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William Stubbs

Excerpt

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## CHAPTER I.

## INTRODUCTION.

1. Constitutional History.—2. Its German origin :—in France.—3. In Spain.—4. In Germany.—5. In England.—6. Analogy of Language.—7. Of Religion.—8. Of Law.—9. Result of the comparison.

1. THE growth of the English Constitution, which is the subject of this book, is the resultant of three forces, whose reciprocal influences are constant, subtle, and intricate. These are the national character, the external history, and the institutions of the people. The direct analysis of the combination forms no portion of our task, for it is not until a nation has arrived at a consciousness of its own identity that it can be said to have any constitutional existence, and long before that moment the three forces have become involved inextricably; the national character has been formed by the course of the national history quite as certainly as the national history has been developed by the working of the national character; and the institutions in which the newly conscious nation is clothed may be either the work of the constructive genius of the growing race, or simply the result of the discipline of its external history. It would then be very rash and unsafe to attempt to assign positively to any one of the three forces the causation of any particular movement or the origin of any particular measure, to the exclusion of the other two; or to argue back from result to cause without allowing for the operation of other co-ordinate and reciprocally acting factors.

But it does not follow that cautious speculation on questions of interest, which are in themselves prior to the starting point, would be thrown away; and some such must necessarily be discussed in order to complete the examination of the subject in its

Preliminary questions.

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integrity by a comparison of its development with the corresponding stages and contemporary phenomena of the life of other nations. Of these questions the most important, and perhaps the only necessary ones, for all minor matters may be comprehended under them, are those of nationality and geographical position ;—who were our forefathers, whence did they come, what did they bring with them, what did they find on their arrival, how far did the process of migration and settlement affect their own development, and in what measure was it indebted to the character and previous history of the land they colonised ?

Germanic  
origin of the  
English.

Such a form of stating the questions suggests at least the character of the answer. The English are not aboriginal, that is, they are not identical with the race that occupied their home at the dawn of history. They are a people of German descent in the main constituents of blood, character, and language, but most especially, in connexion with our subject, in the possession of the elements of primitive German civilisation and the common germs of German institutions. This descent is not a matter of inference. It is a recorded fact of history, which those characteristics bear out to the fullest degree of certainty. The consensus of historians, placing the conquest and colonisation of Britain by nations of German origin between the middle of the fifth and the end of the sixth century, is confirmed by the evidence of a continuous series of monuments. These show the unbroken possession of the land thus occupied, and the growth of the language and institutions thus introduced, either in purity and unmolested integrity, or, where it has been modified by antagonism and by the admixture of alien forms, ultimately vindicating itself by eliminating the new and more strongly developing the genius of the old.

Influence of  
the Ger-  
manic races  
in Europe  
generally.

2. The four great states of Western Christendom—England, France, Spain, and Germany—owe the leading principles which are worked out in their constitutional history to the same source. In the regions which had been thoroughly incorporated with the Roman empire, every vestige of primitive indigenious cultivation had been crushed out of existence. Roman civilisation in its turn fell before the Germanic races : in Britain it had

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*German System in France.*

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perished slowly in the midst of a perishing people, who were able neither to maintain it nor to substitute for it anything of their own. In Gaul and Spain it died a somewhat nobler death, and left more lasting influences. In the greater part of Germany it had never made good its ground. In all four the constructive elements of new life are barbarian or Germanic, though its development is varied by the degrees in which the original stream of influence has been turned aside in its course, or affected in purity and consistency by the infusion of other elements and by the nature of the soil through which it flows.

The system which has for the last twelve centuries formed the history of France, and in a great measure the character of the French people, of which the present condition of that kingdom is the logical result, was originally little more than a simple adaptation of the old German polity to the government of a conquered race. The long sway of the Romans in Gaul had re-created, on their own principles of administration, the nation which the Franks conquered. The Franks, gradually uniting in religion, blood and language with the Gauls, retained and developed the idea of feudal subordination in the organisation of government unmodified by any tendencies towards popular freedom. In France accordingly feudal government runs its logical career. The royal power, that central force which partly has originated, and partly owes its existence to the conquest, is first limited in its action by the very agencies that are necessary to its continuance; then it is reduced to a shadow. The shadow is still the centre round which the complex system, in spite of itself, revolves: it is recognised by that system as its solitary safeguard against disruption, and its witness of national identity; it survives for ages, notwithstanding the attenuation of its vitality, by its incapacity for mischief. In course of time the system itself loses its original energy, and the central force gradually gathers into itself all the members of the nationality in detail, thus concentrating all the powers which in earlier struggles they had won from it, and incorporating in itself those very forces which the feudatories had imposed as limitations on the sovereign power. So its

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Changes in  
the consti-  
tution of  
France.

character of nominal suzerainty is exchanged for that of absolute sovereignty. The only checks on the royal power had been the feudatories ; the crown has outlived them, absorbed and assimilated their functions ; but the increase of power is turned not to the strengthening of the central force, but to the personal interest of its possessor. Actual despotism becomes systematic tyranny, and its logical result is the explosion which is called revolution. The constitutional history of France is thus the summation of the series of feudal development in a logical sequence which is indeed unparalleled in the history of any great state, but which is thoroughly in harmony with the national character, forming it and formed by it. We see in it the German system, modified by its work of foreign conquest and deprived of its home safeguards, on a field exceptionally favourable, prepared and levelled by Roman agency under a civil system which was capable of speedy amalgamation, and into whose language most of the feudal forms readily translated themselves.

The working  
out of  
feudalism.

Kindred  
influences  
of the Goths  
and other  
races in  
Spain.

3. In Spain too the permanency of the Germanic or of the kindred Visigothic influences is a fact of the first historical importance. Here, upon the substratum of an indigenous race conquered, crushed, re-created, remodelled into a Roman province more Roman than Rome itself, is superinduced the conquering race, first to ravage, then to govern, then to legislate, then to unite in religion, and lastly to lead on to deliverance from Moorish tyranny. The rapidity with which Spanish history unfolds itself enables us to detect throughout its course the identity of the ruling, constructive nationality. The Visigothic element is kept to itself at first by its heresy ; before the newness of its conversion has given it time to unite with the conquered nation, it is forced into the position of a deliverer. The Moorish conquest compels union, sympathy, amalgamation, but still leaves the apparatus of government in the hands of the Visigothic kings and nobles ; the common law, the institutions, the names are Germanic. Although the history of Spain, a crusade of seven centuries, forces into existence forms of civil life and expedients of administration which are peculiar to itself, they are distinctly coloured by the pertinacious freedom of the primitive customs ; the con-

stitutional life of Castille is, in close parallel or in marked contrast, never out of direct relation with that of Germany and England, as that of Aragon is with French and Scottish history. To a German race of sovereigns Spain finally owed the subversion of her national system and ancient freedom.

4. In Germany itself, of course, the development of the primitive polity is everywhere traceable. Here there is no alien race, for Germany is never conquered but by Germans; there is much migration, but there is much also that is untouched by migration: where one tribe has conquered or colonised another, there feudal tenure of land and jurisdiction prevails: where the ancient race remains in its old seats, there the alod subsists and the free polity with which the alod is inseparably associated. The imperial system has originated other changes; there are Swabians in Saxony, Saxons in Thuringia: feudal customs in each case follow the tenure, but where the feud is not, there remains the alod, and even the village community and the mark. In the higher ranges of civil order, a mixed imperial and feudal organisation, which like the Spanish has no exact parallel, retains a varying, now substantial, now shadowy existence. The imperial tradition has substituted a fictitious for a true bond of union among the four nations of the German land. To the general reader the constitutional struggle is merely one of nationality against imperialism; of the papal north against the imperial south; but under that surface of turmoil the lower depths of national life and constitutional organism heave constantly. Bavaria, Saxony, Franconia, Swabia have their national policy, and preserve their ancient modifications of the still more ancient customs. The weakness of the imperial centre, the absence of central legislature and judicature, allows the continued existence of the most primitive forms; the want of cohesion prevents at once their development and their extinction. So to deeper study the wonderful fertility and variety of the local institutions of Germany presents a field of work bewildering and even wearying in its abundance: and great as might be the reward of penetrating it, the student strays off to a field more easily amenable to philosophic treatment. The constitutional history of Germany is the

General  
character of  
German  
Constitutional  
History.

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English Constitutional History a development of Germanic principles in comparative purity.

hardest, as that of France is the easiest, subject of historical study. As a study of principles, in continuous and uniform development, it lacks both unity and homogeneousness.

5. England, although less homogeneous in blood and character, is more so in uniform and progressive growth. The very diversity of the elements which are united within the isle of Britain serves to illustrate the strength and vitality of the one which for thirteen hundred years has maintained its position either unrivalled or in victorious supremacy. If its history is not the perfectly pure development of Germanic principles, it is the nearest existing approach to such a development<sup>1</sup>. England gained its sense of unity centuries before Germany: it developed its genius for government under influences more purely indigenous: spared from the curse of the imperial system and the Mezentian union with Italy, and escaping thus the practical abeyance of legislation and judicature, it developed its own common law free from the absolutist tendencies of Roman jurisprudence; and it grew equably, harmoniously, not merely by virtue of local effort and personal privilege.

The smaller states of Europe.

In the four great nationalities the Germanic influence is the dominant principle: in England, Germany and France directly; whilst in Spain all formative power is traceable to the kindred Gothic rule. The smaller states share more or less in the same general characteristics, Portugal with Spain; Scandinavia with Germany and England, with whose institutions it had originally everything in common, and whose development in great things and in small it seems to have followed with few variations, translating their constitutional systems into language of its own.

Italy.

In Italy the confusion of nationalities is most complete, and Roman institutions, owing perhaps to the rapid succession of conquerors and the shortlivedness of their organisations as contrasted with the permanency of the papal-imperial system, subsisted with least change. Yet there also, the Northern States through the German, and the Southern through the Norman connexion, both moreover having gone through the crucible of Lombard

<sup>1</sup> Bethmann-Hollweg, *Civilprocess*, iv. 10. Konrad Maurer, *Kritische Ueberschau*, i. 47. Gneist, *Self-government*, i. 3.

oppression, retain marks of Teutonic impact. The institutions, national and free in one aspect, feudal and absolutist in another, testify, if not to the permanence, at least to the abiding impressions of the association. The republican history of the North and the feudal system of the South, the municipalities of Lombardy and the parliaments of Naples, are much more German than Roman.

6. Nor do the great nationalities return a different answer when interrogated by more convincing tests than that of external history. If language be appealed to, and language is by itself the nearest approach to a perfect test of national extraction, the verdict is in close accordance. The impact of barbarian conquest split up the unity of the Latin tongue as it did that of the Latin empire; it destroyed its uniformity and broke up its constructional forms. But in the breaking it created at least three great languages—the French, the Spanish, and the Italian; each possessing new powers of development which the Latin had lost, and adapting itself to a new literature, fertile in beauty and vivacity, far surpassing the effete inanities that it superseded. The breath of the life of the new literatures was Germanic, varied according to the measure of Germanic influence in other things. The poetry of the new nations is that of the leading race: in South France and Spain Visigothic, in North France Norman, even in Italy it owes all its sweetness and light to the freedom which has breathed from beyond the Alps. In these lands the barbarian tongue has yielded to that of the conquered; in Spain and France because the disproportion of the numbers of the two races was very great; both Franks and Visigoths had become Romanised to a certain extent before the conquest; and the struggle with the native peoples assumed in neither case the character of extermination. In Italy the succession of masters was too rapid to allow a change of language to come into question among the greater and more abiding part of the people. Of the Germans of Germany and the English of early times it is scarcely necessary to speak, for whatever may have been the later modifications, the influence of the Latin of the fifth century on the language of either must have been infinitesimal. No European tongue

*Effect of the German and Gothic conquests on language.*

*and on new literature.*

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Analogy of  
language  
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is more thoroughly homogeneous in vocabulary and in structure than that known as the Anglo-Saxon : it is as pure as those of Scandinavia, where no Roman influences ever penetrated, and no earlier race than the German left intelligible traces. Early and medieval German are also alike unadulterated. The analogy between language and institutions is in these cases direct : in Spain and France the outer garb is Roman, the spirit and life is Germanic : one influence preponderates in the language, the other in the polity ; and the amalgamation is complete when the Gaul has learned to call himself a Frenchman, when the Goth, the Suevian, the Alan and the Vandal, are united under the name of Spaniard.

Evidence of  
religion.

7. The most abiding influence of Rome is that of religion ; the Roman church continues to exist when the old imperial administration has perished. Spain, Gaul and Italy, even Western Britain and Western Germany, retain the Christianity which Roman missions have planted. Yet in this very department the importance of the new spring of life is specially conspicuous. Spain alone of the four nations owes nothing to German Christianity. Her religious history is exactly analogous to that of her language : after a century's struggle the Visigoth and the Suevian become Catholic. In France and Western

Germanic  
influence on  
the Church.

Germany, which had been Christianised mainly under the imperial influences, and had developed an independent theology during the Roman period, the influx of the Franks and their subsequent conversion produced a complex result. The Christianity which had stood out against Visigothic indifference or intolerance, withered under Frank patronage. The secular tendencies of the imperial religious administration expanded under the Merovingian imitators, and had it not been for the reformation begun by Boniface and worked out under the auspices of the Karolings, the Gallican church might have sunk to the level of the Italian or the Byzantine. But the same Austrasian influences which revived the composite nationality, breathed new life into the fainting church, drawing from England and the converted North new models of study and devotion. The labours of English missionaries in German Saxony helped to



consolidate and complete in both church and state the Germanic empire of the Karolings. The Austrasian domination was more purely Germanic than the Neustrian which it superseded. Charles the Great, as the reformer of the church and founder of the modern civilisation of France, was a German king who worked chiefly by German instruments.

8. In the domain of Law the comparison is equally clear. The number of possible factors is small: the primitive codes of the conquerors, the Roman law under which the conquered were living, and the feudal customs which were evolved from the relations of the two races. For there remain no original vestiges of the indigenous laws of Spain and Gaul, and it is only from Irish and Welsh remains of comparatively late date that we find that the Celtic tribes had any laws at all.

Influence of German customs on the common law of the nations.

The common law of Spain is throughout the medieval period Germanic in its base: although the written law of the Visigoths is founded on the Theodosian code, and the so-called Roman natives lived by Roman law, the *fueros* which contain the customary jurisprudence are distinctly akin to the customs of England and Germany; the wergild and the system of compurgation, the primitive elements of election and representation, are clearly traceable<sup>1</sup>. It is not until the fourteenth century that the civil law of Justinian supersedes the ancient customs, and then with its invariable results.

Spain.

Medieval France is divided between the feudal customs of the North and the personal law of the South, which last was chiefly based on the Theodosian and earlier Roman jurisprudence. The former territory is more Frank in population, nearer to the German home, and bears more distinct marks of Karolingian legislation; the latter, before the Frank conquest, has borne the successive waves of Visigothic and Burgundian invasion, and has strengthened through them, or imparted to them, its own legal system as developed under the Romans. Of the great expositions of feudal custom, most are from Northern France: the

France.

<sup>1</sup> Dunham, *History of Spain and Portugal*, iv. 109-118: from *Edinb. Review*, No. 61 (an article attributed to Palgrave). Palgrave, *Commonwealth*, pp. 128-131, &c. Lea, *Superstition and Force*, p. 65.

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*libri feudorum* were compiled by Lombard lawyers from the acts of the Franconian and Swabian emperors ; and the Assizes of Jerusalem are based on the work of a Lotharingian lawgiver. The essence of feudal law is custom, and custom escapes the jealousies and antipathies that assail law imposed by a legislative centre : it grows and extends its area by imitation rather than by authority : and the scientific lawyer can borrow a custom of feudal jurisprudence where he cannot venture to lay down a principle of Roman law. Hence the uncertainty of detail contrasted with the uniformity of principle in feudal law.

Law in Germany.

Germany, except in the few Capitularies of the Frank sovereigns, has no central or common written law ; even the Capitularies are many of them only local in their operation : she does not except by way of custom adopt the Roman civil law ; her feudal law is, like the feudal law elsewhere, based on the Frank customs. Her common law, whether sought in the jurisprudence of the Alemanni, the Franks and the Saxons, or enunciated in the *Sachsenspiegel* and the *Schwabenspiegel*, is primitive, just as all her lower range of institutions may be said to be ; it subsists but it does not develop.

English common law based on early Germanic usages.

England has inherited no portion of the Roman legislation except in the form of scientific or professional axioms, introduced at a late period, and through the ecclesiastical or scholastic or international university studies. Her common law is, to a far greater extent than is commonly recognised, based on usages anterior to the influx of feudality, that is, on strictly primitive custom ; and what she has that is feudal may be traced through its Frank stage of development to the common Germanic sources <sup>1</sup>.

General result.

9. The result of this comparison is to suggest the probability that the polity developed by the German race on British soil is the purest product of their primitive instinct. With the exception of the Gothic Bible of Ulfilas, the Anglo-Saxon remains are the earliest specimens of Germanic language as well as literature, and the development of modern English from the Anglo-Saxon is a

<sup>1</sup> Brunner, in *Holtzendorff's Encyclopädie*, pp. 226, 227.