicial, are held to be equally bound by the constitution and equally dependent upon the constituent power. But it may be remarked that, if one were to carry out in all strictness the principle of the separation of the three powers, then the same right of examining the validity of laws as is attributed to the judicial or to the legislative power, would have to be attributed also to the executive power, at least to its highest authority.

All this shows that the problem cannot be solved from the standpoint of the principle of separation of powers. The problem is not whether unconstitutional laws, logically examined, are valid or not; for it is perfectly clear that we are unable to attribute to these laws logical validity, if we compare them with the constitution from which they derive their obligatory character. At bottom, the real question is: Who is to ascertain and declare, in a legally binding manner, the constitutionality or the unconstitutionality of a law? There is nothing less likely to assist in solving this question in a legally practicable way, than the principle of the separation of powers. For if the three powers were entirely separated, each of them would have to settle independently the question of whether it has overstepped its jurisdiction. And this is precisely that situation not only out of which conflicts are likely to arise, but also under which no means would be available for their settlement. There are only two ways of settling such conflicts: 1) they can be settled by the constituent power which is superior to all others (this, however, may seem too much like a settlement according to a newly created constitutional provision and not according to one which existed at the moment the conflict arose); and 2) they can be settled either by the legislative or by the judicial, or by the executive power. Thus, by logical necessity, it must be left in every state, by written or unwritten constitutional law, to some one power to decide conclusively upon its own jurisdiction and upon that of the other powers; the answer to the question which power this shall be, must be derived either from the text or from the spirit of the constitutional law of that state. We have already indicated certain ways in which conflicts between the executive and the judiciary are settled.

Regarding the overstepping of its own jurisdiction on the part of the legislative power, we must first remark, that such a transgressing is impossible in countries where there is no formal constitution and

where, for this reason, there are no legal limits to the legislative power, as is the case in England. But if such limits are set by the constitution, then the aforementioned problem arises of who is to decide whether this power has kept within the limits of its jurisdiction and whether, accordingly, it has created valid laws. The decision will hardly be left to the executive power, at least not in those states where it coöperates in the process of legislating, or where a bill passed becomes law notwithstanding an executive protest (such as an executive "veto" or, in parliamentary states, a refusal of immediate sanction); but the same applies when the executive is not permitted to interfere with legislation, as is the case in the absolute democracy, the law being considered there as the direct expression of the people's will and therefore as absolutely binding on the executive. (In the first two instances the executive has entirely exhausted its power to interfere with legislation and, thus, also its power to secure its constitutionality; and in the third instance it has no such right whatever). If the executive power itself is divided, as in federal states, then the federal executive, it is true, may have the right to challenge the validity of the laws of the particular states or provinces, and, vice versa, the executive of the states or provinces may have the right to challenge the validity of federal laws, on the ground of their unconstitutionality; but then it is a special court which decides the case.

Thus, but two possibilities are left: First—the legislative power itself decides on its proper jurisdiction by the very act of legislating, and such a solution was the evident intention of the aforementioned French decree of 1790; if that is so, then all the laws are obligatory not only for the administrative authorities, but also for the courts, and any provision of the constitution on the jurisdiction of the legislative power and its limits is, then, without sanction; it is a *lex imperfecta*. Then, any product of the legislative power which is promulgated as a law, must be taken as law. The court could inquire only into the act of promulgation, if its validity were doubtful, *i. e.*, whether the promulgation was performed according to the prescriptions of the constitution; but that is all; it could not examine the constitutionality, *i. e.*, the validity of the act of legislation. The administrative authorities, on the other hand, could not even examine the promulgation, if it had been performed by the supreme chief of the executive (and countersigned by the ministers, if this is required by the constitution). Second—the examination of the constitutionality of laws is confided to the courts. According to one method the courts have the right to treat

a law which they believe is contradictory to the constitution as invalid, non-existent, in that particular case which is before the court; thus, the court does not annul an unconstitutional law any more than it annuls an illegal ordinance. It is not the law itself which is the subject of the proceedings and of the judgment, but some other matter, and it is only while engaged in this other matter that the court declares that it is unable to apply a law referred to by a party, on the ground that this law is contrary to the constitution. The law continues to exist in spite of this declaration; and another court may consider it as valid. At first sight such an attitude of the courts towards legislation seems to be in harmony with the principle of separation of powers, for the courts do not interfere with legislation; they do not annul unconstitutional laws; they consider them as invalid and refuse to apply them only when these laws come into the proper sphere of the judiciary, *i. e.*, in cases brought before the court. Nevertheless, the practical consequence approaches annulment of the law at least in the sphere of the judiciary. For if, as would be expected in such an important matter, the final judgment had been rendered by the supreme court, the legal opinion of the latter could hardly be disregarded by the lower courts, because the question of the validity of the disputed law could be brought up before the supreme court every time a new case arose under it. This method of control over laws by the judiciary obtains in the United States of America (though its Constitution is silent upon the question) and, according to its example, is employed in a number of South American States (Argentina, Brazil, Venezuela, Colombia), in the British Dominions of Canada, Australia, South Africa, and in certain European states (Norway, Greece, Roumania). In a previous chapter there was given an explanation of the historical reasons for the existence of this method in the United States (see pp. 66-7). In other countries also, the opinion that the courts should properly exert a control such as this, has gained ground in recent times and, in spite of many objections, continues to do so; and that is a proof of the increasing tendency to subject as much of the activity of the state organs as possible, not only as far as legality but also as far as constitutionality is concerned, to the control of independent courts.

But this judicial control is even more intensive when, as in the Austrian republic, a special court is established to decide on the constitutionality of a law, not only when this question arises in proceedings which primarily concern another question and which are carried on before one of the highest courts, but also when the question of

constitutionality is the sole matter of dispute; thus, in Austria, the federal government may challenge the validity of a provincial law, and a provincial government the validity of a federal law; in all these cases the "Constitutional Court" declares invalid a law which it holds to be unconstitutional, and this annulment has binding force for all the state authorities. But in that republic no other court has authority to examine and decide upon the validity of laws. In the Czechoslovak republic also, a special "Constitutional Court" is established to invalidate unconstitutional laws. In Switzerland, the federal court has authority to declare invalid cantonal laws (but not federal laws) which are inconsistent with the federal or the cantonal constitution.

A law may be unconstitutional for two reasons: 1) because it regulates a matter which the constitution has excluded from the jurisdiction of the legislative power, *e. g.*, the fundamental rights of the citizen, the integrity of which is thus protected even against the legislator—and 2) because, in the process of legislation, the provisions of the constitution relative to the legislative procedure were not observed. It may be remarked that the correct promulgation of a law cannot be accepted by a court having power to examine the constitutionality of laws as a proof either of the correctness of the legislative procedure or of the conformity of the substance of the law to the substance of the constitution.

Finally the question may be put whether a court which has the right to examine the constitutionality of a law, has also the right to examine the constitutionality of an amendment of the constitution—a question which concerns the constitutional correctness of the procedure applied in making the amendment. When the judiciary (or a part of it) is invested with the unrestricted power of examining the constitutionality of the laws, we cannot see why laws which amend the constitution should be excepted from this control; and, in fact, in recent times, the courts in the United States of America have vindicated this power. But in such cases, in our opinion, the subject of control could be only the procedure observed in amending the constitution, whereas the validity of the substance (the text) of the new constitution (of the federal constitution in a federal state) or of the constitutional amendment, which has become the supreme law of the land through a correct procedure, could not be made dependent upon its conformity to any other state rule; the only legal test which could still possibly be brought to it would be that of its conformity to an international rule.

There are constitutions (*e. g.*, that of the United States) in which

no mention is made of any control of legislation; if it should happen that no settled conclusion could be reached regarding this matter by any interpretation either of the text or the spirit (purpose) of the constitution, then the opinion which was more consistent with the whole legal system of the country and especially with the position of the judiciary would in all probability prevail and eventually develop into a custom.

The question of who may examine the constitutionality of the laws is of great importance to the legal and political aspect of the state. For, with this right, is necessarily connected the power to interpret the constitution authoritatively and conclusively. It is obvious that all the authorities, legislative, administrative and judicial, who carry out the provisions of the constitution, must interpret them. But the great question is that of whose interpretation is conclusive, and particularly whether the legislative organ, by the act of legislating, has absorbed, entirely and preclusively the right of interpreting the constitution in so far as conformity of the law to the constitution is concerned. The authoritative and conclusive interpretation of a norm by an organ makes this organ, to a considerable degree, master over this norm, because what he ascertains to be its meaning, prevails. As Garner<sup>10</sup> relates, Bishop Hoadley, in a sermon preached before the King in 1717, proclaimed a doctrine that has often been quoted and approved by British and American jurists: "Nay," he said, "whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the lawgiver to all intents and purposes and not the person who first wrote and spoke them." This is a little exaggerated, since the term "interpretation," if it is not to lose its essential meaning, must include certain limitations that make it distinct from "creation." Yet it is true that authoritative interpretations of a norm, made at different times, may change its authoritative meaning. The American judicature furnishes some good examples of this in that the Supreme Court of the United States has, in consideration of the rapid changes of modern life, interpreted the provisions of the Constitution in different ways; *e. g.*, the expression "commerce" in Art. I, section 8, of the Constitution.<sup>11</sup> Another and even more striking example of how the meaning of the Constitution can be

<sup>10</sup> *Loc. cit.*, p. 776 n. 2.

<sup>11</sup> See Munro, *The Government of the United States*, rev. ed., New York, Macmillan, 1930, p. 308, 309.

adapted to suit changing social needs by action of the Supreme Court, is the judicature of this court in bringing federal and state laws to the test of that Amendment of the Constitution (Art. V and Art. XIV) which provides that no person be deprived "of life, liberty, or property, without due process of law." "Due process of law," in the opinion of the court, means much more than is generally understood, according to modern principles of procedure, by "a fair trial"; it means in addition that the law itself, when dealing with questions of life, liberty, or property must be reasonable and not grossly "unfair." The Supreme Court, in examining the constitutionality of the laws, was enabled by this extensive interpretation of this clause to apply to their validity a test of wide and as yet undetermined significance, namely of their ability to meet the requirements of modern life as it is affected by industrial development. And so it became possible to make a restriction particularly of the meaning of the term "liberty of contract" without violation of the Constitution, provided the restriction was justifiable by reasons of public safety, health, or morality. Hence some laws regulating labor-contracts and restricting absolute contractual freedom, in view of special circumstances, were considered constitutional by the Supreme Court, whereas others were declared unconstitutional on the ground that they involved a deprivation of liberty or property without due process of law.<sup>12</sup> The judicature of the court in admitting reasonable restrictions on the free use of property was supported by the view that the "police power" of the state may control liberty and property for the sake of the people's life, health and safety;<sup>13</sup> and the principle was laid down that property intended for public use (*e. g.*, a railway) is a matter of public interest which may be regulated by legislation, at least to a certain extent. Thus the Supreme Court, in balancing the liberty of the individual or of groups of individuals against the police power of the state was enabled, in passing upon the constitutionality of laws, to pay due consideration to the development of modern social and industrial life. And so, we must not be surprised to find that such authoritative interpretations on the part of the Supreme Court have resulted in adding to many clauses of the Constitution a new meaning. According to Garner<sup>14</sup>

<sup>12</sup> See Munro, *loc. cit.*, p. 350.

<sup>13</sup> See McLaughlin, *Steps in the Development of American Democracy*, The Abingdon Press, 1920, p. 153, 155.

<sup>14</sup> *Loc. cit.*, p. 535.

"Almost every clause" (*viz.*, of the Constitution of the United States) "has been the subject of interpretation and construction; and if we were to strip it of the meanings that have been added by the courts during its existence of more than a century, we should hardly be able to recognize it."

The difference between those legal systems which confide the authoritative interpretation of the constitution to the judicial power, and those which leave it to the legislative power, is considerable if only for the reason that the courts have the opportunity of so interpreting only in particular cases which are brought before them either by other state authorities or by private persons, whereas the legislative power can proceed upon its own initiative; moreover, the courts, in such cases, presumably will employ more care and consideration than parliaments. And thus, the real or at least a reasonable meaning of the constitution is likely to be better safeguarded and construed by a court than by a politically biased majority in parliament. The difference in the makeup of the courts and of the legislative organ justifies this opinion. But on the other hand, it is just this difference in composition which might be used to support the opposite view, according to which the conclusive interpretation of the constitution ought to be intrusted to an institution which, in its composition, is the closest to the constituent power (*i. e.*, to the maker of the constitution) and in which primarily the people are represented; in modern states, that body is the legislature.

In America, this authority of interpretation is bestowed upon the judicial power, and, in many European countries, upon the legislative power; in America, the judge is bound to the constitution absolutely, in many parts of Europe he is bound absolutely to the laws, or better to say, to what the legislative organ produces and what is promulgated as law.

But even in America, as we have already mentioned (p. 79), an entire isolation of the Supreme Court from the legislative organ could not be attained; as Wilson<sup>15</sup> said "the constitutional interpretations of the Supreme Court have changed, slowly but none the less surely, with the altered relations of power between the national parties." Generally speaking, there is the danger, however slight, that in so far as the courts are confronted with the task of annulling or disregarding laws passed by the legislature, they may possibly be affected by political

<sup>15</sup> *Congressional Government*, fifth ed., 1889, p. 37.

considerations and eventually assume political power. In this connection, we may mention a proposal vigorously supported by a former President of the United States, Theodore Roosevelt: Whenever the highest court of a state has declared a law unconstitutional, the question of the validity of the law may be decided by a referendum of the people (Recall of judicial decisions). This was not meant to apply to decisions of the Supreme Court of the United States. Such a provision indeed was introduced in the Constitution of Colorado in 1912. According to Art. VI of this Constitution, the decision of the supreme court by which a state law or a city charter is declared as in violation of the state or the federal constitution is not binding before a fixed term has elapsed within which a certain number of electors may request that the law or charter in question be submitted to the people (referendum petition). If the law (or charter) then is approved by the majority of voters it has effect notwithstanding the decision of the supreme court. But this example remained isolated, and the whole movement, vehemently attacked, slackened pace without leaving, except in this one case, any practical consequences. The supreme court of Colorado itself declared this constitutional amendment to be unconstitutional, *i. e.*, in conflict with the federal constitution.<sup>16</sup>

A very important principle, which, as we have demonstrated, applies to the conclusive interpretation of the supreme legal rules, applies also to the lower rules, namely that not all the state organs have an equal power to interpret all the law of the country. Certain organs are bound to observe absolutely the rules of a certain rank, *i. e.*, they can not examine their validity, namely their conformity to the rules of a higher rank; and, in consequence, their capacity of interpreting these higher rules is restricted to a considerable degree.

We have seen that the separation of powers in the sense of their complete coördination and of their independence from each other is inconsistent with the unity of the law, which means the unity of the state; but we must now emphasize that a division of jurisdictions—if we mean thereby that every state organ must have its own definite sphere of action and that what he does within that sphere is binding upon other organs unless they themselves are authorized to control his acts—is not only consistent with this unity, but even necessary for it. Thus the principle of division of jurisdictions is combined with the principle of control, the latter presupposing the existence of a

<sup>16</sup> See Munro, *loc. cit.*, p. 528.

jurisdiction distinct from that of the controlling organ, since the controlling organ can take action only subsequently and eventually. If, however, no such control exists, then the principle of division of jurisdictions turns into the principle of final legal validity, which means that what a state organ does within its jurisdiction, becomes either immediately or under certain conditions (lapse of time without any appeal being lodged) conclusive and binding not only upon the inferior and upon the coördinate authorities, but also upon the superior authorities and finally upon that authority itself which gave the decision. For these reasons many rules (laws, ordinances, etc.) must be carried out by the proper state organs even though they, possibly, do not conform to the constitution, just as judicial decisions which have acquired legal validity must be carried out, even though they do not happen to be in conformity with the law.

If we consider the law of a country only as a system of juridical rules, then any one of these rules or any legal act which is contradictory to a supreme rule of this system must be held invalid; for we cannot conceive how a norm of a higher rank and a norm of a lower rank which is contradictory to it could both have validity at the same time. But, as the "law of a country" in addition includes an organization of superior and inferior organs each of whom has his definite jurisdiction, the declaration (decision, act) of the proper organ, if this declaration carries final legal validity, is obligatory not only for other organs but for everyone whose interests might be effected by it; thus it is valid law, no matter whether it is or is not in conformity with a higher legal rule.

The understanding of the unity of the law as a system of rules on the one hand, and, on the other, the understanding of its division into various degrees, combined with the separation and limitation of jurisdictions and with the principle of legal validity, gives us a vision of the ideality of the law as a system of norms as well as of its reality as it works through the activity of the state organs. It is this same synthetic view which helped us to understand the situation of the state under international law (see pp. 28-9-30).

## PART V. THE STATE AND NON-STATE ORGANIZATIONS

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The law (if we mean by this the customary or statutory rules applied and enforced by state authorities) is not the only standard of human conduct. There are still other rules and principles regulating this conduct, *e. g.*, religious, moral, and social rules. These are distinguished from the juridical rules in that they are not connected with physical force, but with some other kind of sanction, *e. g.*, spiritual consequences or exclusion from the community organized according to these rules.

However, the law may adopt these rules in its system, so that they become connected with the state organs and with law enforcement. But having acquired thus juridical validity, they do not lose their original value, which is independent of state law. The commandment not to murder, *e. g.*, which has taken the form of legal rule in almost every country, but which has besides its legal sanction, religious, moral and social sanctions, is not deprived of the latter even if, in all or in certain cases, the sanctions of the law should be set aside. Apart from these rules which happen to belong to a legal system and to another system at the same time, there are still many norms of a non-juridical character towards which the state is indifferent in the sense that it neither commands nor forbids their fulfillment. This category includes, in many states, the religious prescriptions of prayer or of assistance of adult persons at religious services. The undisturbed fulfilment of these prescriptions is ordinarily protected by the state; but in many states, this protection does not extend beyond the protection of personal liberty in general.

Thus, the state may assume the attitude towards rules which do not originate with the state itself that it may either forbid their observance as is the case now in many states with regard to slavery, blood-feud, polygamy; or it may adopt what they contain, *e. g.*, the religious and moral injunction not to steal; or it may permit their performance and protect it as a part of personal liberty.

In the same way that men are seen to be united in the state if they are considered from the view-point of juridical norms, so also if they are considered from the above-mentioned view-points they are often

seen to be organized in societies pursuing religious, social, or moral purposes; these societies have, like the state, their own organizatory rules and their organs, *i. e.*, persons whose duty it is to take care that the rules in question are carried out; moreover, they often have at their disposal certain property to be used to promote their aims. Such organizations are, though similar to, nevertheless essentially different from the state, because their rules lack those sanctions which are characteristic of the enforcement of state rules; and if in any case such rules should come to be guaranteed by the same means of enforcement as state rules, they would then themselves enter into the same category with them.

What we have just pointed out regarding the possible attitude of state law towards other rules, applies in the main also to the possible relations between the state as a specific juridical organization and the aforementioned organizations (which, if they are Christian religious societies, are called Churches).

1) The state can interdict such organizations; but it does not necessarily follow from this that the fulfilment of their religious or moral principles, if performed by their adherents, is forbidden also; however, under this system men may be forbidden to associate in order to fulfil these principles, *e. g.*, to exercise their faith publicly in an organized way (public worship) and to appoint special organs (ministers) for this purpose. This attitude would be similar to that which was assumed at the time of the French Revolution toward certain associations which were interdicted as being in rivalry with the state (see p. 138).

2) The state may, so to speak, adopt the organization of the Church, and identify itself with it, so that the state organization is, at the same time, either entirely or at least partly, a church organization, and vice versa. Under this system of closest union between state and church the organs of the church (the priests) are state officials and the head of the state is also head of the church. One church is dominant, for it seems evident that the state organization cannot identify itself with a number of organizations more or less contrary to each other; the other denominations, if not interdicted altogether, enjoy fewer rights than the dominant one. Survivals of this system, which, in our time, has almost entirely vanished, are still to be found in England, where one church is the state church or the "established" church. In England and in a few other states this system is reflected in the rule

that the head of the state must profess the creed of the state church. If state and church are united so that the church organization and its religious aims prevail over the secular organization, we speak of a theocracy (*e. g.*, the ancient Jewish state). But at present both this system and the "hierocratic" system have disappeared; the latter, at one time during the Middle Ages, implied the supremacy of the Pope over the European states.

3) It is also possible that the state recognize and permit the activity of one, or of a number, or of all religious organizations without identifying itself with any of them; and that implies the rule that no person is prevented from belonging to no denomination at all. This permission (which, of course, can extend only to the organizations of denominations within the state territory) is given sometimes by an individual (administrative) act, and sometimes in a law, in which the conditions of this permission are determined in an abstract way so that, if these conditions (*e. g.*, conformity to "public morals" and to the state laws) are fulfilled, the activity of the organization in question cannot be interdicted.

Yet, within the outlines of this general principle:

a) It is possible that the same rights as are granted to all other organizations be granted to the religious organizations, but nothing more. According to this system, the churches (which we take as examples of religious organizations) are under the law applying to associations in general; they enjoy the same rights (autonomy) as do all other associations; church law, from the view-point of the state, is association law. The state does not interfere with the autonomy of the association; the law of the state does not deal with religious matters; the state guarantees liberty to the church, but does not give her any help; it does not provide for the education of the organs of the church and does not pay them; religion is not taught in state schools. It is not quite exact, and it is only to a certain extent justifiable, to speak of this system as a separation of church and state; for if two organizations are entirely separated from each other then no legal relation can exist between them, whereas under the system in question, a relation does exist, because of the mere fact of the recognition of the church as an association under the law of the state. Examples of such a "separation of church and state" are France, Belgium, the United States of America, and Germany; this system,

however, sometimes takes on considerably different features in different countries.

b) It is also possible that, on account of their importance to the state, the religious associations by comparison with other associations, enjoy a privileged legal status. This appears not only in the allowing of public worship and public performance of religious ceremonies, but also in the actual help, especially in monetary grants extended to religious associations by the state, and in the appropriation of public funds for the education and sustenance of church functionaries, as well as in the fact that it is the duty of the state organs to give assistance, under certain conditions, to the church organs in carrying out church ordinances, and sometimes even to enforce them when obligations of the church organs themselves or of other members of the religious community are involved, *e. g.*, collecting of contributions due (administrative execution which does not always require authorization by a judgment of a court) etc. It is this assistance of the state extended thus to the administration of church property which constitutes the main reason why the churches, under this system, are said to have the status of "public corporations." But on the other hand the state lays upon the organs of religious associations certain duties which are performed elsewhere by state organs (*e. g.*, registration of marriages, births, deaths); the state is also entitled to exert a certain influence in the appointment of ecclesiastical organs, especially of higher ones, and in the establishment of ecclesiastical circuits (parishes, dioceses). It may be that either all the churches in the state or only some of them have this status. If all the religious bodies, recognized by the state, are equally privileged, one speaks of a "system of parity," the characteristic of which appears particularly in the equal protection extended to the teaching of the religious creed and to the performance of the religious prescriptions and ceremonies, and also in the equal apportionment of the state subvention.

The relations between state and church, *i. e.*, the determination of their respective jurisdictions, may be regulated by an act of the state (legislative or administrative); or by an act of the church (such acts as these, emanating from the church alone, appear to be no longer practicable); or by a combined legal act of the state and of the church. This latter act must, of its very nature, be a contract (treaty) which, however, is not concluded between a state and the organization of the members of the church on the territory of this state, but between a

state and the church itself which, as such, is not limited by state boundaries. In concluding such a treaty and under it, state and church are equal, coördinate contracting parties; the church, as far as the conclusion of the treaty is concerned, having the same status as the state, is, like the latter, directly subject to international law; and thus the treaty concluded between state and church by their heads, is an international treaty. Such treaties, up to now, have been made only with the Roman Catholic Church; they are called concordats. It is possible for the regulations embodied in a concordat to be the same as those embodied in a unilateral state or church law. But there is yet this difference that, through the concordat, these regulations are raised to the level of international law, so that they are endowed with all the authority and guarantees of this law. Questions concerning the negotiation, signature and ratification of a concordat, and also questions relative to its invalidation as well as to non-compliance with it, must be settled according to the principles of international law. The concordat is under the same sanctions as any other international treaty. Furthermore, as to the question of when and how the regulations of the concordat become obligatory upon the population of the state and, particularly, upon its organs, all that applies, in this respect, regarding international treaties, applies also to concordats. But this formal equality does not permit us to anticipate anything in the regulation itself; by virtue of a concordat a church may enjoy either a privileged status, or the same rights as all other denominations, or, it may be, even fewer rights than are enjoyed by other denominations in the state concerned. However, a concordat always has this effect—that, under it, any alteration of the legal situation of the church regarding the matters regulated in the concordat, by one side alone, either by state or by church legislation, would be just as illegal as a change not effected by all the contracting parties, of regulations contained in an international treaty.

Concordats have been concluded from time to time with the head of the Catholic Church, the Pope of Rome. This fact alone (even without taking into consideration his right to that "exterritoriality" which is granted only to heads of states, and the diplomatic status of his envoys called "nuncios") proves that from the standpoint of international law the Pope is considered to be the head of a church organization coördinate with the states of the international community. In this respect the legal situation of the Catholic Church and of her head has not been changed, but has merely been confirmed, by the "Lateran

Treaty" which was concluded between the Holy See of Rome and the Kingdom of Italy in 1929. By this treaty the "State of the Vatican City" was created, in which the Pope wields not only spiritual power but the entire and unrestricted temporal power as well; for this reason this new state must be considered independent, enjoying the same legal status as every other state of the international community. However, this temporal power of the Pope in an independent state has been established only as a means of guaranteeing the unhampered exercise of his spiritual sovereignty over the Catholic Church throughout the world, which sovereignty he always had independently of any state recognition. This is clearly expressed in Art. 26 of the Lateran Treaty which reads: "The Holy See maintains that with the agreements signed today adequate assurance is guaranteed as far as is necessary for the said Holy See to provide, with due liberty and independence, for the pastoral regime of the Diocese of Rome and of the Catholic Church in Italy and in the world. . . ."

Thus, church rules, when they are legally connected with state law in any of the ways indicated, and if they are considered solely from the viewpoint of this law, are either general state rules (as may be the case under the system of union of church and state, and as it is in a theocracy, and now also in the "State of the Vatican City," whose legal system is based on canon law and pontifical constitutions and rules), or association law (under the system of "separation of church and state"), or privileged association law, or, in the case of a concordat, international law.



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