The Division of Labor in Society

by

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9. Lebon, *L'homme et les sociétés*, vol. II, p. 154.
10. Bischoff, *Das Herngewicht der Menschen. Eine Studie* (Bonn, 1880).
11. Waitz, *Anthropologie*, vol. III, pp. 101–2.
12. Ibid., vol. VI, p. 121.
13. H. Spencer, *The Principles of Sociology* (London, 1876) vol. I, pp. 753–4.
14. The matriarchal family certainly existed among the Germanic tribes. Cf. Dargun, *Mutterrecht und Raubehe im germanischen Rechte* (Breslau, 1883).
15. W. Robertson Smith, *Marriage and Kinship in Early Arabia* (Cambridge, 1885) p. 67.
16. Lebon, *L'homme*, p. 154.
17. A. Comte, *Cours de philosophie positive*, vol. IV, p. 425. Analogous ideas are to be found in Schaeffle, *Bau und Leben des sozialen Körpers*, vol. II, *passim*, and Clément, *Science sociale*, vol. I, pp. 235 ff.
18. Cf. *infra*, Book III, Chapter I.
19. Bain, *Emotions and The Will*.
20. H. Spencer, *The Principles of Psychology* (London, 1881) vol. I, pp. 558–77.

Chapter II

Mechanical Solidarity, or Solidarity by Similarities

The bond of social solidarity to which repressive law corresponds is one the breaking of which constitutes the crime. We use the term 'crime' to designate any act which, regardless of degree, provokes against the perpetrator the characteristic reaction known as punishment. To investigate the nature of this bond is therefore to ask what is the cause of the punishment or, more precisely, what in essence the crime consists of.

Assuredly crimes of different species exist. But it is no less certain that all these species of crime have something in common. This is proved by the reaction that they provoke from society: the fact that punishment, except for differences in degree, always and everywhere exists. The oneness of the effect reveals the oneness of the cause. Undoubtedly essential resemblances exist not only among all crimes provided for in the legislation of a single society, but among all crimes recognised as such and punished in different types of society. No matter how different these acts termed crimes may appear to be at first sight, they cannot fail to have some common basis. Universally they strike the moral consciousness of nations in the same way and universally produce the same consequence. All are crimes, that is, acts repressed by prescribed punishments. Now the essential properties of a thing lie in those observed wherever it exists and which are peculiar to it. Thus if we wish to learn in what crime essentially consists, we must distinguish those traits identical in all the varieties of crime in different types of society. Not a single one of these types may be omitted. Legal conceptions in the lowest forms of society are as worthy of consideration as those in the highest forms. They are facts that prove no less instructive. To rule them out of court would be to run the risk of perceiving the essence

of crime where it is not. It would be like the biologist whose definition of living phenomena would be very inexact if he had scorned to observe single-cell entities. If he had looked at organisms alone – and particularly the higher organisms – he would have wrongly concluded that life consists essentially in the organisation of cells.

The way to discover this permanent, general element is clearly not to go through all those acts which have been designated as crimes at all times and in all places, in order to note the characteristics they present. For, despite what has been stated, if there are acts that have been universally regarded as criminal, these constitute a tiny minority. Thus such a method would provide us with only a singularly distorted notion of the phenomenon, because it would apply only to exceptions.[1] The variations in repressive law at the same time prove that this unchanging character is not to be found in the intrinsic properties of acts imposed or prohibited by penal rules, because these display so great a diversity, but in the relationship they entertain with some condition outside themselves.

This relationship was believed to lie in the kind of antagonism existing between these acts and the larger interests of society. It has been claimed that penal rules have expressed for each type of society the basic conditions for collective life. Their authority thus sprang from necessity. Moreover, since these needs vary according to societies, one could in this way explain the variations in repressive law. We have already given our views on this point. Such a theory ascribes much too large a part to deliberate calculation and reflection in directing social evolution. There are a whole host of acts which have been, and still are, regarded as criminal, without in themselves being harmful to society. The act of touching an object that is taboo, or an animal or man who is impure or consecrated, of letting the sacred fire die out, of eating certain kinds of meat, of not offering the traditional sacrifice on one's parents' grave, of not pronouncing the precise ritual formula, or of not celebrating certain feasts, etc. – how have any of these ever constituted a danger to society? Yet we know the prominent position occupied in the repressive law of a large number of peoples by such a regulation of ritual, etiquette, ceremonial and religious practices. We need only open the Pentateuch to be convinced of it. Moreover, as these facts are found normally in certain social species, we cannot regard them

as mere anomalies or pathological cases which we may legitimately dismiss.

Even where the criminal act is certainly harmful to society, the degree of damage it causes is far from being regularly in proportion to the intensity of repression it incurs. In the penal law of most civilised peoples murder is universally regarded as the greatest of crimes. Yet an economic crisis, a crash on the stock market, even a bankruptcy, can disorganise the body social much more seriously than the isolated case of homicide. Assuredly murder is always an evil, but nothing proves that it is the greatest evil. What does one human being the less matter to society? Or one cell fewer in the organism? It is said that public safety would be endangered in the future if the act remained unpunished. But if we compare the degree of danger, however real it may be, to the penalty, there is a striking disproportion. All in all, the instances just cited show that an act can be disastrous for society without suffering the slightest repression. On any score, therefore, this definition of crime is inadequate.

Modifying the definition, can it be asserted that criminal acts are those that *seem* harmful to the society that represses them? Can we also say that penal rules express, not the conditions essential to social life, but those that *appear* to be so to the group observing the rules? Yet such an explanation explains nothing: it does not allow us to understand why, in so many cases, societies have mistakenly enforced practices which in themselves were not even useful. In the end this alleged solution to the problem really amounts to a truism. If societies therefore force every individual to obey these rules it is plainly because, rightly or wrongly, they esteem this systematic and exact obedience to be indispensable, insisting strongly upon it. This therefore comes down to our saying that societies deem the rules necessary because they deem them necessary! What we should be saying is why they judge them necessary. If the view held by societies was based upon the objective necessity for prescriptive punishments, or at least upon their utility, this would be an explanation. But this goes against the facts, so the entire problem remains unsolved.

However, this latter theory is not without some foundation. It is correct in seeking the conditions that constitute criminality in certain states of the individual. Indeed, the only feature common to all crimes is that, saving some apparent exceptions to be examined later, they comprise acts universally condemned by the members of

each society. Nowadays the question is raised as to whether such condemnation is rational and whether it would not be wiser to look upon crime as a mere sickness or error. But we need not launch into such discussions, for we are seeking to determine what is or has been, not what should be. The real nature of the fact we have just established cannot be disputed, viz., that crime disturbs those feelings that in any one type of society are to be found in every healthy consciousness.

We can determine in no other way the nature of these sentiments nor define them in relation to their special purposes, for these purposes have varied infinitely, and can vary again.[2] Nowadays it is altruistic sentiments that manifest this characteristic most markedly. But at one time, not at all distant, religious or domestic sentiments, and a host of other traditional sentiments, had precisely the same effect. Even now, despite what Garofalo says, a mere negative sympathy for others is by no means the only condition for bringing about such an effect. Even in peacetime do we not feel as much aversion for the man who betrays his country as for the robber and swindler? In countries where feeling for the monarchy is still alive, do not crimes of *lèse-majesté* arouse the general indignation? In democratic countries do not insults levelled at the people unleash the same anger? Thus we cannot draw up a catalogue of those sentiments the violation of which constitutes the criminal act. Such feelings are indistinguishable from others, save for one characteristic: they are shared by most average individuals in the same society. Thus the rules forbidding those acts for which the penal law provides sanctions are the sole ones to which the celebrated legal axiom, 'No man is presumed ignorant of the law', can be applied without exaggeration. Since the rules are inscribed upon everyone's consciousness, all are aware of them and feel they are founded upon right. At least this is true for the normal condition. If adults are encountered who are ignorant of these basic rules or refuse to recognise their authority, such ignorance or refusal to submit are irrefutably symptoms of a pathological aversion. Or if by chance a penal rule persists for some time although disputed by everyone, it is because of a conjunction of exceptional circumstances, which are consequently abnormal – and such a state of affairs can never endure.

This explains the special manner in which penal law becomes codified. All written law serves a dual purpose: to prescribe certain

obligations, and to define the sanctions attached to them. In civil law, and more generally in every kind of law where sanctions are restitutory, the legislator approaches and resolves these two problems separately. Firstly, he determines the nature of the obligation as exactly as possible; only then does he state the manner in which a sanction should be applied. For example, in the chapter of the French civil code devoted to the respective duties of husband and wife, these rights and duties are spelt out in a positive way, but nothing is said as to what happens when these duties are not fulfilled by one or the other party. The sanction must be sought elsewhere in the Code. Occasionally the sanction is even taken totally for granted. Thus Article 214 of the civil code prescribes that the wife must live with her husband; one may deduce that the husband can oblige her to return to the marital home, but this sanction is nowhere formally laid down. By contrast, penal law prescribes only sanctions and says nothing about the obligations to which they relate. It does not ordain that the life of another person must be respected, but ordains the death of the murderer. It does not first state, as does civil law: This is the duty; but states immediately: This is the punishment. Undoubtedly if an act is punished, it is because it is contrary to a mandatory rule, but this rule is not expressly spelt out. There can be only one reason for this: it is because the rule is known and accepted by everybody. When a customary law acquires the status of a written law and is codified, it is because litigious questions require a solution more closely defined. If the custom continued quietly to function, provoking no argument or difficulty, there would be no reason for it to undergo this transformation. Since penal law is only codified so as to establish a sliding scale of penalties, it is therefore because a custom by itself can give rise to doubt. Conversely, if rules whose violation entails punishment need no juridical expression it is because they are not at all a subject of dispute, and because everyone feels their authority.[3]

It is true that sometimes the Pentateuch does not lay down sanctions, although, as we shall see, it contains little else than penal rules. This is the case for the Ten Commandments, as they are formulated in Exodus 20 and Deuteronomy 5. But this is because the Pentateuch, although it fulfilled the function of a code, is not properly one. Its purpose is not to gather together into a single system, and to detail with a view to their application, the penal rules followed by the Jewish people. So far short does it fall of forming a

codification that the various sections comprising it do not even seem to have been drawn up at the same time. It is above all a summary of the traditions of all kinds through which the Jews explained to themselves, and in their own way, the origins of the world, of their society and of their main social practices. Thus if the Pentateuch enunciates certain duties to which punishments were certainly attached, this is not because they were unknown or failed to be acknowledged by the Jews, or because it was necessary to reveal them to them. On the contrary, since the book is merely a compilation of national legends, we may be sure that all it contained was graven on everyone's consciousness. Nevertheless it was essential to recapitulate in a set form the popular beliefs about the origins of these precepts, the historical circumstances in which it was assumed that they had been promulgated, and the sources of their authority. From this viewpoint, therefore, the determination of punishments becomes something incidental.[4]

For the same reason the operation of repressive justice always tends to some extent to remain diffuse. In very different types of society it is not exercised through a special magistrate, but society as a whole shares in it to a greater or lesser degree. In primitive societies where, as we shall see, law is wholly penal in character, it is the people assembled together who mete out justice. This was the case for the primitive Germans.[5] In Rome, whereas civil matters fell to the praetor, criminal ones were judged by the people, at first by the *comices curiates*, and then, from the law of the Twelve Tables onwards, by the *comices centuriates*. Until the end of the Republic, although in fact the people had delegated its powers to standing commissions, they remained the supreme judges in these kinds of cases.[6] In Athens, under the legislation of Solon, criminal jurisdiction fell in part to the Ηλίαια, a huge collegial body which nominally included all citizens over the age of thirty.[7] Lastly, in Germano-Roman nations society intervened in the exercise of these same functions in the form of the jury. Thus the diffuse state that pervades this sphere of judicial power would be inexplicable if the rules whose observance it ensures, and in consequence the sentiments these rules reflect, were not immanent in everyone's consciousness. It is true that in other cases the power was held by a privileged class or by special magistrates. Yet these facts do not detract from the value as proof of the other ones mentioned. Although the feelings of the collectivity are no longer expressed

save through certain intermediaries, it does not follow that these feelings are no longer of a collective nature just because they are restricted to the consciousnesses of a limited number of people. Their delegation to these people may be due either to an ever-increasing growth in cases necessitating the appointment of special officials, or to the extreme importance assumed by certain personages or classes in society, which authorises them to be the interpreters of its collective sentiments.

Yet crime has not been defined when we have stated that it consists of an injury done to the collective sentiments, since some of these may be wounded without any crime having been committed. Thus incest is fairly generally an object of aversion, and yet it is a purely immoral act. The same holds good for breaches of sexual honour committed by a woman outside marriage, either by yielding her liberty utterly to another or by receiving the surrender of his liberty. Thus the collective sentiments to which a crime corresponds must be distinguished from other sentiments by some striking characteristic: they must be of a certain average intensity. Not only are they written upon the consciousness of everyone, but they are deeply written. They are in no way mere halting, superficial caprices of the will, but emotions and dispositions strongly rooted within us. The extreme slowness with which the penal law evolves demonstrates this. It is not only less easily modified than custom, but is the one sector of positive law least amenable to change. For instance, if we observe what the law-givers have accomplished since the beginning of the century in the different spheres of the law, innovations in penal law have been extremely rare and limited in scope. By contrast, new rules have proliferated in other branches of the law – civil, commercial, administrative or constitutional. If we compare penal law as laid down in Rome by the Law of the Twelve Tables with its condition in the classical era, the changes we note are minimal beside those that civil law underwent over the same period. Mainz states that from the Twelve Tables onwards the main crimes and offences were fixed: 'For ten generations the calendar of public crimes was not added to save by a few laws which punished embezzlement of public funds, conspiracy and perhaps *plagium*.'[8] As for private offences, only two new ones were recognised: plundering (*actio bonorum vi raptorum*) and malicious damage (*damnum injuria datum*). Such is the position everywhere. In the lower forms of society, as will be seen, law is almost exclusively of a penal kind,

and consequently remains unchanged. Generally religious law is always repressive: it is essentially conservative. This unchangeable character of penal law demonstrates the strength of resistance exerted by the collective sentiments to which it corresponds. Conversely, the greater malleability of purely moral laws and the relative swiftness with which they evolve demonstrates the lesser strength of the sentiments underlying them. They have either developed more recently and have not yet had time to penetrate deeply the individual consciousness, or their roots are in a state of decay and are floating to the surface.

A last addition is needed for our definition to be accurate. If, in general, the sentiments that purely moral sanctions protect, that is, ones that are diffuse, are less intense and less solidly organised than those protected by punishments proper, exceptions still remain. Thus there is no reason to concede that normal filial piety or even the elementary forms of compassion for the most blatant forms of misery are nowadays more superficial sentiments than is the respect for property or public authority. Yet the wayward son and even the most arrant egoist are not treated as criminals. Consequently it is not enough for these sentiments to be strongly held; they must be precise. Indeed, every single one relates to a very clearly defined practice. Such a practice may be simple or complex, positive or negative, that is, consisting in an action undertaken or avoided; but it is always determinate. It is a question of doing or not doing this or that, of not killing or wounding, or uttering a particular formula, or accomplishing a particular rite, etc. By contrast, sentiments such as filial love or charity are vague aspirations to very general objects. Thus penal rules are notable for their clarity and precision, whilst purely moral rules are generally somewhat fluid in character. Their indeterminate nature not infrequently makes it hard to formulate any clear definition of them. We may state very generally that people should work, or have compassion for others, etc., but we cannot determine precisely the manner or extent to which they should do so. Consequently there is room here for variations and shades of meaning. By contrast, because the sentiments embodied in penal rules are determinate, they possess a much greater uniformity. As they cannot be interpreted in different ways, they are everywhere the same.

We are now in a position to conclude.

The totality of beliefs and sentiments common to the average

members of a society forms a determinate system with a life of its own. It can be termed the collective or common consciousness. Undoubtedly the substratum of this consciousness does not consist of a single organ. By definition it is diffused over society as a whole, but nonetheless possesses specific characteristics that make it a distinctive reality. In fact it is independent of the particular conditions in which individuals find themselves. Individuals pass on, but it abides. It is the same in north and south, in large towns and in small, and in different professions. Likewise it does not change with every generation but, on the contrary, links successive generations to one another. Thus it is something totally different from the consciousnesses of individuals, although it is only realised in individuals. It is the psychological type of society, one which has its properties, conditions for existence and mode of development, just as individual types do, but in a different fashion. For this reason it has the right to be designated by a special term. It is true that the one we have employed above is not without ambiguity. Since the terms 'collective' and 'social' are often taken as synonyms, one is inclined to believe that the collective consciousness is the entire social consciousness, that is, co-terminous with the psychological life of society, whereas, particularly in higher societies, it constitutes only a very limited part of it. Those functions that are judicial, governmental, scientific or industrial – in short, all the specific functions – appertain to the psychological order, since they consist of systems of representation and action. However, they clearly lie outside the common consciousness. To avoid a confusion[9] that has occurred it would perhaps be best to invent a technical expression which would specifically designate the sum total of social similarities. However, since the use of a new term, when it is not absolutely necessary, is not without its disadvantages, we shall retain the more generally used expression, 'collective (or common) consciousness', but always keeping in mind the restricted sense in which we are employing it.

Thus, summing up the above analysis, we may state that an act is criminal when it offends the strong, well-defined states of the collective consciousness.[10]

This proposition, taken literally, is scarcely disputed, although usually we give it a meaning very different from the one it should have. It is taken as if it expressed, not the essential characteristics of the crime, but one of its repercussions. We well know that crime

offends very general sentiments, but ones that are strongly held. But it is believed that their generality and strength spring from the criminal nature of the act, which consequently still remains wholly to be defined. It is not disputed that any criminal act excites universal disapproval, but it is taken for granted that this results from its criminal nature. Yet one is then hard put to it to state what is the nature of this criminality. Is it in a particularly serious form of immorality? I would concur, but this is to answer a question by posing another, by substituting one term for another. For what *is* immorality is precisely what we want to know – and particularly that special form of immorality which society represses by an organised system of punishments, and which constitutes criminality. Clearly it can only derive from one or several characteristics common to all varieties of crime. Now the only characteristic to satisfy that condition refers to the opposition that exists between crime of any kind and certain collective sentiments. It is thus this opposition which, far from deriving from the crime, constitutes the crime. In other words, we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness. We do not condemn it because it is a crime, but it is a crime because we condemn it. As regards the intrinsic nature of these feelings, we cannot specify what that is. They have very diverse objects, so that they cannot be encompassed within a single formula. They cannot be said to relate to the vital interests of society or to a minimum of justice. All such definitions are inadequate. But by the mere fact that a sentiment, whatever may be its origin and purpose, is found in every consciousness and endowed with a certain degree of strength and precision, every act that disturbs it is a crime. Present-day psychology is increasingly turning back to Spinoza's idea that things are good because we like them, rather than that we like them because they are good. What is primary is the tendency and disposition: pleasure and pain are only facts derived from this. The same holds good for social life. An act is socially evil because it is rejected by society. But, it will be contended, are there no collective sentiments that arise from the pleasure or pain that society feels when it comes into contact with their objects? This is doubtless so, but all such sentiments do not originate in this way. Many, if not the majority, derive from utterly different causes. Anything that obliges our activity to take on a definite form can give rise to habits that result in dispositions which

then have to be satisfied. Moreover, these dispositions alone are truly fundamental. The others are only special forms of them and are more determinate. Thus to find charm in a particular object, collective sensibility must already have been constituted in such a way as to be able to appreciate it. If the corresponding sentiments are abolished, an act most disastrous for society will not only be capable of being tolerated, but honoured and held up as an example. Pleasure cannot create a disposition out of nothing; it can only link to a particular end those dispositions that already exist, provided that end is in accordance with their original nature.

Yet there are cases where the above explanation does not appear to apply. There are acts that are repressed with greater severity than the strength of their condemnation by public opinion. Thus combinations between officials, the encroachment by judicial authorities on the administrative powers, or by religious upon secular functions are the object of a repression which is disproportionate to the indignation they arouse in the individual consciousness. The misappropriation of public property leaves us fairly indifferent, and yet for it fairly stiff punishments are meted out. It may even happen that an act that is punished does not directly offend any collective sentiment. We feel no urge to protest against fishing or hunting in the close season, or against overloaded vehicles on the public highway. Yet we have no grounds for distinguishing these offences completely from others. Any radical distinction[11] would be arbitrary, since all exhibit in varying degree the same external criterion. Doubtless in none of these examples does the punishment appear unjust. If the punishment is not rejected by public opinion, such opinion, if left to its own devices, would either not insist upon it at all or would show itself less demanding. Thus in all cases of this kind the criminality does not derive – or at least not entirely so – from the degree of sensitivity of the collective sentiments which are offended, but may be traced to another cause.

It is undoubtedly the case that once some governmental authority is instituted it possesses enough power of itself to attach penal sanctions on its own initiative to certain rules of conduct. By its own action it has the ability to create certain crimes or to attach greater seriousness to the criminal character of certain others. Thus all the acts we have just instanced have one characteristic in common, that is, they are directed against one or other of the bodies that control the life of society. Should we then concede that they are two types of

crime springing from two different causes? Such an hypothesis cannot be considered for a moment. However numerous its varieties, crime is essentially the same everywhere, since everywhere it entails the same consequence, that is, punishment. Although this may vary in severity, it does not thereby change in nature. Now the same fact cannot have two causes, unless this duality is only apparent and fundamentally the causes are one. That power to react peculiar to the state must be of the same nature as that spread throughout society as a whole.

Where, in fact, might it originate? From the serious nature of the interests that the state directs, interests that require protecting in a very special way? But we know that the harm alone done to these interests, weighty though they may be, is not enough to determine the reaction of punishment. The harm must also be perceived in a certain manner. Moreover, how does it come about that the slightest injury done to the organ of government is punished, whilst other injuries of a much more fearsome kind inflicted on other bodies within society are redressed only by recourse to civil law? The slightest infringement of the regulations relating to the highways and waterways is penalised by a fine. But even the repeated breaching of contracts, or persistently unscrupulous conduct in economic relationships, merely necessitates the apportionment of damages. The machinery of government certainly plays an outstanding role in social life, but there are other bodies in society whose interests continue to be vital and yet whose functioning is not underpinned in the same manner. If the brain is of importance, the stomach is likewise an essential organ, and the latter's ailments may be threatening to life, just as are the former's. Why is this privileged position accorded to what is occasionally called the 'brain' of society?

The problem is easily solved when we perceive that wherever an authority with power to govern is established its first and foremost function is to ensure respect for beliefs, traditions and collective practices – namely, to defend the common consciousness from all its enemies, from within as well as without. It thus becomes the symbol of that consciousness, in everybody's eyes its living expression. Consequently the energy immanent within the consciousness is communicated to that authority, just as affinities of ideas are transmitted to the words they represent. This is how the

authority assumes a character that renders it unrivalled. It is no longer a social function of greater or lesser importance, it is the embodiment of the collectivity. Thus it partakes of the authority that the collectivity exercises over the consciousness of individuals, and from this stems its strength. Yet once this strength has arisen, not breaking free from the source from which it derives and on which it continues to feed, it nevertheless becomes a factor of social life which is autonomous, capable of producing its own spontaneous actions. Precisely because of the hegemony this strength has acquired, these actions are totally independent of any external impulsion. On the other hand, since it is merely derived from the power immanent in the common consciousness, it necessarily possesses the same properties and reacts in similar fashion, even when the common consciousness does not react entirely in unison. It thus wards off any hostile force, just as would the diffused consciousness of society, even if the latter does not feel that hostility or feels it less strongly; that is, a governing authority categorises as crimes those acts that are harmful to it, even when the sentiments of the collectivity are not affected to the same extent. Nevertheless, it is from these latter sentiments that it receives the whole power allowing it to create crimes and offences. As well as the certainty that the power cannot come from elsewhere and yet cannot come from nothing, the following facts (on which we shall expand fully in the rest of this volume) confirm this explanation. The scope of the action that governmental authority exerts over the number of criminal acts, and the designation of what is criminal, depend upon the power it possesses. This power in turn may be measured either by the degree of authority that it exercises over its citizens or by the degree of seriousness attributed to the crimes directed against it. We shall see that it is in lower societies that this authority is greatest and where this seriousness weighs most heavily, and moreover, that it is in these self-same types of society that the collective consciousness possesses most power.[12]

Thus it is always to the collective consciousness that we must return. From it, directly or indirectly, all criminality flows. Crime is not only injury done to interests which may be serious; it is also an offence against an authority which is in some way transcendent. Experientially speaking, there exists no moral force superior to that of the individual, save that of the collectivity.

Moreover, there exists a means of verifying the conclusion at which we have just arrived. What characterises a crime is that it determines the punishment. Thus if our own definition of crime is exact it must account for all the characteristics of the punishment. We shall proceed to verify this.

Firstly, however, we must establish what those characteristics are.

II

In the first place, punishment constitutes an emotional reaction. This characteristic is all the more apparent the less cultured societies are. Indeed primitive peoples punish for the sake of punishing, causing the guilty person to suffer solely for the sake of suffering and without expecting any advantage for themselves from the suffering they inflict upon him. The proof of this is that they do not aim to punish fairly or usefully, but only for the sake of punishing. Thus they punish animals that have committed the act that is stigmatised,[13] or even inanimate things which have been its passive instrument.[14] When the punishment is applied solely to people, it often extends well beyond the guilty person and strikes even the innocent – his wife, children or neighbours, etc.[15] This is because the passionate feeling that lies at the heart of punishment dies down only when it is spent. Thus if, after having destroyed the one who was its most immediate cause, some strength of feeling still remains, quite automatically it reaches out further. Even when it is sufficiently moderate in intensity to attack only the guilty person it manifests its presence by its tendency to exceed in seriousness the act against which it is reacting. From this there arose refinements of pain that were added to capital punishment. In Rome the thief had not only to give back the object stolen but also to pay a fine of double or even quadruple its value.[16] Moreover, is not the aim of the very widespread punishment of talion to assuage the passion for vengeance?

Nowadays, however, it is said that punishment has changed in nature. Society no longer punishes to avenge, but to defend itself. In its hands the pain it inflicts is only a systematic instrument for its protection. Society punishes, not because the punishment of itself affords some satisfaction, but in order that the fear of punishment may give pause to the evilly inclined. It is no longer wrath that

governs repression, but well premeditated foresight. Thus the preceding remarks cannot be generally applied: they may only concern the primitive form of punishment and cannot be extended to cover its present-day form.

Yet, in order to justify legitimately so radical a distinction between these two sorts of punishment it is not enough to demonstrate that they are employed for different ends. The nature of a practice does not necessarily alter because the conscious intentions of those implementing it are modified. Indeed it could already have fulfilled the same role in former times without this having been perceived. In that case why should it be transformed by the mere fact that we realise more fully the effects that it produces? It adapts itself to the new conditions of existence created for it without thus undergoing any essential changes. This is what happened in the case of punishment.

It would indeed be mistaken to believe that vengeance is mere wanton cruelty. It may very possibly constitute by itself an automatic, purposeless reaction, an emotional and senseless impulse, and an unreasoned compulsion to destroy. But in fact what it tends to destroy was a threat to us. Therefore in reality it constitutes a veritable act of defence, albeit instinctive and unreflecting. We wreak vengeance only upon what has done us harm, and what has done us harm is always dangerous. The instinct for revenge is, after all, merely a heightened instinct of self-preservation in the face of danger. Thus it is far from true that vengeance has played in human history the negative and sterile role attributed to it. It is a weapon of defence, which has its own value – only it is a rough and ready weapon. As it has no conception of the services that it automatically renders it cannot consequently be regulated. It strikes somewhat at random, a prey to the unseeing forces that urge it on, and with nothing to curb its accesses of rage. Nowadays, since we are better aware of the purpose to be achieved, we also know better how to use the means at our disposal. We protect ourselves more systematically, and consequently more effectively. But from the very beginning this result was achieved, although less perfectly. Thus between the punishment of today and yesterday there is no great gulf, and consequently it had no need to change to accommodate itself to the role that it plays in our civilised societies. The whole difference lies in the fact that punishment now produces its effects with a greater awareness of what it is about.

Now, although the individual or social consciousness does not fail to influence the reality it highlights, it has no power to change the nature of that reality. The internal structure of the phenomena remains unchanged, whether these are conscious or not. We may therefore expect the essential elements of punishment to be the same as before.

And indeed punishment has remained an act of vengeance, at least in part. It is claimed that we do not make the guilty person suffer for the sake of suffering. It is nevertheless true that we deem it fair that he should suffer. We may be wrong, but this is not what is at issue. We are seeking for the present to define punishment as it is or has been, and not how it should be. Certainly the term 'public vindication', which recurs incessantly in the language of the law-courts, is no vain expression. If we suppose that punishment can really serve to shield us in the future, we esteem that above all it should be an *expiation* for the past. What proves this are the meticulous precautions we take to make the punishment fit the seriousness of the crime as exactly as possible. These precautions would be inexplicable unless we believed that the guilty person must suffer because it is he who has done the injury, and indeed must suffer in equal measure. In fact this gradation is unnecessary if punishment is only a defence mechanism. It would undoubtedly be dangerous for society if the gravest criminal undertakings were placed on the same level as mere minor offences. Yet in most cases there could only be advantage in placing the minor ones on the same level as the serious ones. One cannot take too many precautions against one's enemy. Can we say that the perpetrators of the most trivial offences possess natures any less perverse and that, to counteract their evil instincts, less onerous punishments will suffice? But although their tendencies may be less tainted with vice, they are not thereby less intense. Thieves are as strongly disposed to thieving as murderers to homicide. The resistance shown by the former category is in no way weaker than that of the latter. Thus, to overcome it, we should have recourse to the same means. If, as has been said, it was solely a matter of repelling a harmful force by an opposing one, the latter's intensity should be merely commensurate with that of the former, without the quality of the harmful force being taken into consideration. The scale of punishments should therefore comprise only very few gradations. The punishment

should vary only according to whether the subject is more or less hardened a criminal, and not according to the nature of the criminal act. An incorrigible thief should be treated like an incorrigible murderer. But in fact, even when it had been shown that the guilty person is definitely incurable, we would still not feel bound to mete out excessive punishment to him. This demonstrates that we have remained true to the principle of talion, although we conceive of it in a more lofty sense than once we did. We no longer measure in so material and rough terms either the gravity of the fault or the degree of punishment. But we still consider that there should be an equilibrium between the two elements, whether we derive any advantage or not in striking such a balance. Thus punishment has remained for us what it was for our predecessors. It is still an act of vengeance, since it is an expiation. What we are avenging, and what the criminal is expiating, is the outrage to morality.

There is above all one form of punishment where this passionate character is more apparent than elsewhere: it is shame that doubles most punishments, and that increases with them. Very often it serves no purpose. What good does it do to disgrace a man who is no longer to live in the society of his peers and who has more than abundantly proved by his behaviour that more fearful threats have failed to deter him? To disgrace him is understandable when there is no other punishment available, or as a supplement to some comparatively trivial material penalty. Where this is not the case punishment does the same task twice over. One may even say that society only resorts to legal punishments when others are inadequate. If this is so, why continue with the latter? They are a form of additional tribulation that serves no purpose, or one whose sole reason is the need to repay evil with evil. They are so much the result of instinctive, irresistible feelings that they often spread to innocent objects. Thus the scene of the crime, the tools used in it, the relatives of the guilty person – all sometimes share in the opprobium that we heap upon him. The causes that give rise to this diffused repression are also those of the organised repression that accompanies it. Moreover, we need only observe how punishment operates in the law-courts to acknowledge that its motivating force is entirely emotional. For it is to the emotions that both prosecuting and defending counsel address themselves. The latter seeks to arouse sympathy for the guilty person, the former to stir up the social

sentiments that have been offended by the criminal act, and it is under the influence of these opposing passions that the judge delivers sentence.

Thus the nature of punishment has remained essentially unchanged. All that can be said is that the necessity for vengeance is better directed nowadays than in the past. The spirit of foresight that has been awakened no longer leaves the field so clear for the blind play of passion; it contains it within set limits, opposing absurd acts of violence and damage inflicted wantonly. Being more enlightened, such passionate action spreads itself less at random. We no longer see it turn upon the innocent, in order to have satisfaction come what may. Nevertheless it lies at the very heart of the penal system. We can therefore state that punishment consists of a passionate reaction graduated in intensity.[17]

From where, however, does this reaction spring? Is it from the individual or from society?

We all know that it is society that punishes. But it might be that it does not do so on its own behalf. Yet what places beyond doubt the social character of punishment is that once it is pronounced, it cannot be revoked save by government, in the name of society. If it were a satisfaction granted to individuals, they would always be the ones to decide whether to commute it: one cannot conceive of a privilege that is imposed and which the beneficiary cannot renounce. If it is society alone that exerts repression, it is because it is harmed even when the harm done is to individuals, and it is the attack upon society that is repressed by punishment.

Yet we can cite cases where the carrying out of the punishment depends upon the will of individuals. In Rome certain offences were punished by a fine that went to the injured party, who would waive it or make it the subject of bargaining: such was the case for covert theft, rapine, slander and malicious damage.[18] These offences, termed private offences (*delicta privata*), were contrasted with crimes proper, repression of which was carried out in the name of the city. The same distinction is found in Greece and among the Jews.[19] Among more primitive peoples punishment seems occasionally to be a matter even more completely private, as the practice of the vendetta tends to show. Such societies are made up of elementary aggregates, almost of a family nature, which may conveniently be designated *clans*. When an attack is committed by one or several members of a clan against another clan, it is the latter that itself

punishes the offence committed against it.[20] What at least apparently gives even more importance to these facts, from the theoretical viewpoint, is that it has been frequently maintained that the vendetta was originally the sole form of punishment. Thus at first punishment may have consisted of private acts of vengeance. But then, if today society is armed with the right to punish, it seems that this can only be by virtue of some sort of delegation by individuals. Society is only their agent. It is their interests that it looks after in their stead, probably because it looks after them better. But they are not properly those of society itself. In the beginning individuals took vengeance themselves; now it is society that avenges them. Yet since the penal law cannot have changed its nature through this simple transfer, there is thus nothing peculiarly social about it. If society appears to play a predominant role it is only as a substitute for individuals.

Yet however widely held this theory may be, it runs counter to the best established facts. We cannot instance a single society where the vendetta was the primitive form of punishment. On the contrary, it is certain that penal law was essentially religious in origin. This is clearly the case of India and Judaea, since the law practised there was considered to be one of revelation.[21] In Egypt the ten books of Hermes, which contained the criminal law and all other laws relating to the governance of the state, were called sacerdotal, and Élien asserts that from earliest times the Egyptian priests exercised judicial power.[22] The same holds true for ancient Germany.[23] In Greece justice was considered to be an emanation from Zeus, and the passion as a vengeance from the god.[24] In Rome the religious origins of the penal law are made clear by ancient traditions,[25] by archaic practices which subsisted until a late date, and by legal terminology itself.[26] But religion is something essentially social. Far from pursuing only individual ends, it exercises constraint over the individual at every moment. It obliges him to observe practices that are irksome to him and sacrifices, whether great or small, which cost him something. He must give from his possessions the offerings which he is constrained to present to the divinity. He must take from his work or leisure time the necessary moments for the performance of rites. He must impose upon himself every kind of privation that is commanded of him, and even renounce life itself if the gods so decree. The religious life is made up entirely of abnegation and altruism. Thus if criminal law was originally religious law, we may

be sure that the interests it served were social. It is offences against themselves that the gods avenge by punishment, and not those of individuals. But the offences against the gods are offences against society.

Thus in lower societies the most numerous offences are those that are injurious to the public interest: offences against religion, customs, authority, etc. We have only to see in the Bible, the laws of Manou, and the records surviving of ancient Egyptian law, how slight in comparison is the importance given to prescripts that protect individuals. This is in contrast to the abundant growth of repressive legislation concerning the various forms of sacrilege, failure to observe the various religious obligations, and the requirements of ceremonial, etc.[27] At the same time these crimes are those most severely punished. Among the Jews the most abominable crimes are those committed against religion.[28] Among the ancient Germans two crimes alone were punished by death, according to Tacitus: treason and desertion.[29] According to Confucius and Meng Tseu, impiety is a more grievous transgression than assassination.[30] In Egypt the slightest act of sacrilege was punished by death.[31] In Rome, at the top of the scale of criminality was to be found the *crimen perduellionis*.[32]

But what then are these private punishments, instances of which we have noted earlier? They are of a mixed nature, partaking of both a repressive and a restitutory sanction. Thus the private offence in Roman law represents a kind of intermediate stage between real crime and the purely civil offence. It has features of both and hovers on the bounds of both domains. It is an offence, in the sense that the sanction prescribed by the law does not consist merely in putting matters to rights; the offender is not only obliged to make good the damage he has caused, but he owes something else in addition, an act of expiation. However, it is not entirely a crime since, although it is society that pronounces the sentence, it is not society that is empowered to apply it. This is a right that society confers upon the injured party, who alone can exercise it freely.[33] Likewise, the *vendetta* is clearly a punishment that society recognises as legitimate, but leaves to individuals the task of carrying out. Thus these facts merely confirm what we have stated regarding the nature of the penal system. If this kind of intermediate sanction is partly a private matter, to a corresponding extent it is not a punishment. Its penal nature is proportionately less pronounced

when its social character is less evident, and vice versa. Private vengeance is therefore far from being the prototype of punishment; on the contrary, it is only an incomplete punishment. Far from crimes against the person being the first to be repressed, in the beginning they are merely situated on the threshold of the penal law. They only moved up in the scale of criminality as society correspondingly assumed control of them more completely. This process, which we need not describe, was certainly not effected by a mere act of transferral. On the contrary, the history of this penal system is nothing but a progressive succession of encroachments by society upon the individual, or rather upon the primary groupings that it comprises. The effect of these encroachments was increasingly to substitute for the law relating to individuals that relating to society.[34]

But the characteristics outlined above belong just as much to that diffused repression which follows acts that are merely immoral as to legal repression. What distinguishes the latter, as we have said, is that it is organised. But in what does this organisation consist?

When we reflect upon the penal law as it functions in present-day societies we represent it as a code in which very precise punishments are attached to crimes equally precisely defined. It is true that the judge enjoys a certain latitude in applying to each particular case these general dispositions. But in its essentials the punishment is predetermined for each category of criminal acts. This elaborate organisation is not, however, an essential element in punishment, because many societies exist in which punishments are not prescribed in advance. In the Bible there are numerous prohibitions which are utterly categoric but which are nevertheless not sanctioned by an expressly formulated punishment. Their penal character, however, is not in dispute, for, although the texts remain silent regarding the punishment, at the same time they express so great an abhorrence for the forbidden act that one cannot suspect for a moment that it will remain unpunished.[35] Thus there is every reason to believe that this silence on the part of the law simply relates to the fact that how a crime was to be repressed was not determined. Indeed many of the stories in the Pentateuch teach us that there were criminal acts whose criminality was undisputed, but where the punishment was determined only by the judge who applied it. Society was well aware that it was faced with a crime, but the penal sanction that was to be attached to it was not yet defined.[36]

Moreover, even among those punishments laid down by the legislator there are many that are not precisely specified. Thus we know that there were different forms of capital punishment which were not all on the same footing. Yet in a great number of cases the texts speak only generally of the death penalty, without stating what manner of death should be inflicted. According to Sumner Maine the same was true of early Rome; the *crimina* were tried before the assembly of the people which, acting in a sovereign capacity, decreed what the punishment was to be by a law, at the same time as establishing the truth of the charge.[37] Moreover, even until the sixteenth century the general principle of the penal system 'was that its application was left to the discretion of the judge, *arbitrio et officio judicis*. . . . Only the judge was not allowed to devise punishments other than those that were customary.'[38] Another consequence of this judicial power was to make dependent upon the judge's discretion even the nature of the criminal act, which was thus itself indeterminate.[39]

So it is not the regulation of punishment that constitutes the distinctive organisation of this kind of repression. Nor is it the institution of a criminal procedure. The facts we have just cited suffice to show that for a long time this was lacking. The only organisation met with everywhere that punishment proper existed is thus reduced to the establishment of a court of law. In whatever way this was constituted, whether it comprised the people as a whole or only an elite, whether or not it followed a regular procedure both in investigating the case and in applying the punishment, by the mere fact that the offence, instead of being judged by an individual, was submitted for consideration to a properly constituted body and that the reaction of society was expressed through the intermediary of a well-defined organism, it ceased to be diffuse: it was organised. The organisation might have been more complete, but henceforth it existed.

Thus punishment constitutes essentially a reaction of passionate feeling, graduated in intensity, which society exerts through the mediation of an organised body over those of its members who have violated certain rules of conduct.

Now the definition of crime we have given quite easily accounts for all these characteristics of punishment.

III

Every strong state of the consciousness is a source of life; it is an essential factor in our general vitality. Consequently all that tends to weaken it diminishes and depresses us. The result is an impression of being disturbed and upset, one similar to what we feel when an important function is halted or slows down. It is therefore inevitable that we should react vigorously against the cause of what threatens such a lowering of the consciousness, that we should attempt to throw it off, so as to maintain our consciousness in its entirety.

Among the most outstanding causes that produce this effect must be ranged the representation we have of the opposing state. In fact a representation is not a simple image of reality, a motionless shadow projected into us by things. It is rather a force that stirs up around us a whole whirlwind of organic and psychological phenomena. Not only does the nervous current that accompanies the formation of ideas flow within the cortical centres around the point where it originated, passing from one plexus to another, but it also vibrates within the motor centres, where it determines our movements, and within the sensorial centres where it evokes images. It occasionally sparks off the beginnings of illusions and may even affect the maturative functions.[40] This vibration is the stronger the more intense the representation itself, and the more the emotional element in it is developed. Thus the representation of a feeling in contradiction to our own acts within us, moving in the same direction and in the same fashion as the feeling for which it has become the substitute. It is as if itself it had entered our consciousness. Indeed it has the same affinities, although these are less strong; it tends to arouse the same ideas, the same impulsions, the same emotions. Thus it offers resistance to the free play of our personal feeling, and so weakens it, whilst attracting in an opposite direction an entire part of our energy. It is as if a foreign force had penetrated us, one of a kind capable of upsetting the free functioning of our psychological life. This is why a conviction opposed to our own cannot manifest itself before us without disturbing us. It is because at the same time as it penetrates into us, being antagonistic to all that it encounters, it provokes a veritable disorder. Undoubtedly, so long as the conflict breaks out only between abstract ideas there is nothing very painful about it, because there is nothing very profound. The locus of such ideas is at

one and the same time the most elevated and yet the most superficial area of the consciousness. The changes that occur within it, not having widespread repercussions, do not affect us strongly. Yet when some cherished belief of ours is at stake we do not allow, and cannot allow, violence to be done to it with impunity. Any assault upon it provokes an emotional reaction of a more or less violent nature, which is turned upon the assailant. We lose our temper, wax indignant against it, inveigh against it, and the sentiments stirred up in this way cannot fail to be translated into action. We flee from it, keep it at a distance, and banish it from our society, etc.

Certainly we do not claim that any strong conviction is necessarily intolerant; common observation is enough to prove the contrary. But this is because external causes neutralise those whose effects we have just analysed. For instance, there may exist between two adversaries some general sympathy which keeps their antagonism within bounds, tempering it. But this sympathy needs to be stronger than the antagonism, or else it does not survive. Or indeed the two elements confronting each other will abandon the contest when it becomes evident that it will be indecisive; each will content itself with maintaining its respective position. Not being able to destroy each other, they are mutually tolerant. The reciprocal toleration that sometimes marks the end of wars of religion is often of this nature. In all such cases, if the clash of feelings does not produce its natural consequences, it is not because it does not contain them, but because it is prevented from producing them.

Nevertheless such consequences are useful at the same time as being necessary. Apart from the fact that they inevitably flow from the causes that produce them, they assist in maintaining those causes. All such violent emotions really constitute an appeal to additional forces to restore to the sentiment under attack the energy drained from it by opposition. It has sometimes been asserted that anger is useless because it is a mere destructive passion, but this is to regard it from only one viewpoint. In fact it consists in the over-stimulation of the latent forces available, which come to the aid of our personal feeling, enabling it to stand up to the dangers facing it by stiffening those forces. In a state of peace, if we may express it in this way, that feeling is not adequately equipped for the struggle. It would be in danger of succumbing if reserves of passion were not marshalled to enter the fight at the requisite time. Anger is

no more than the mobilisation of such reserves. It may even turn out that, since the support summoned up in this way goes beyond what is necessary, argument, far from shaking our convictions, has the effect on us of strengthening them even more.

We are aware of how much force a belief or sentiment may acquire merely because they are experienced within a single community of people in contact with one another. Nowadays the causes of this phenomenon are well known.[41] Just as opposing states of consciousness are mutually enfeebling to one another, identical states of consciousness, intermingling with one another, strengthen one another. Whilst the former take something away from one another, the latter add something. If someone expresses to us an idea that was already one we had, the representation we evoke of it is added to our own idea; it superimposes itself upon it, intermingles with it, and transmits to it its own vitality. From this act of fusion burgeons a new idea that absorbs the former ones and which in consequence is more filled with vitality than each idea taken separately. This is why in large gatherings of people an emotion can assume such violence. It is because the strength with which it is produced in each individual consciousness is reciprocated in every other consciousness. To acquire such an intensity for us, a collective sentiment need not even be felt already by us, by virtue of our own individual nature, for what we add to it, all in all, is very little. It suffices for us not to prove too impervious for the collective sentiment to impose itself upon us, penetrating us from the outside with a strength it draws from its origins. Therefore since the sentiments that crime offends within a single society are the most universally collective ones of all, since they represent especially powerful states of the common consciousness, they cannot possibly brook any opposition. Above all, if this opposition is not purely theoretical, if it asserts itself not only in words but deeds, since it then rises to a peak, we cannot fail to react against it passionately. A mere re-establishment of the order that has been disturbed cannot suffice. We need a more violent form of satisfaction. The force that the crime has come up against is too intense for it to react with so much moderation. Indeed it could not do so without becoming weakened, for it is thanks to the intensity of its reaction that it recovers, maintaining the same level of vitality.

In this way we can explain one characteristic of this reaction which has often been pointed out as irrational. It is certain that

behind the notion of expiation there is the idea of a satisfaction rendered to some power, real or ideal, which is superior to ourselves. When we demand the repression of crime it is not because we are seeking a personal vengeance, but rather vengeance for something sacred which we vaguely feel is more or less outside and above us. Depending upon time and place, we conceive of this object in different ways. Occasionally it is a simple idea, such as morality or duty. Very often we represent it to ourselves in the form of one or several concrete beings: ancestors, or a divinity. This is why penal law is not only of essentially religious origin, but continues always to bear a certain stamp of religiosity. This is because the acts that it punishes always appear as attacks upon something which is transcendent, whether this is a being or a concept. It is for this same reason that we explain to ourselves how such attacks appear to require from us a higher sanction than the mere reparation we content ourselves with in the sphere of purely human interests.

Such a representation is assuredly an illusion. In one sense it is indeed ourselves that we are avenging, and ourselves to whom we afford satisfaction, since it is within us, and within us alone, that are to be found the feelings that have been offended. But this illusion is necessary. Since these sentiments, because of their collective origin, their universality, their permanence over time, and their intrinsic intensity, are exceptionally strong, they stand radically apart from the rest of our consciousness, where other states are much weaker. They dominate us, they possess, so to speak, something superhuman about them. At the same time they bind us to objects that lie outside our existence in time. Thus they appear to us to be an echo resounding within ourselves of a force that is alien, one moreover superior to that which we are ourselves. We are therefore forced to project them outside ourselves, relating what concerns them to some external object. Today we know how these partial alienations of personality occur. Such a mirage is so inevitable that it will occur in one form or another so long as a repressive system exists. For, were it otherwise, we would need to nurture within us only collective sentiments of moderate intensity, and in that case punishment would no longer exist. It will be asserted that the error will disappear of its own accord as soon as men have become aware of it. Yet in vain do we know that the sun is an immense sphere: we see it always as a disc a few inches across. Our understanding may

well teach us to interpret our sensations, but it cannot change them. Moreover, the error is only in part. Since these sentiments are collective, it is not us that they represent in us, but society. Thus by taking vengeance for them it is indeed society and not ourselves that we are avenging. Moreover, it is something that is superior to the individual. We are therefore wrong to impugn this quasi-religious characteristic of expiation, making it some kind of unnecessary, parasitical trait. On the contrary, it is an integrating element in punishment. Certainly it only expresses its nature metaphorically, but the metaphor is not without truth.

Moreover, it is understandable that the reaction of punishment is not in every case uniform, since the emotions that determine it are not always the same. In fact they vary in intensity according to the strength of the feeling that has suffered injury, as well as according to the gravity of the offence it has sustained. A strong state of feeling reacts more than does a weak one, and two states of equal intensity react unequally according to the degree to which they have been violently attacked. Such variations must necessarily occur and are useful, moreover, for it is important that the strength invoked should be proportionate to the extent of the danger. If too weak, it would be insufficient; if too violent, it would represent a useless dissipation of energy. Since the gravity of the criminal act varies according to the same factors, the proportionality everywhere observed between crime and punishment is therefore established with a kind of mechanical spontaneity, without any necessity to make elaborate computations in order to calculate it. What brings about a gradation in crimes is also what brings about a gradation in punishments; consequently the two measures cannot fail to correspond, and such correspondence, since it is necessary, is at the same time constantly useful.

As for the social character of the reaction, this derives from the social nature of the sentiments offended. Because these are to be found in every individual consciousness the wrong done arouses among all who witness it or who know of its existence the same indignation. All are affected by it; consequently everyone stiffens himself against the attack. Not only is reaction general, but it is collective – which is not the same thing. It does not occur in each individual in isolation but all together and in unison, moreover varying according to each case. In fact, just as opposing sentiments repel each other, like sentiments attract, and this occurs the more

strongly the more intense they are. As opposition is a danger that exacerbates them, this strengthens their power of attraction. Never does one feel so great the need to see once more one's fellow countrymen as when one is abroad. Never does the believer feel himself so strongly drawn towards his co-religionists as in time of persecution. Undoubtedly the company of those who think and feel as we do is agreeable at any time. But we seek it out, not only with pleasure but passionately, after arguments have taken place in which the beliefs we share have been hotly disputed. Crime therefore draws honest consciousnesses together, concentrating them. We have only to observe what happens, particularly in a small town, when some scandal involving morality has just taken place. People stop each other in the street, call upon one another, meet in their customary places to talk about what has happened. A common indignation is expressed. From all the similar impressions exchanged and all the different expressions of wrath there rises up a single fount of anger, more or less clear-cut according to the particular case, anger which is that of everybody without being that of anybody in particular. It is public anger.

Moreover, this can prove to be of use by itself. The sentiments brought into play draw their entire strength from the fact that they are common to everybody: they are strongly felt because they are not contested. The reason for the particular respect given them is the fact that they are universally respected. Now crime is only possible if this respect is not truly universal. It consequently implies that the sentiments are not absolutely collective, and it attacks that unanimity, the source of their authority. If therefore when this occurs the individual consciousnesses that the crime offends did not unite together to demonstrate to one another that they were still at one, that the particular case was an anomaly, in the long run they could not fail to be weakened. But they need to strengthen one another by giving mutual assurance that they are still in unison. Their sole means of doing so is to react in common. In short, since it is the common consciousness that is wounded, it must also be this that resists; consequently, resistance must be collective.

Why this resistance is organised remains to be expounded.

This trait can be explained if we note that an organised repression is not in opposition to a diffuse repression, but is distinguished from it by a mere difference in degree: the reaction is more united. The greater intensity of the sentiments, and their more definite nature,

which punishment proper avenges, easily account for this more complete state of unity. If the feeling that has been denied is weak, or is only weakly offended, it can only provoke a weak concentration of those consciousnesses that have been outraged. However, quite the contrary occurs if the state of feeling is strongly offended and if the offence is grave: the entire group attacked closes ranks in the face of danger and, in a manner of speaking, clings closer together. One is no longer content to exchange impressions when the occasion presents itself, nor draw closer together when the chance occurs or when meeting is convenient. On the contrary, the anxiety that has spread from one person to another impels forcibly together all those who resemble one another, causing them to assemble in one place. This physical concentration of the whole group, bringing the interpenetration of minds ever closer, also facilitates every concerted action. Emotional reactions enacted within each individual consciousness are thus afforded the most favourable conditions in which to coalesce together. Yet if they were too diverse in quantity or quality a complete fusion would not be possible between those elements which were partially heterogeneous and irreducible. But we know that the sentiments that determine these reactions are very definite and in consequence very uniform. Thus, partaking of the same uniformity, as a result they merge very naturally with one another, blending into a single amalgam, which serves as a surrogate for each one, a surrogate that is utilised, not by each individual in isolation, but by the body social constituted in this way.

Historically many facts go to prove that this was the genesis of punishment. Indeed we know that in the beginning it was the gathering of the whole people which fulfilled the functions of a court of law. And if we refer again to the examples we quoted recently from the Pentateuch,[42] it will be seen that things happened as we have just described. As soon as the news of a crime became widely known, the people gathered together and, although the punishment was not predetermined, their reaction was unanimous. In certain cases it was even the people who carried out the sentence collectively as soon as it had been pronounced.[43] Then, when the assembly became embodied in the person of a leader, the latter became wholly or in part the organ of punitive reaction and the system developed in conformity with the general laws for any organic development.

Thus it is certainly the nature of the collective sentiments that accounts for punishment, and consequently for crime. Moreover, we can again see that the power to react, which is available to the functions of government, once these have emerged, is only an emanation of the power diffused throughout society, since it springs from it. The one power is no more than the reflection of the other; the extent of the one varies with the extent of the other. Moreover, we must add that the institution of this power serves to sustain the common consciousness itself. For that consciousness would grow weaker if the organ that represented it did not share the respect that it inspires and the special authority that it wields. But that organ cannot partake of that respect unless every action that offends it is combated and repulsed, just as are those actions that offend the collective consciousness, even indeed when that consciousness is not directly affected.

IV

Thus our analysis of punishment has substantiated our definition of crime. We began by establishing inductively that crime consisted essentially in an act contrary to strong, well-defined states of the common consciousness. We have just seen that in effect all the characteristics of punishment derive from the nature of crime. Thus the rules sanctioned by punishment are the expression of the most essential social similarities.

We can therefore see what kind of solidarity the penal law symbolises. In fact we all know that a social cohesion exists whose cause can be traced to a certain conformity of each individual consciousness to a common type, which is none other than the psychological type of society. Indeed under these conditions all members of the group are not only individually attracted to one another because they resemble one another, but they are also linked to what is the condition for the existence of this collective type, that is, to the society that they form by coming together. Not only do fellow-citizens like one another, seeking one another out in preference to foreigners, but they love their country. They wish for it what they would wish for themselves, they care that it should be lasting and prosperous, because without it a whole area of their psychological life would fail to function smoothly. Conversely,

society insists upon its citizens displaying all these basic resemblances because it is a condition for its own cohesion. Two consciousnesses exist within us: the one comprises only states that are personal to each one of us, characteristic of us as individuals, whilst the other comprises states that are common to the whole of society.[44] The former represents only our individual personality, which it constitutes; the latter represents the collective type and consequently the society without which it would not exist. When it is an element of the latter determining our behaviour, we do not act with an eye to our own personal interest, but are pursuing collective ends. Now, although distinct, these two consciousnesses are linked to each other, since in the end they constitute only one entity, for both have one and the same organic basis. Thus they are solidly joined together. This gives rise to a solidarity *sui generis* which, deriving from resemblances, binds the individual directly to society. In the next chapter we shall be better able to demonstrate why we propose to term this solidarity mechanical. It does not consist merely in a general, indeterminate attachment of the individual to the group, but is also one that concerts their detailed actions. Indeed, since such collective motives are the same everywhere, they produce everywhere the same effects. Consequently, whenever they are brought into play all wills spontaneously move as one in the same direction

It is this solidarity that repressive law expresses, at least in regard to what is vital to it. Indeed the acts which such law forbids and stigmatises as crimes are of two kinds: either they manifest directly a too violent dissimilarity between the one who commits them and the collective type; or they offend the organ of the common consciousness. In both cases the force shocked by the crime and that rejects it is thus the same. It is a result of the most vital social similarities, and its effect is to maintain the social cohesion that arises from these similarities. It is that force which the penal law guards against being weakened in any way. At the same time it does this by insisting upon a minimum number of similarities from each one of us, without which the individual would be a threat to the unity of the body social, and by enforcing respect for the symbol which expresses and epitomises these resemblances, whilst simultaneously guaranteeing them.

By this is explained why some acts have so frequently been held to be criminal, and punished as such, without in themselves being

harmful to society. Indeed, just like the individual type, the collective type has been fashioned under the influence of very diverse causes, and even of random events. A product of historical development, it bears the mark of those circumstances of every kind through which society has lived during its history. It would therefore be a miracle if everything to be found in it were geared to some useful end. Some elements, more or less numerous, cannot fail to have been introduced into it which are unrelated to social utility. Among the dispositions and tendencies the individual has received from his ancestors or has developed over time there are certainly many that serve no purpose, or that cost more than the benefits they bring. Undoubtedly most of these are not harmful, for if they were, in such conditions the individual could not live. But there are some that persist although lacking in all utility. Even those that do undisputedly render a service are frequently of an intensity disproportionate to their usefulness, because that intensity derives in part from other causes. The same holds good for collective emotions. Every act that disturbs them is not dangerous in itself, or at least is not so perilous as the condemnation it earns. However, the reprobation such acts incur is not without reason. For, whatever the origin of these sentiments, once they constitute a part of the collective type, and particularly if they are essential elements in it, everything that serves to undermine them at the same time undermines social cohesion and is prejudicial to society. In their origin they had no usefulness but, having survived, it becomes necessary for them to continue despite their irrationality. This is generally why it is good that acts that offend these sentiments should not be tolerated. Doubtless, by reasoning in the abstract it can indeed be shown that there are no grounds for a society to prohibit the eating of a particular kind of meat, an action inoffensive in itself. But once an abhorrence of this food has become an integral part of the common consciousness it cannot disappear without social bonds becoming loosened, and of this the healthy individual consciousness is vaguely aware.[45]

The same is true of punishment. Although it proceeds from an entirely mechanical reaction and from an access of passionate emotion, for the most part unthinking, it continues to play a useful role. But that role is not the one commonly perceived. It does not serve, or serves only very incidentally, to correct the guilty person or to scare off any possible imitators. From this dual viewpoint its

effectiveness may rightly be questioned; in any case it is mediocre. Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour. If that consciousness were thwarted so categorically, it would necessarily lose some of its power, were an emotional reaction from the community not forthcoming to make good that loss. Thus there would result a relaxation in the bonds of social solidarity. The consciousness must therefore be conspicuously reinforced the moment it meets with opposition. The sole means of doing so is to give voice to the unanimous aversion that the crime continues to evoke, and this by an official act, which can only mean suffering inflicted upon the wrongdoer. Thus, although a necessary outcome of the causes that give rise to it, this suffering is not a gratuitous act of cruelty. It is a sign indicating that the sentiments of the collectivity are still unchanged, that the communion of minds sharing the same beliefs remains absolute, and in this way the injury that the crime has inflicted upon society is made good. This is why it is right to maintain that the criminal should suffer in proportion to his crime, and why theories that deny to punishment any expiatory character appear, in the minds of many, to subvert the social order. In fact such theories could only be put into practice in a society from which almost every trace of the common consciousness has been expunged. Without this necessary act of satisfaction what is called the moral consciousness could not be preserved. Thus, without being paradoxical, we may state that punishment is above all intended to have its effect upon honest people. Since it serves to heal the wounds inflicted upon the collective sentiments, it can only fulfil this role where such sentiments exist, and in so far as they are active. Undoubtedly, by forestalling in minds already distressed any further weakening of the collective psyche, punishment can indeed prevent such attacks from multiplying. But such a result, useful though it is, is merely a particular side-effect. In short, to visualise an exact idea of punishment, the two opposing theories that have been advanced must be reconciled: the one sees in punishment an expiation, the other conceives it as a weapon for the defence of society. Certainly it does fulfil the function of protecting society, but this is because of its expiatory nature. Moreover, if it must be expiatory, this is not because suffering redeems error by virtue of some mystic strength or another, but because it cannot produce its socially useful effect save on this one condition.[46]

From this chapter it can be seen that a social solidarity exists which arises because a certain number of states of consciousness are common to all members of the same society. It is this solidarity that repressive law materially embodies, at least in its most essential elements. The share it has in the general integration of society plainly depends upon the extent, whether great or small, of social life included in the common consciousness and regulated by it. The more varied the relationships on which that consciousness makes its action felt, the more also it creates ties that bind the individual to the group; the more, consequently, social cohesion derives entirely from this cause and bears this imprint. Yet on the other hand the number of these relationships is itself proportionate to the number of repressive rules. In determining what part of the judicial apparatus is represented by penal law, we shall at the same time measure the relative importance of this solidarity. It is true that by proceeding in this way we shall leave out of account certain elements of the collective consciousness which, because of their lesser intensity or their indeterminate nature, remain outside the scope of repressive law whilst contributing to the maintenance of social harmony. It is these elements that are protected by punishments of a mere diffuse kind. Yet the same holds good for the other sectors of the law. None exists that is not supplemented by custom and, as there is no reason to suppose that the relationship between law and custom is not the same in these different domains, this omission will not jeopardise the results of our comparison.

Notes

1. Yet this is the method that Garofalo followed. Undoubtedly he appears to abandon it when he acknowledges the impossibility of drawing up a list of actions that are universally punished (*Criminologie*, p. 5), which moreover is exaggerated. Yet in the end he comes back to this method since, all in all, the natural crime for him is one that disturbs those sentiments everywhere fundamental to the penal law, viz., a fixed element in the moral sense, and that alone. But why should a crime which disturbs a sentiment peculiar only to certain types of society be less of a crime than the others? Thus Garofalo is led to deny the character of crime to acts that have been universally acknowledged to be criminal among certain social species, and in consequence is led to limit artificially the bounds of criminality. The result is that his notion of crime is singularly incomplete. It is also very fluctuating, for the author does not include in his comparisons all types of society, but excludes a large number that he characterises as abnormal. A social fact may be stated to be abnormal in relation to the type of species, but a species itself cannot be abnormal. The two words are a contradiction in terms. However interesting Garofalo's attempt to arrive at a scientific notion of crime may be, it is not carried out using a sufficiently exact and accurate method. This is clearly shown in his use of the expression 'natural crime'. Are not all crimes natural? We are probably seeing here a reversion to Spencer's doctrine, in which social life is only really natural in industrial societies. Unfortunately, nothing can be more untrue.
2. We do not see what scientific grounds Garofalo has for saying that the moral sentiments at present possessed by the civilised portion of humanity constitute a morality 'not capable of being lost, but whose development is continually growing' (ibid., p. 9). What grounds are there for setting bounds to the changes that may occur, whether in one direction, or the other?
3. Binding, *Die Normen und ihre Übertretung* (Leipzig, 1872) vol. I, pp. 6 ff.
4. The only real exceptions to this peculiarity of the penal code occur when it is an official act of authority that creates the offence. In that case the duty is generally defined independently of its sanction. Later we shall explain the reason for his exception.
5. Tacitus, *Germania*, ch. XII.
6. Cf. Walter, *Histoire de la procédure civile et du droit criminel chez les Romains* (Fr. trans.) § 829; Rein, *Kriminalrecht der Römer*, p. 63.
7. Cf. Gilbert, *Handbuch der Griechischen Staatsalterthümer* (Leipzig, 1881) vol. I, p. 138.
8. 'Esquisse historique du droit criminel de l'ancienne Rome', *Nouvelle Revue historique du droit français et étranger* (1882) pp. 24 and 27.
9. Such a confusion is not without its dangers. Thus it is occasionally asked whether the individual consciousness varies with the collective consciousness. Everything depends on the meaning assigned to the term. If it represents social similarities, the variation, as will be seen, is one of inverse relationship. If it designates the entire psychological life of society, the relationship is direct. Hence the need to draw a distinction.
10. We shall not go into the question as to whether the collective consciousness is like that of the individual. For us this term merely designates the sum total of social similarities, without prejudice to the category by which this system of phenomena must be defined.
11. One has only to see how Garofalo distinguishes what he calls true crimes from others (*Criminologie*, p. 45). This is based upon a personal appraisal, which relies upon no objective characteristic.
12. Moreover, when the punishment is made up entirely of a fine, since it is merely a reparation, whose amount is fixed, the action lies on the boundary between penal and restitutory law.
13. Cf. Exodus 21:28; Leviticus 20:16.

14. For example, the knife used to commit a murder. Cf, Post, *Bausteine für eine allgemeine Rechtswissenschaft*, vol. I, pp. 230–1.
15. Cf. Exodus 20:4 and 5; Deuteronomy 12:12–18; Thonissen, *Etudes sur l'histoire du droit criminel*, vol. I, pp. 70 and 178 ff.
16. Walter, *Histoire de la procédure civile et du droit criminel chez les Romains*, (Fr. trans.), § 793.
17. Moreover, this is recognised even by those who find the idea of expiation incomprehensible. Their conclusion is that, to be congruent with their doctrine, the traditional conception of punishment should be utterly transformed, and reformed from top to bottom. This is because the conception rests, as it has always done, on the principle that they oppose (cf. Fouillée, *Science sociale*, pp. 307 ff.).
18. Rein, *Kriminalrecht der Römer*, p. 111.
19. Among the Jews theft, violation of trusteeship, abuse of confidence, were treated as private offences.
20. Cf. L. H. Morgan, *Ancient Society* (London, 1870) p. 76.
21. In Judaea the judges were not priests, but every judge was the representative of God, the man of God (Deuteronomy, chapter I, verse 17; Exodus, chapter XXII, verse 28). In India it was the king who passed judgement, but this function was regarded as essentially religious (*Manou*, VIII, V, pp. 303–11).
22. Thonissen, *Etudes sur l'histoire du droit criminel*, vol. I, p. 107.
23. Zöpfl, *Deutsche Rechtsgeschichte*, p. 909.
24. Hesiod says: 'It is the son of Saturn who gave men justice' (*Travaux et jours*, vol. V, 279 and 280, ed. Didot). 'When mortals give themselves over . . . to wrong actions, far-sighted Zeus inflicts prompt punishment upon them' (ibid., p. 266; cf. *Iliad*, vol. XVI, pp. 384 ff.).
25. Walter, *Histoire de la procédure*, p. 788.
26. Rein, *Kriminalrecht*, pp. 27–36.
27. Cf. Thonissen, *Etudes*, *passim*.
28. Munck, *Palestine*, p. 216.
29. Tacitus, *Germania*, ch. XII.
30. Plath, *Gesetz und Recht im alten China* (1865) pp. 69 and 70.
31. Thonissen, *Etudes*, vol. I, p. 145.
32. Walter, *Histoire de la procédure*, ss. 803.
33. However, what accentuated the penal character of the private offence was that it entailed infamy, a real public punishment. (Cf. Rein, *Kriminalrecht*, p. 916, and Bouvy, *De l'infamie en droit romain* (Paris, 1884) p. 35.)
34. In any case it is important to note that the *vendetta* is a matter which is eminently of a collective nature. It is not the individual who takes revenge, but his clan; later it is the clan or family which is paid restitution.
35. Deuteronomy 6:25.
36. A man was found gathering wood on the Sabbath day: 'Those who had caught him in the act brought him to Moses and Aaron and all the community, and they kept him in custody, *because it was not clearly known what was to be done with him*' (Numbers 15:32–34). Elsewhere the case concerns a man who had taken God's name in vain. Those present arrested him but did not know how he should be dealt with. Moses himself did not know, and went away to consult God's will (Leviticus 24:12–16). (The Biblical quotation is given in the translation of the New English Bible.)

37. H. Sumner Maine, *Ancient Law* (London, 1861) pp. 372–3.
38. Du Boys, *Histoire du droit criminel des peuples modernes*, vol. VI, p. 11.
39. Ibid., p. 14.
40. H. Maudsley, *The Physiology of Mind* (London, 1876) p. 271.
41. Cf. Espinas, *Sociétés animales* (Alcan, Paris) *passim*.
42. Cf. *supra*, note 3b.
43. Cf. Thonissen, *Etudes*, vol. I, pp. 30 and 232. Witnesses to a crime sometimes played a predominant role in carrying out the sentence.
44. In order to simplify our exposition we assume that the individual belongs to only one society. In fact we form a part of several groups and there exist in us several collective consciousnesses; but this complication does not in any way change the relationship we are establishing.
45. This does not mean that a penal rule should nonetheless be retained because at some given moment it corresponded to a particular collective feeling. The rule has no justification unless the feeling is still alive and active. If it has disappeared or grown weak nothing is so vain or even counter-productive as to attempt to preserve it artificially by force. It may even happen to become necessary to fight against a practice that was common once, but is no longer so, one that militates against the establishment of new and essential practices. But we need not enter into this problem of a casuistic nature.
46. In saying that punishment, as it is, has a reason for its existence we do not mean that it is perfect and cannot be improved upon. On the contrary, it is only too plain that, since it is produced by purely mechanical causes, it can only be very imperfectly attuned to its role. The justification can only be a rough and ready one.

Chapter III

Solidarity Arising from the Division of Labour, or Organic Solidarity

I

The very nature of the restitutory sanction is sufficient to show that the social solidarity to which that law corresponds is of a completely different kind.

The distinguishing mark of this sanction is that it is not expiatory, but comes down to a mere *restoration of the 'status quo ante'*. Suffering in proportion to the offence is not inflicted upon the one who has broken the law or failed to acknowledge it; he is merely condemned to submit to it. If certain acts have already been performed, the judge restores them to what they should be. He pronounces what the law is, but does not talk of punishment. Damages awarded have no penal character: they are simply a means of putting back the clock so as to restore the past, so far as possible, to its normal state. It is true that Tarde believed that he had discovered a kind of civil penal law in the awarding of costs, which are always borne by the losing party.[1] Yet taken in this sense the term has no more than a metaphorical value. For there to be punishment there should at least be some proportionality between the punishment and the wrong, and for this one would have to establish exactly the degree of seriousness of the wrong. In fact the loser of the case pays its costs even when his intentions were innocent and he is guilty of nothing more than ignorance. The reasons for this rule therefore seem to be entirely different. Since justice is not administered free, it seems equitable that the costs should be borne by the one who has occasioned them. Moreover, although it is possible that the prospect of such costs may stop the overhasty litigant, this is not enough for them to be considered a

punishment. The fear of ruin that is normally consequent upon idleness and neglect may cause the businessman to be energetic and diligent. Yet ruin, in the exact connotation of the term, is not the penal sanction for his shortcomings.

Failure to observe these rules is not even sanctioned by a diffused form of punishment. The plaintiff who has lost his case is not disgraced, nor is his honour impugned. We can even envisage these rules being different from what they are without any feeling of repugnance. The idea that murder can be tolerated sets us up in arms, but we very readily accept that the law of inheritance might be modified, and many even conceive that it could be abolished. At least it is a question that we are not unwilling to discuss. Likewise, we agree without difficulty that the laws regarding easements or usufruct might be framed differently, or that the mutual obligations of buyer and vendor might be determined in another way, and that administrative functions might be allocated according to different principles. Since these prescriptions do not correspond to any feeling within us, and as generally we do not know their scientific justification, since this science does not yet exist, they have no deep roots in most of us. Doubtless there are exceptions. We do not tolerate the idea that an undertaking entered into that is contrary to morals or obtained either by violence or fraud can bind the contracting parties. Thus when public opinion is faced with cases of this kind it shows itself less indifferent than we have just asserted, and it adds its disapprobation to the legal sanction, causing it to weigh more heavily. This is because there are no clear-cut partitions between the various domains of moral life. On the contrary, they form a continuum, and consequently adjacent areas exist where different characteristics may be found at one and the same time. Nevertheless the proposition we have enunciated remains true in the overwhelming majority of cases. It demonstrates that rules where sanctions are restitutory either constitute no part at all of the collective consciousness, or subsist in it in only a weak state. Repressive law corresponds to what is the heart and centre of the common consciousness. Purely moral rules are already a less central part of it. Lastly, restitutory law springs from the farthest zones of consciousness and extends well beyond them. The more it becomes truly itself, the more it takes its distance.

This characteristic is moreover evinced in the way that it functions. Whereas repressive law tends to stay diffused throughout

society, restitutory law sets up for itself ever more specialized bodies: consular courts, and industrial and administrative tribunals of every kind. Even in its most general sector, that of civil law, it is brought into use only by special officials – magistrates, lawyers, etc., who have been equipped for their role by a very special kind of training.

But although these rules are more or less outside the collective consciousness, they do not merely concern private individuals. If this were the case, restitutory law would have nothing in common with social solidarity, for the relationships it regulates would join individuals to one another without their being linked to society. They would be mere events of private life, as are, for instance, relationships of friendship. Yet it is far from the case that society is absent from this sphere of legal activity. Generally it is true that it does not intervene by itself and of its own volition: it must be solicited to do so by the parties concerned. Yet although it has to be invoked, its intervention is none the less the essential cog in the mechanism, since it alone causes that mechanism to function. It is society that declares what the law is, through its body of representatives.

However, it has been maintained that this role is in no way an especially social one, but comes down to being that of a conciliator of private interests. Consequently it has been held that any private individual could fulfil it, and that if society adopted it, this was solely for reasons of convenience. Yet it is wholly inaccurate to make society a kind of third-party arbitrator between the other parties. When it is induced to intervene it is not to reconcile the interests of individuals. It does not investigate what may be the most advantageous solution for the protagonists, nor does it suggest a compromise. But it does apply to the particular case submitted to it the general and traditional rules of the law. Yet the law is pre-eminently a social matter, whose object is absolutely different from the interests of the litigants. The judge who examines a divorce petition is not concerned to know whether this form of separation is really desirable for the husband and wife, but whether the causes invoked for it fall into one of the categories stipulated by law.

Yet to assess accurately the importance of the intervention by society it must be observed not only at the moment when the sanction is applied, or when the relationship that has been upset is restored, but also when it is instituted.

Social action is in fact necessary either to lay a foundation for, or to modify, a number of legal relationships regulated by this form of law, and which the assent of the interested parties is not adequate enough either to institute or alter. Of this nature are those relationships in particular that concern personal status. Although marriage is a contract, the partners can neither draw it up nor rescind it at will. The same holds good for all other domestic relationships, and *a fortiori* for all those regulated by administrative law. It is true that obligations that are properly contractual can be entered into or abrogated by the mere will to agreement of the parties. Yet we must bear in mind that, if a contract has binding force, it is society which confers that force. Let us assume that it does not give its blessing to the obligations that have been contracted; these then become pure promises possessing only moral authority.[2] Every contract therefore assumes that behind the parties who bind each other, society is there, quite prepared to intervene and to enforce respect for any undertakings entered into. Thus it only bestows this obligatory force upon contracts that have a social value in themselves, that is, those that are in conformity with the rules of law. We shall even occasionally see that its intervention is still more positive. It is therefore present in every relationship determined by restitutory law, even in ones that appear the most completely private, and its presence, although not felt, at least under normal conditions, is no less essential.[3]

Since the rules where sanctions are restitutory do not involve the common consciousness, the relationships that they determine are not of the sort that affect everyone indiscriminately. This means that they are instituted directly, not between the individual and society, but between limited and particular elements in society, which they link to one another. Yet on the other hand, since society is not absent it must necessarily indeed be concerned to some extent, and feel some repercussions. Then, depending upon the intensity with which it feels them, it intervenes at a greater or lesser distance, and more or less actively, through the mediation of special bodies whose task it is to represent it. These relationships are therefore very different from those regulated by repressive law, for the latter join directly, without any intermediary, the individual consciousness to that of society, that is, the individual himself to society.

But these relationships can assume two very different forms.

Sometimes they are negative and come down to a mere abstention; at other times they are positive, or ones affording co-operation. To the two categories of rules that determine either kind of relationship correspond two kinds of social solidarity between which a distinction must be drawn.

II

The negative relationship that may serve as a model for the others is that which joins a thing to a person.

Things in fact are a part of society, just as persons are, and play a specific part in it. Thus their relationship to the body social needs to be determined. So we may say that there exists a solidarity of things whose nature is special enough to be outwardly interpreted in legal consequences of a very particular character.

Jurisconsults in fact distinguish between two kinds of rights: they term one kind 'real', the other 'personal'. The right of property and mortgage belongs to the first kind, the right to credit to the second kind. What characterises 'real' rights is that they alone give rise to a right of preference and succession. In this case the right that I possess over something is exclusive of any other that might be established after mine. If, for example, a property has been successively mortgaged to two creditors, the second mortgage cannot in any way restrict the rights acquired under the first. Moreover, if my debtor disposes of the thing over which I possess a mortgage right, this is in no way affected, but the third party acquiring it is obliged to pay me or to surrender what he has acquired. Now, for this to be the case, the legal bond must link directly, without the mediation of any third person, the thing specific to me in my legal status. This privileged situation is thus the consequence of the solidarity peculiar to things. When, on the contrary, the right is personal, the person under an obligation to me can, by contracting new obligations, give me co-creditors whose right is equal to mine and, although I possess as surety all my debtor's goods, if he disposes of them they are removed from my surety by being no longer part of his estate. This is because no special relationship exists between these goods and myself, but one between the person of their owner and myself.[4]

We can thus see what this 'real' form of solidarity consists of: it

links things directly to persons, but not persons with one another. In an extreme case someone, believing himself to be alone in the world, may exercise a 'real' right, leaving other persons out of account. Consequently, since it is only through the mediation of persons that things are integrated into society, the solidarity that arises from this integration is wholly negative. It does not cause individual wills to move towards common ends, but only causes things to gravitate around those individual wills in an orderly fashion. Because 'real' rights are limited in this way, they do not come into conflicts; disputes are forestalled, but there is no active co-operation, no *consensus*. Let us envisage such agreement to be as complete as possible; the society where it obtains, if it does so alone, will resemble a huge constellation in which each star moves in its orbit without disturbing the motion of neighbouring stars. Such a solidarity thus does not shape from the elements drawn together an entity capable of acting in unison. It contributes nothing to the unity of the body social.

From the above, it is easy to determine to what part of restitutory law this form of solidarity corresponds: it is the corpus of 'real' rights. Now, from the very definition that has been given of these, it follows that the law of property is its most perfect exemplar. Indeed the most perfect relationship that can exist between a thing and a person is one that wholly subordinates the former to the latter. Yet this relationship is itself very complex, and the various elements that form it can become the object of as many 'real' secondary rights, such as usufruct, easements, usage and habitation. All in all we may say that 'real' rights comprise property law in its various forms (literary, artistic, industrial, personal estate, real estate) and its different modes, such as those regulated by the second book of the Civil Code. As well as this book, French law recognises four other 'real' rights, but which are only ancillaries to or possible substitutes for personal rights: surety, property usufruct, preferential right and mortgage (arts. 2071–2203). It is appropriate to add to these all matters relating to the law of inheritance, the law of testacy, and consequently, of intestacy, since the latter creates, when it has been declared, a sort of provisional succession. Indeed inheritance is a thing, or a set of things, over which heirs and legatees have a 'real' right, whether this is acquired *ipso facto* by the decease of the former owner, or whether it is only opened up as the result of a judicial act, as happens for indirect heirs and legatees with a

particular title. In all these cases the legal relationship is directly established, not between one person and another, but between a person and a thing. The same is true for gifts made by will, which is no more than the exercise of the 'real' right that the owner disposes of over his possessions, or at least over the portion of which he is free to dispose.

But there are relationships between one person and another which, although in no way 'real', are nevertheless as negative as those just mentioned, and express a solidarity of the same kind.

Firstly, there are relationships that bring into play the exercise of 'real' rights proper. In fact, inevitably the functioning of these sometimes brings up against one another holders of those rights themselves. For example, when one thing is added on to another, the owner of the thing deemed to be the principal one becomes at the same time the owner of the other one; only 'he must pay the other person the value of the thing joined to his' (art. 566). This obligation is clearly a personal one. Likewise any owner of a party wall who wishes to raise its height is obliged to pay the co-proprietor an indemnity for the obligation imposed (art. 658). A legatee with a particular title to an article must address himself to the main legatee to obtain the release to him of the thing bequeathed, although he acquires a right to it immediately upon the decease of the testator (art. 1014). But the solidarity that these relationships express does not differ from those we have just discussed: in fact they are established only to make good or forestall any damage occasioned. If the holder of a 'real' right could always exercise it without ever going beyond bounds, with each person remaining in his own domain, there would be no reason for any legal relationship. But in fact such overlapping is constantly occurring between these different rights, so that one cannot realise the value of one right without encroaching upon the other rights that limit it. In one case the thing over which I enjoy a right is in the hands of another; this is what happens with a legacy. In another, I cannot enjoy my right without harming that of another; this is what occurs for certain easements charges. Relationships are therefore needful to repair the damage if it has already been done, or to prevent it happening. But there is nothing positive about these relationships. They do not cause the persons whom they bring into contact to co-operate together; they do not imply any such co-operation. But they merely restore or maintain, in the new conditions that have been brought about, that negative solidarity which has been disturbed in its functioning by circumstances. Far from uniting people, they only arise in order to unravel more efficiently what has been united by force of circumstance, to re-establish boundaries that have been violated and to reinstate each individual in his own domain. These relationships are so closely identical to those of a thing with a person that those who drew up the civil Code have not dealt with them separately, but have treated them at the same time as 'real' rights.

Finally, the obligations that arise from an offence or a quasi-offence are of exactly the same character.[5] Indeed they constrain each individual to repair the damage he has wrongfully caused to the legitimate interests of another. Thus they are personal, but the solidarity to which they correspond is clearly entirely negative, since they consist not in rendering a service, but in refraining from harm. The tie the breaking of which they penalise is wholly external. The only difference between these relationships and the previous ones is that, in the one case, the break arises from a misdeed and in the other, from circumstances determined and foreseen by the law. But the system of order disturbed is the same one; it arises, not from competition, but purely from abstention.[6] Moreover the rights whose infringement gives rise to these obligations are themselves 'real', for I am the owner of my body, my health, my honour and my reputation by the same right and in the same way as the material things controlled by me.

To sum up: the rules relating to 'real' rights and personal relationships that are established by virtue of them form a definite system whose function is not to link together the different parts of society, but on the contrary to detach them from one another, and mark out clearly the barriers separating them. Thus they do not correspond to any positive social tie. The very expression 'negative solidarity' that we have employed is not absolutely exact. It is not a true solidarity, having its own life and being of a special nature, but rather the negative aspects of every type of solidarity. The first condition for an entity to become coherent is for the parts that form it not to clash discordantly. But such an external harmony does not bring about cohesion. On the contrary, it presumes it. Negative solidarity is only possible where another kind is present, positive in nature, of which it is both the result and the condition.

Indeed the rights that individuals possess both over themselves and things can only be determined by means of compromise and

mutual concessions, for everything that is granted to some is necessarily given up by others. It is sometimes stated that the level of normal development in an individual could be deduced either from the concept of human personality (Kant), or from the idea of the individual organism (Spencer). This is possible, although the rigour in this reasoning is very questionable. In any case what is certain is that, in historical reality, it is not upon these abstract considerations that the moral order was founded. In fact, for a man to acknowledge that others have rights, not only as a matter of logic, but as one of daily living, he must have agreed to limit his own. Consequently this mutual limitation was only realisable in a spirit of understanding and harmony. Now if we assume a host of individuals with no previous ties binding them to one another, what reason might have impelled them to make these reciprocal sacrifices? The need to live in peace? But peace in itself is no more desirable than war. The latter has its drawbacks and advantages. Have there not been peoples and individuals whose passion has at all times been war? The instincts to which it corresponds are no less powerful than those that peace satisfies. No doubt sheer weariness of hostilities can for a while put an end to them, but this simple truce can be no more lasting than the temporary lassitude that brought it about. This is all the more true of outcomes due merely to the triumph of force. They are as provisional and precarious as the treaties that terminate wars between nations. Men need peace only in so far as they are already united by some bond of sociability. In this case the feelings that cause them to turn towards one another modify entirely naturally promptings of egoism. From another viewpoint the society that encloses them, unable to exist save when not shaken at every instant by some upheaval, bears down upon them with all its weight to force them to make the necessary concessions to one another. It is true that we sometimes see independent societies reach agreement to determine the extent of their respective rights over things, that is, over their territory. But the extreme instability of these relationships is precisely the best proof that negative solidarity alone is not sufficient. If today, among cultured peoples, it seems to be stronger, if that portion of international law that determines what might be called the 'real' rights of European societies perhaps possesses more authority than once it did, it is because the different nations of Europe are also much less independent of one another. This is because in certain respects they

are all part of the same society, still incohesive, it is true, but one becoming increasingly conscious of itself. What has been termed the balance of power in Europe marks the beginning of the organisation of that society.

It is customary to distinguish carefully between justice and charity, that is, the mere respect of others' rights, from every act that goes beyond that purely negative virtue. In both these kinds of practices may be seen two independent strata of ethics: justice, by itself, might constitute its basic foundation; charity might be its crowning glory. The distinction is such a radical one that, according to the protagonists of a certain kind of ethics, justice alone is needful for the smooth functioning of social life. Altruism is scarcely more than a private virtue, which it is laudable for the individual to pursue, but which society can very well do without. Many even view its intervention in public life with some disquiet. From what was stated previously we can see just how far this conception is from according with the facts. In reality, for men to acknowledge and mutually guarantee the rights of one another, they must first have a mutual liking, and have some reason that makes them cling to one another and to the single society of which they form a part. Justice is filled with charity, or to employ once more our expression, negative solidarity is only the emanation of another solidarity that is positive in nature: it is the repercussion of social feelings in the sphere of 'real' rights which come from a different source. Thus there is nothing specific about justice, but it is the necessary accompaniment to every kind of solidarity. It is necessarily encountered everywhere men live a life in common, whether this results from the social division of labour or from the attraction of like to like.

III

If the rules just discussed are separated from restitutory law, what remains constitutes a system that is no less well defined, and includes domestic law, contractual law, commercial law, procedural law, and administrative and constitutional law. The relationships that are regulated by these laws are of a nature entirely different from the preceding ones; they express a positive contribution, a co-operation deriving essentially from the division of labour.

The questions resolved by domestic law may be reduced to the following two types:
(1) Who is entrusted with the different domestic functions? Who is the spouse, who the father, who the legitimate child, who the guardian, etc.?
(2) What is the normal type of these functions and their relationships?
The stipulations laid down to meet the first of these questions are those that determine the status and conditions required to contract a marriage, the necessary formalities for the marriage to be a valid one, the conditions regarding legitimate, illegitimate and adoptive children, the mode of selecting a guardian, etc.

On the other hand, it is the second question that is settled by the section on the respective laws and duties relating to husband and wife, on the state of their relationship in case of divorce, nullity or separation (including division of property), on the powers of the father, on the legal consequences of adoption, on administration by a guardian and on his relationship with his ward, on the role of the family council *vis-à-vis* guardian and ward, on the role of parents in the case of suspension of civil rights, and on the constitution of a board of guardians.

This section of civil law has therefore as its purpose the determination of how the various family functions are allocated and what should be the relationship of each function to the others. Their significance is that they express the special solidarity that unites the members of a family as the result of the domestic division of labour. It is true that we are scarcely accustomed to conceiving the family in this light. It is very often believed that what brings about this cohesion is exclusively a commonality of sentiments and beliefs. Indeed there are so many matters shared in common between the members of the family group that the special character of the tasks incumbent upon each member easily eludes us. This prompted Comte to declare that domestic union excludes 'any thought of direct and common co-operation towards any common goal'.[7] But the legal organisation of the family whose essential traits we have just briefly recalled, demonstrates the reality of these functional differences and their importance. The history of the family from its origins shows in fact a mere uninterrupted movement towards dissociation, in the course of which these various functions, at first undivided and overlapping, have gradually separated out and been

constituted independently, being distributed among the various relatives according to sex, age and dependent relationships, so as to make each relative a specialised functionary in domestic society.[8] Far from being only an ancillary and secondary phenomenon, this family division of labour, on the contrary, dominates the whole of the development of the family.

The relationship of the division of labour to contractual law is no less marked.

The contract is indeed the supreme legal expression of co-operation. It is true that there exist so-called 'benevolent' contracts that bind only one of the parties. If I make an unconditional gift to another person, if I assume voluntarily the trusteeship of some object, or a power of attorney, there ensue for me precise, clear-cut obligations. Yet no real co-operation between the contracting parties exists since burdens are laid upon one of them alone. Yet co-operation is not entirely absent from the phenomenon; it is merely gratuitous or unilateral. For instance, what is a gift if not an exchange without reciprocal obligations? These kinds of contract are therefore merely a variation of contracts of a truly co-operative nature.

Moreover, they are very rare, for it is only exceptionally that gratuitous acts fall under legal regulation. As for the other contracts, which comprise the overwhelming majority, the obligations to which they give rise are correlative, either through reciprocal obligations or through services previously rendered. The undertaking entered into by the one party stems either from that entered into by the other, or from a service already performed by the latter.[9] Now such reciprocity is only possible where co-operation exists and this in turn does not occur without the division of labour. To co-operate, in fact, is to share with one another a common task. If this task is subdivided into tasks qualitatively similar, although indispensable to one another, there is a simple or first-level division of labour. If they are different in kind, there is composite division of labour, or specialisation proper.

This latter form of co-operation is moreover the one that the contract by far the most usually expresses. The only one of different significance is the contract of association, and also perhaps the marriage contract, in so far as it determines the share in household expenses to be contributed by husband and wife. Even for this to be the case, the contract of association must place all associates on the

same level, with identical contributions and functions. But this is a case which never exactly occurs in matrimonial relations, because of the division of labour between husband and wife. Against these rare kinds of contract let us contrast the innumerable contracts whose purpose is to harmonise functions that are special and different: contracts between buyer and seller, exchange contracts, contracts between employers and workers, between hirer and person hiring, between lender and borrower, between the repository and the depositor, between innkeeper and traveller, between one enjoying a power of attorney and his mandatory, between the creditor and the pledge given by the debtor, etc. In general, the contract is the symbol of exchange. Thus not unjustifiably Spencer was able to term a contract physiological, one like that which at every moment occurs in the exchange of substances between the different organs of the living body.[10] Now it is plain that exchange always assumes some more or less developed division of labour. It is true that the contracts we have just mentioned are still of a somewhat general character. But we must not forget that law only draws the general contours, the main features of social relationships, those that are to be found identical in the different spheres of collective life. Thus each one of these types of contract assumes a host of others, more specialised, of which it is, as it were, the common blueprint, but which at the same time regulates the others, those in which relationships are established between more specialised functions. Thus despite the relative simplicity of this scheme, it is enough to demonstrate the extreme complexity of the facts that it epitomises.

Moreover, this specialisation of functions is directly manifest in the commercial code, which especially regulates contracts specific to commerce: contracts between agent and principal, between carrier and consignor, between the bearer of a bill of exchange and the drawer, between shipowner and creditors, or shipowner and captain and crew; between the freighting agency and the charterer, between lender and borrower in a contract duly legally engrossed, between insurer and insured. Yet here again a great gap exists between the comparatively general nature of the legal prescriptions and the diversity of special functions whose relationships are regulated by these, as is shown by the important position accorded in commercial law to custom.

Where the commercial code does not regulate contracts proper, it determines what certain special functions must be, such as those of

the stockbroker, the dealer, the ship's captain, the receiver in a case of bankruptcy, so as to ensure solidarity in all the various parts of the commercial system.

Procedural law, whether this be criminal, civil or commercial, plays the same role in the legal system. The sanctions of legal rules of all kinds can only be applied through a certain number of ancillary functions, such as those of magistrates, defence lawyers, solicitors, jurors, plaintiffs and defendants. Procedures decide the manner in which the functions must be applied and relate to one another. It states what they should be and what is the role of each one in the general life of the corpus of the law.

It seems to us that, in a rational classification of legal rules, procedural law should be considered merely as a variety of administrative law: we do not see what rational difference separates the administration of justice from the rest of administration. Whatever the rights or wrongs of this viewpoint, administrative law proper regulates ill-defined functions that are termed administrative,[11] just as procedural law does judicial functions. It determines what their normal type is, and their relationships either with one another or with the diffused functions of society. One would only need to except a certain number of rules which are generally classified under this heading, although they are penal in character.[12] Finally, constitutional law performs the same role for governmental functions.

It may well be surprising to see classified under the same heading administrative and political law with what is usually termed private law. Yet firstly, such a connection is needed if the nature of the sanctions is taken as the basis for classification. Nor does it seem possible for us to adopt any other system if we wish to proceed scientifically. Moreover, to separate completely these two kinds of law we would have to admit that private law really exists, whereas we believe that all law is public, because all law is social. All the functions of society are social, just as all the functions of an organism are organic. The economic functions, just like the others, are also of this character. Moreover, even among the most diffuse functions there are none that are not to some extent subject to the effects of the machinery of government. Thus from this viewpoint between them there is no more than a difference in degree.

To sum up: the relationships that are regulated by co-operative law, with its restitutory sanctions, and the solidarity these

relationships express, result from the social division of labour. Moreover, it is explicable that, in general, co-operative relationships do not carry with them any other form of sanctions. Indeed, special tasks, by their very nature, are exempt from the effects of the collective consciousness. This is because if something is to be the object of shared sentiments, the first condition is that it should be shared, that is, present in every consciousness, and that each individual may be able to conceive of it from a single, identical viewpoint. Doubtless, so long as functions are of a certain general nature, everyone can have some feeling for them. Yet the more specific they become the more also the number is restricted of those who are aware of each and every function. Consequently the more they overflow beyond the common consciousness. The rules that determine them cannot therefore possess that superior force and transcendent authority which, when it suffers harm, exacts expiation. It is indeed also from public opinion that their authority springs, just as do penal rules, but from an opinion that is specific to certain sectors of society.

Moreover, even in those special circles where the rules are applied, and where consequently they are evoked in the minds of people, they do not reflect any very acute feelings, nor even in most cases any kind of emotional state. For, since they determine the manner in which the different functions should work together in the various combinations of circumstances that may arise, the objects to which they relate are not ever-present in the consciousness. We are not always having to administer a guardianship or a trusteeship,[13] nor having to exercise our rights as creditor or buyer, etc. Above all, we do not have to exercise them in particular conditions. But the states of consciousness are strong only in so far as they are permanent. The infringement of these rules does not therefore touch to the quick the common spirit of society, nor, at least usually, that of these special groups. Consequently the infringement cannot provoke more than a very moderate reaction. All that we require is for the functions to work together in a regular fashion. Thus if this regularity is disturbed, we are satisfied if it is re-established. This is most certainly not to say that the development of the division of labour cannot have repercussions in the penal law. There are, as we already know, administrative and governmental functions where certain relationships are regulated by repressive law, because of the special character marking the organ of the common consciousness

and everything appertaining to it. In yet other cases, the bonds of solidarity linking certain social functions may be such that once they are broken repercussions occur that are sufficiently general to provoke a reaction of punishment. But for reasons we have already stated, these consequences are exceptional.

In the end this law plays a part analogous in society to that of the nervous system in the organism. That system, in effect, has the task of regulating the various bodily functions in such a way that they work harmoniously together. Thus it expresses in a very natural way the degree of concentration that the organism has reached as a result of the physiological division of labour. Therefore we can at the different levels of the animal scale ascertain the measure of that concentration according to the development of the nervous system. Likewise this means that we can ascertain the measure of concentration that a society has reached through the social division of labour, according to the development of co-operative law with its restitutory sanctions. One can foresee that such a criterion will be of great utility to us.

IV

Since negative solidarity on its own brings about no integration, and since, moreover, there is nothing specific in it, we shall identify only two kinds of positive solidarity, distinguished by the following characteristics:

(1) The first kind links the individual directly to society without any intermediary. With the second kind he depends upon society because he depends upon the parts that go to constitute it.

(2) In the two cases, society is not viewed from the same perspective. In the first, the term is used to denote a more or less organised society composed of beliefs and sentiments common to all the members of the group: this is the collective type. On the contrary, in the second case the society to which we are solidly joined is a system of different and special functions united by definite relationships. Moreover, these two societies are really one. They are two facets of one and the same reality, but which none the less need to be distinguished from each other.

(3) From this second difference there arises another which will serve to allow us to characterise and delineate the features of these two kinds of solidarity.

The first kind can only be strong to the extent that the ideas and tendencies common to all members of the society exceed in number and intensity those that appertain personally to each one of those members. The greater this excess, the more active this kind of society is. Now what constitutes our personality is that which each one of us possesses that is peculiar and characteristic, what distinguishes it from others. This solidarity can therefore only increase in inverse relationship to the personality. As we have said, there is in the consciousness of each one of us two consciousnesses: one that we share in common with our group in its entirety, which is consequently not ourselves, but society living and acting within us; the other that, on the contrary, represents us alone in what is personal and distinctive about us, what makes us an individual.[14] The solidarity that derives from similarities is at its *maximum* when the collective consciousness completely envelops our total consciousness, coinciding with it at every point. At that moment our individuality is zero. That individuality cannot arise until the community fills us less completely. Here there are two opposing forces, the one centripetal, the other centrifugal, which cannot increase at the same time. We cannot ourselves develop simultaneously in two so opposing directions. If we have a strong inclination to think and act for ourselves we cannot be strongly inclined to think and act like other people. If the ideal is to create for ourselves a special, personal image, this cannot mean to be like everyone else. Moreover, at the very moment when this solidarity exerts its effect, our personality, it may be said by definition, disappears, for we are no longer ourselves, but a collective being.

The social molecules that can only cohere in this one manner cannot therefore move as a unit save in so far as they lack any movement of their own, as do the molecules of inorganic bodies. This is why we suggest that this kind of solidarity should be called mechanical. The word does not mean that the solidarity is produced by mechanical and artificial means. We only use this term for it by analogy with the cohesion that links together the elements of raw materials, in contrast to that which encompasses the unity of living organisms. What finally justifies the use of this term is the fact that the bond that thus unites the individual with society is completely analogous to that which links the thing to the person. The individual consciousness, considered from this viewpoint, is simply a dependency of the collective type, and follows all its motions, just as the

object possessed follows those which its owner imposes upon it. In societies where this solidarity is highly developed the individual, as we shall see later, does not belong to himself; he is literally a thing at the disposal of society. Thus, in these same social types, personal rights are still not yet distinguished from 'real' rights.

The situation is entirely different in the case of solidarity that brings about the division of labour. Whereas the other solidarity implies that individuals resemble one another, the latter assumes that they are different from one another. The former type is only possible in so far as the individual personality is absorbed into the collective personality; the latter is only possible if each one of us has a sphere of action that is peculiarly our own, and consequently a personality. Thus the collective consciousness leaves uncovered a part of the individual consciousness, so that there may be established in it those special functions that it cannot regulate. The more extensive this free area is, the stronger the cohesion that arises from this solidarity. Indeed, on the one hand each one of us depends more intimately upon society the more labour is divided up, and on the other, the activity of each one of us is correspondingly more specialised, the more personal it is. Doubtless, however circumscribed that activity may be, it is never completely original. Even in the exercise of our profession we conform to usages and practices that are common to us all within our corporation. Yet even in this case, the burden that we bear is in a different way less heavy than when the whole of society bears down upon us, and this leaves much more room for the free play of our initiative. Here, then, the individuality of the whole grows at the same time as that of the parts. Society becomes more effective in moving in concert, at the same time as each of its elements has more movements that are peculiarly its own. This solidarity resembles that observed in the higher animals. In fact each organ has its own special characteristics and autonomy, yet the greater the unity of the organism, the more marked the individualisation of the parts. Using this analogy, we propose to call 'organic' the solidarity that is due to the division of labour.

At the same time this chapter and the preceding one provide us with the means of estimating the part played by each one of these two social links in the overall, common result which by different ways they contribute in producing. In fact we know under what external forms these two kinds of solidarity are symbolised, that is,

what is the corpus of legal rules corresponding to each one. Consequently to know their respective importance within a given social type, it is enough to compare the respective extent of the two kinds of law that express them, since the law always varies with the social relationships that it regulates.[15]

Notes

1. Tarde, *Criminalité comparée* (Alcan, Paris) p. 113.
2. Even that moral authority derives from custom, and hence from society.
3. We must confine ourselves here to these general remarks, common to every form of restitutory law. Numerous demonstrations of this truth will be found later (Chapter VII) for that part of law that corresponds to the solidarity engendered by the division of labour.
4. It has sometimes been stated that the status of father or son, etc. was the object of 'real' rights (cf. Ortolan, *Instituts*, vol. I, p. 660). But such forms of status are only abstract symbols of various rights, some 'real' (for example, a father's right over the fortune of his under-age children), others personal.
5. Arts 1382–1386 of the Civil Code. To these might be linked the articles concerning the reclaiming of a debt.
6. A contracting party who fails to fulfil his undertakings is also obliged to indemnify the other party. But in that case the damages awarded serve as a sanction for a positive bond. It is not because he has committed any harm that the breaker of a contract pays, but for not having carried out his obligation.
7. A. Comte, *Cours de philosophie positive*, vol. IV, p. 419.
8. For further development of this point, cf. Chapter VII.
9. For instance, in the case of a loan with interest.
10. H. Spencer, *Principles of Ethics* (London, 1893).
11. We have retained the expression normally used. But it would require to be defined, and this we are not able to do. All in all, it seems to us that these functions are those placed directly under the influence of governmental authorities. But many distinctions would have to be made.
12. Also, those that concern the 'real' rights of legally constituted bodies ('*personnes morales*') of an administrative kind, for the relationships that they determine are negative ones.
13. This is why the law that regulates the relationships of domestic functions is not penal in character, although its functions are fairly general.
14. Nevertheless these two consciousnesses are not regions of ourselves that are 'geographically' distinct, for they interpenetrate each other at every point.

15. To clarify ideas, in the table that follows we develop the classification of legal rules that is implicit in this chapter and the preceding one:

I. *Rules with an organised, repressive sanction.*
(A classification will be found in the next chapter.)

II. *Rules with a restitutory sanction determining different relationships.*

Negative or abstaining relationships	Of a thing to a person	Right to property in its various forms (personal estate, real estate, etc.)	
		Various procedures of the right of property (estate charges, usufruct, etc.)	
	Of persons to one another	Determined by the normal exercise of 'real' rights	
		Determined by the illegal violation of 'real' rights.	
	Between domestic functions		
Positive or co-operative relationships	Between diffused economic functions	Contractual relationships in general.	
		Special contracts.	
	Administrative functions	One to another.	
		With governmental functions.	
		With functions diffused throughout society.	
	Governmental functions	One to another.	
		With administrative functions.	
		With diffused political functions.	