PREFACE TO VOLUME III.

In this volume we resume the study of the development of political theory in its immediate relation to the historical events and conditions of the Middle Ages at the point where we left it in the first volume. I venture to hope that historical scholars will agree that it has proved to be of real service to deal with the political ideas inherent in feudalism in close relation to this development.

I should wish to express once again my obligations to the admirable work of Mr R. L. Poole, the most learned of English students of the Middle Ages, who more than thirty years ago, in his 'Illustrations of Mediæval Thought,' pointed out the great significance of the position of Manegold and John of Salisbury in the development of mediæval political theory. The detailed study of the political literature of their times has only served to bring out more clearly the justice and insight of his recognition of their place and importance.

As this work advances I become more and more conscious of the difficulty of handling such large and diverse materials, and I am therefore very grateful to those scholars who have been so kind as to help me with their technical knowledge of particular aspects of the literature; and I wish therefore
to express my most sincere thanks to Miss Pope of Somerville College, who has very kindly examined all the references to Mediaeval French writers, to Professor Meyrial of Paris, and Mr E. Barker of New College, who have read the proofs of Part I., and to Mr F. Urquhart of Balliol, who has read the proofs of Part II.

The printed texts of Bracton are obviously very defective, and I have used the text of the Bodleian MSS., Digby, 222. Professor Woodbine, in the first volume of his edition of Bracton, has indeed thrown some doubt upon Maitland's judgment of the value of this text, but I have thought it best in the meanwhile, pending the appearance of Professor Woodbine's text, to use it. I am under great obligation to Mr G. C. Winstedt of Magdalen College and the Bodleian Library for furnishing me with its readings throughout.

A. J. CARLYLE.


In this edition the text of Bracton is given as in Professor Woodbine's edition, so far as it has been published, and I give the reference to the folios, but I have also retained the reference to Books and chapters, as these may be convenient.

A. J. C.

1928.

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INTRODUCTION.

In the last volume we endeavoured to determine the nature of the influence of the ancient world on the political theory of the Middle Ages, as it is represented in the systems of medieval Roman and Canon law. It seemed well to consider these elements of medieval theory first, because in order to appreciate rightly the nature or characteristic developments of political thought, we must first consider carefully how much had been inherited from the ancient world, and also because with the help of these more or less systematic works we can distinguish more easily between the normal opinions of men and abnormal or eccentric views.

We must now face the task of trying to determine what were the characteristic political theories of those centuries of the Middle Ages during which all ideas were in a state of ferment, during which nothing was fixed or systematic, but every day as it brought new conditions so also it brought new theories, new ideas, often in such bewildering abundance as to make it difficult to estimate their value.

We turn in this volume first to the consideration of the characteristic conceptions of feudalism and their influence on the development of political ideas, and we have found that in order to deal with this effectively we must carry our study down to the end of the thirteenth century. For the rest we deal with the political theory as illustrated in general literature only to the end of the twelfth century, for in the thirteenth century the great schoolmen began to reduce the world of ideas.
and theories to a systematic form. The work of these great systematic thinkers was indeed often admirable and enlightened, and we propose in later volumes to deal with this, but there has been in our judgment some tendency to misunderstand mediaeval thought, because it has been studied too exclusively in these systematic writers. There has been a tendency to conceive of it as representing a completely articulated system of fixed principles and logical deductions from them. This is true, strictly speaking, only of the thirteenth century, and even then only of the great schoolmen. The literature of the centuries from the tenth to the twelfth century represents no such systematic mode of thought; the men of these times had indeed in the writings of the Christian Fathers a great body of theories and principles which had a constant influence upon them, while their habit of life and feeling was grounded in the traditions of the new Teutonic societies, but in neither of these had they an ordered and articulated system of political thought, but rather a body of principles, significant indeed and profound, but not always easily to be reconciled with each other. The history of the social and political ideas of these centuries is the history of the continual discovery of the relation of the traditions and principles which men had inherited to the actual circumstances of the time.

Our main difficulty in handling the matter is due not to the want of materials, for there is almost an over-abundance of these, but rather to the variety and complexity of the materials, and to the difficulty necessarily inherent in the attempt to set out in some systematic terms the conceptions of men who were not systematic thinkers, while they were acting and thinking energetically and often audaciously. And if the materials are abundant, the political ideas themselves are somewhat bewildering in their complexity. It has sometimes been thought that the political theory of the Middle Ages was simple and clear, because it was dominated by the principle of the unity of the world under the supremacy of the spiritual power. But the real truth is very different. We do not doubt that these conceptions had a real importance, but there were other aspects of the theory of society which were at least equally important, and which were more permanent in their importance. We cannot rightly apprehend the character of mediaeval civilisation if we conceive of it as something isolated from the continuous movement of Western life, for indeed as it was in a large measure founded upon the civilisation of the ancient world, so also it contained the elements of the modern.

Let us try to sum up briefly the general characteristics of the political ideas with which the men of the Middle Ages set out.

It is evident to any student of the political thought of the Middle Ages that it was immensely influenced by the traditions of the Christian Fathers—it is from them that it directly and immediately derived the forms under which it expressed its own conceptions. The formal political theory of the Middle Ages is dominated by the contrast between nature and convention; to the Fathers and to the great majority of mediaeval writers, until St Thomas Aquinas and the recovery of the Aristotelian Politics, all the great institutions of society are conventional and not natural. Men are, in this view, by nature free and equal, and possess the world and the things in it in common, while coercive government and slavery and private property are conventional institutions which were devised to correct the vices of human nature when it lost its first innocence. These great formal conceptions indeed control the terms of political theory until the end of the eighteenth century, until Rousseau and Burke and the beginnings of the modern historical method. In the first volume of this work we have endeavoured to set out in detail the characteristics of this mode of thought, and we can here only refer the readers to this.

If, however, we are rightly to appreciate the relations of mediaeval thought to that of the ancient world, we must remember that although these theories came to the Middle Ages primarily through the Christian Fathers, they were not distinctively Christian conceptions, but rather the commonplaces of the later philosophical schools, and the Fathers learned them in the schools and universities where they were educated. The
forms of the political theory of the Middle Ages represent therefore an inheritance from the Stoics and other philosophical schools of the Empire.

We must consider a little more closely the character of these theories. To the Stoics and the Christian Fathers the institutions of society were conventional, not natural, and they understood the nature as being in the first place the primitive. But the natural was to them something more than the primitive, it represented something which was also essential and permanent. It was necessary for the due order of human life that men should rule over each other, and the Fathers added to this the conception that in some sense slavery was a punishment as well as a remedy for human vice. But both philosophers and Fathers maintained that the freedom and equality of human nature continued to be real. Their conception of human nature was radically distinct from that which is represented by the Aristotelian philosophy. To them there was no such thing as a naturally servile person, for the soul of man was always free. This principle is indeed the exact reverse of that of Aristotle. He found the ground and justification of slavery in his judgment that only some men were in the full sense rational and capable of virtue, while others were not properly and fully possessed of reason, and could not therefore in the strict and complete sense of the word possess virtue. Whatever may have been the foundation of this judgment, the judgment had disappeared before the Christian era, and Cicero had in a famous passage, summing up the philosophical judgment of his time, repudiated it in the strongest terms. Seneca, a hundred years later, repeats the judgment in a memorable phrase. Men's bodies, he says, may be enslaved, the mind is free. These principles are also those of the Christian faith. To St Paul slavery is a merely external and accidental condition, the slave is just as capable of the highest life, the life of communion with God, as the freeman. His great words, "There can be neither Jew nor Greek, there can be neither bond nor free, there can be no male and female: for ye are all one in Christ"

Jesus," represent the principle of all Christian writers. We have in the first volume pointed out how emphatically these principles are restated in the literature of the ninth century, and in the second volume how they are repeated by the Roman jurists and the Canonists of the Middle Ages.

It is not, however, only slavery which was held to be conventional, the same thing applies also to private property. In the primitive and innocent conditions of human life there was no such thing as private property, but all things were common. Private property is the result of man's greed and avarice, and is justified only as a limitation of this. Private property is indeed lawful, but it is the creation of the State, and is determined and limited by its authority; and while the institution is lawful under the sinful conditions of human nature, the good things which God has given men through nature are still intended for the use of all. When the rich man assists the poor he is doing an act of justice, not of charity.

The institution of government is also conventional, and not natural. To the Stoics and the Fathers the coercive control of man by man is not an institution of nature. By nature men, being free and equal, were under no system of coercive control. Like slavery, the introduction of this was the result of the loss of man's original innocence, and represented the need of some power which might control and limit the unreasonable passions and appetites of human nature. This was the doctrine of the Christian Fathers, but it was also the doctrine of the Stoics as represented by Seneca, and it is impossible to understand the medieval theories of government if we forget this. It was not till Aristotle's Politics were rediscovered in the thirteenth century that St Thomas Aquinas under their influence recognised that the State was not merely an institution devised to correct men's vices, but rather the necessary form of a real and full human life. The formal conceptions of the Middle Ages were, however, on this point little affected by St Thomas. It is

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1 Cf. Gal. iii. 28; vol. i. p. 84; and Part I. chap. 5; Part II. chap. 6.  
3 Cf. vol. i. pp. 103-109.  
5 Cf. vol. i. chaps. 4, 8, 12; vol. ii. "Summa Theologica," I. Q. 96. 4.
We have in the second volume endeavoured to give some account of the treatment of this principle by the Civilians and Canonists of the twelfth and thirteenth centuries. We shall have to consider in detail the relation of these principles to the theory and structure of mediæval society. We shall have to deal with the theory and the practical nature of the relations of the spiritual and temporal powers in the Middle Ages, to plunge into the great conflict of the Papacy and the Empire, to try to disentangle the real and vital significance of that great dispute whose clamour fills these centuries.

But before we do this we must remind ourselves of the real nature of the problem, the real and fundamental principle which lies behind the confused noise of factions. Behind the forms of the great conflict we have to recognise the appearance in the consciousness of the civilised world of principles new and immensely significant. For behind it all there lies a development of the conception of individuality or personality which was unknown to the ancient world. We cannot here pretend to measure fully the gulf which lies between the Platonic and Aristotelian philosophy and that of the Stoics, and the other later philosophical systems, but it cannot be doubted that the gulf is profound. The phrases, for instance, in which Seneca describes the self-sufficiency of the wise man may be exaggerated and overstrained. No one, he says, can strictly be said either to benefit or to injure the wise man, for he is, except for his mortality, like God himself; he is indeed bound to the service of the common good, but if the conditions of life are such as to make it impossible for him to take part in public affairs, he can withdraw into himself and still serve the same cause by developing his own nature and character. The phrases may be overstrained and rhetorical, but they represent a sense of individual personality which is immensely significant, an apprehension of aspects of human life which are sacred and inviolable, independent of the authority, and, in his view, even of the support of society.

So far, then, we have been dealing with conceptions which dominate the theories of the Middle Ages, and which had come to them through the Fathers, but which were not strictly speaking distinctively Christian, but rather represented the general principles of the post-Aristotelian philosophy. The political theory of the Middle Ages was also however profoundly affected, or rather controlled, by certain conceptions which were distinctively Christian in their form, if not in their origin.

The first of these is the principle of the autonomy of the spiritual life, which in these ages assumed the form of the independence of the spiritual authority from the control of the temporal. We have endeavoured in the first volume to give some account of the nature and early forms of this conception. It finds characteristic and permanently important expression in the phrases of the letters and tractates of Pope Gelasius I., in which he lays down the great principle that the spiritual and the temporal authority each derives its authority from God, and that each is independent of the other within its own sphere, while each is dependent in the sphere of the other.

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1 Cf. vol. ii. Part I. chap. 10 and II. chap. 3; 'De Otto,' n., and vol. i. pp. 25-29.
2 Cf. vol. i. Part III. chap. 15; and Ep. xii. 2.
The changes which can be traced in the history of Western thought can be observed with equal clearness in the Semitic literature of the Old Testament. There are few sayings more significant than those indignant words in which Ezekiel repudiates the traditional conceptions of Israel. "The soul that sinneth, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him." 1 The solidarity of the primitive and ancient group was giving way before the development of a new apprehension of individuality.

It is this apprehension to which a new impulse and force was given by our Lord and his disciples. To them the soul of man has an individual relation with God which goes beyond the control of the society. The principles of the Christian religion represent, on this side, the same development as that of Ezekiel and the Stoics, and it is on this foundation that the civilisation of the mediaeval and modern world has grown up. This does not mean that religion has no social aspect, or that the political societies have no moral or spiritual character, but it does mean that men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society as embodying this spiritual experience cannot tolerate the control of the State. There are aspects of human life which are not and cannot be under the control of the laws or authority of the State.

It is true that the great individualist development has often been misinterpreted and exaggerated, and the greatest task of the modern world is to recover the sense of the organic unity of human life, that sense of unity which to the Christian faith is equally vital with the sense of individuality. The recovery of that sense of unity by Rousseau and Burke does indeed represent a great moment in the development of human apprehension, and separates the political thinking and action of the nineteenth century by a great gulf from that of the preceding centuries. We are once again Aristotelian, but with a great difference, for the apprehension of individual personality remains with us.

It is these convictions which lie behind the great struggles of the spiritual and temporal powers in the Middle Ages, the greatness of the conflict is some measure of the immense difficulties which beset them, and even now, the attempt to disentangle the sphere of religion from those aspects of life which are under the control of the State. For it must not be supposed that this was an easy thing to do. In the first volume we have endeavoured to point out how in the ninth century, while men clearly recognised in principle the distinction between the sphere of the two great authorities, yet in actual practice the two authorities constantly overlapped. 1 These difficulties became far greater in the centuries which followed, and we cannot measure the significance of the events which took place, or estimate the real character of the theories which were put forward, unless we continually take account of this.

The political theory of the Middle Ages then inherited a great conception of the independence of the Church, and we have here the first conception which was distinctively Christian, at least in form.

There is, however, another conception which the Middle Ages inherited from the ancient world which is also distinctively Christian in form if not in substance. This is the principle of the divine nature and origin of political authority. We have dealt with the origin and nature of this conception in the first volume, 2 and have in the second volume examined the treatment of the subject by the Civilians and Canonists of the twelfth century, 3 and it is unnecessary to say more about it here, as we shall have to consider its significance very carefully in this volume. But we must be under no misapprehension, whatever may have been the precise significance of St Augustine's treatment of the nature of secular authority, and the extent of its influence, the tradition which had come down to the Middle Ages was substantially clear and emphatic, and that was that

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1 Ezekiel xvi. 20.
2 Cf. vol. i. pp. 253-292.
3 Cf. vol. i. pp. 89-90, 147-160, 211-
the secular power is a divine institution and derives its authority from God.

This conception had been interpreted by some of the Fathers, and notably by St Gregory the Great, as meaning that the authority of the secular ruler was in such a sense divine that it was irreligious and profane to resist, or even to criticise it.¹

The theory of the "Divine Right" of the King is a patristic conception whose influence in the Middle Ages we shall have to consider, although it was not till the period of the Renaissance that it can be said to have received its full development, and it was then related to the development of the absolute monarchy in Europe.

Such, then, are in general outline the principles of political theory which the Middle Ages inherited by direct and continuous tradition from the ancient world, and these influences must be clearly and sharply distinguished from those which came to them in the twelfth century through the revived study of the Roman jurisprudence, and in the thirteenth century through the rediscovery of Aristotle's Politics. We have dealt with the former of these influences in the second volume, the latter we must leave till we can deal with the thirteenth century in a later volume. It was in the main through the writings of the Fathers that the continuous tradition came, but, as we shall have occasion to see, it was reinforced throughout these centuries by the energetic study of the Latin authors whose works had survived. We have seen that in many most important aspects this continuous tradition represents rather the general political ideas of the last centuries of the ancient world than distinctively Christian conceptions.

We must now observe that the order of society in Western Europe was based largely upon principles which belonged to the new societies. There has been and there still is much controversy on the exact degree of the independence of the Teutonic constitutions and political principles. The great constitutional historians of the middle of the nineteenth century, like Waitz and Stubbs, assumed that the ancient world had little or no influence in determining the characteristic forms and principles of the government of the Teutonic state. In the latter part of the nineteenth century a very learned and capable body of historical scholars, of whom the chief were, on the Continent, Fuset de Coulanges, and in England, Seebohm, argued that in reality much which had been thought to be Teutonic was merely an adaptation of the forms and principles of the provincial administration of the later empire. We do not need for our purpose to attempt a dogmatic decision of the controversy, though we cannot conceal our own conviction that the balance of historical research and discussion has turned strongly against the Romanist view. For our purpose it is enough that we should observe the nature of the principles which were implicit in the structure of the new societies, and which found a large measure of reasoned expression in the literature especially of the ninth century.

Some of these principles are of great significance. The first and fundamental principle implicit in the organisation of the new societies is the supremacy of the law or custom of the community over all its members, from the humblest free man to the king. And the second is that there could be no succession to kingship without the election or recognition of the community. There is here indeed an obvious parallel, but also an obvious divergence in the structure of the Teutonic societies, as compared with that of the Roman empire. It was indeed the fundamental principle of the Roman jurists that the source of all political authority was the Roman people, that the emperor held his authority only because the Roman people had been pleased to confer it upon him.¹ But there was this far-reaching difference between the Roman legal theory and the principles of the Teutonic societies, that the Roman theory was a theory of origins, while the Teutonic principles were of actually existing conditions. It was not merely that the Teutonic king required the consent or recognition of the community for his accession to power, but that he was not over the law, nor its creator, but under it. The Roman doctrine of the legislative authority of the emperor has no counterpart in

¹ Cf. vol. i. pp. 147-160.

¹ Cf. vol. i. pp. 63-70.
the principles of the Teutonic societies, the law was the law of the community, not of the king. It is true indeed that in the earlier Middle Ages there was normally no such thing as legislation in the modern sense, the law, strictly speaking, was nothing but the traditional custom of the community, and legislative acts were, properly speaking, nothing but authoritative declarations of custom. As the changing conditions of medieval life finally made deliberate modification of these customs inevitable, such action was taken, though reluctantly, but could only be taken with the assent, expressed or tacit, of the community.

Here are indeed political principles or ideas of the highest moment, derived not from the traditions of the ancient world and empire, but rooted in the constitutional practice of the new societies. We have endeavoured to set out the evidence for the predominance of these conceptions in the first volume, but their significance cannot be fully appreciated without a study of the more important works on the constitutional history of the various European countries in the early Middle Ages.

It is in relation to these principles that we have to study the appearance of the doctrine of the social contract; that is, the conception of an agreement or bargain between the people and the ruler. In the popular mind this conception is supposed to belong to the seventeenth and eighteenth centuries, but the real truth is that it is a medieval conception, and that it arose primarily out of conceptions and circumstances which were characteristic of medieval society. This principle or theory has some place in ancient literature, especially in Plato's 'Laws,' and a phrase of St Augustine's has been sometimes quoted as related to it, though probably without any sufficient justification, but there is no evidence that there is any continuity between the Platonic theory and that of the Middle Ages. We have in the first volume pointed out the circumstances of which we think it likely that they all have a real and significant place in mediaeval theory. The great formal conception of the distinction between nature and convention, which came from the post-Aristotelian philosophy in which the Christian Fathers were trained; the principle of the equality and freedom of men which arose out of this and the Christian tradition; the immensely significant conception of the necessary freedom of the spiritual life and the spiritual authority which specially represents this; the conviction of the sanctity of the political order; the principle of the supreme authority of the law or custom of the community, and of the King as responsible to govern according to the law, these conceptions or principles dominated the sentiment and the theory of all mediaeval society.

Our present task is to consider the development of these conceptions under the actual circumstances of European society from the tenth to the thirteenth centuries, and to inquire how far they may have been modified or superseded by other principles. For the new times brought new conditions, new and important forms of political and social relations. We shall

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1 Cf. vol. i., chaps. 19 and 20.
2 Cf. vol. i. p. 17.
3 St Augustine, 'Confessions,' i. ii. 8.
4 Cf. vol. i. pp. 240-252.
have especially to consider how far the development of feudal ideas, and the organisation of European society on the basis of feudal tenure, may have modified or overlaid earlier principles; how far again in the great conflicts between the spiritual and the temporal powers the conception of the sanctity and autonomy of either may have been questioned or denied. The development of mediaeval society was very rapid, and the intellectual development was even more rapid than that of the organisation of society. The greatest difficulty indeed with which the historian has to contend, in trying to interpret the Middle Ages to the modern world, is the impression that the civilisation of these times was stationary and rigid, that the mediaeval world was unlike the modern, specially in this, that it was unchanging, while we perpetually change. This tradition is primarily derived from the ignorance and prejudice of the men of the new learning and the Renaissance, and lingers on, not in serious history, but in the literary tradition, and in the prejudices which arose naturally enough out of the great agitations of the Reformation and the Revolution. If we are to study the Middle Ages intelligently, if we are to appreciate their real relation to the modern world, we must disembrace from our minds these notions of a fixed and stereotyped society, we must rather recognise that there have been few periods in the history of the world when the movement of thought and of life was more rapid than in the twelfth and thirteenth centuries.

When we attempt to trace the history of political ideas in the Middle Ages, we are at once confronted with the fact that, after the active political reflection which is represented in the literature of the ninth century, there follows a considerable period from which very little indeed of political theory has survived in literature. From the end of the ninth century till the middle of the eleventh the references to the principles or ideas of politics are very scanty indeed. We have indeed to remember that it is probable that a great deal of literature, especially in the vernacular languages, has disappeared, but it is at least a probable conclusion from what has survived that there was not much reflection upon social and political questions, and that it was not till the middle of the eleventh century that the great political agitations in Germany, and the development of the great conflict between the Papacy and the Empire, compelled men to question themselves as to the principles which underlay the order of society.

This does not mean that during this time no important changes were taking place in the structure of European society; on the contrary, in some respects the period was one of great and significant development. It was during these years that feudalism was taking shape and form, establishing itself as a system of social and economic and military organisation, and in some degree affecting the structure of government. How far the growth of feudalism affected the principle or theory of political organisation is the first important question which we have to consider.

It was during these years that European civilisation was being rescued from a second great wave of barbarism, which threatened for a time to overwhelm it. For upon the confused faction fights which distracted Western Europe while the great empire of Charlemagne was breaking up, there fell the torrent of the second barbaric invasion. The Norsemen on the North and West, the Magyars on the East harried and plundered, and for a time it seemed as though the work of the preceding centuries would be completely undone; and indeed Europe very nearly relapsed into anarchy, and Church and State were almost overwhelmed in a common destruction. But the victory of Alfred over the Danes, of Otto the Great at the Lechfeld over the Magyars, and the limits within which the Norse invasion of France was finally contained, mark the fact that the new civilisation was stronger than the forces which attacked it, that the new barbarians had to reckon with a civilisation which was not worn out like that of the Western Empire which the forefathers of the Franks and the Englishmen had overthrown five centuries earlier, but with one which was living and powerful and capable of a rapid recovery and growth. The new invasions did indeed leave profound traces behind them, but the greatest and most powerful of the invaders, the Normans who settled in...
North-Western France, proved rapidly that they were capable not merely of conquest, but that they could contribute greatly to the progress of the very civilisation which for the moment they had shaken.

The development of feudalism was in great measure the result of the downfall of the Carolingian civilisation, but the effects of this can also be traced in the relations of the Papacy and the Empire. The breaking up of the Empire of Charlemagne might indeed seem to have set the Papacy at liberty, but actually it left it under the tyranny of the barbarous factions of the Roman nobles, and its degradation was even deeper than that of the State. It was rescued from this in the tenth century by the Otos, and in the eleventh by Henry III., but the conditions of its deliverance held in themselves the seeds of disaster. The emperor exercised, and for the time with excellent results, a very large measure of control over the Church, and especially over the appointment of its chief ministers, but it was impossible that the Church should in the long run acquiesce in this. The principle of its necessary independence was too firmly rooted in its history, and it was the attempt to recover and vindicate this which led to the great conflict of the Papacy and the Empire, of the spiritual and temporal powers in the various European countries. This conflict in its turn contributed a great deal to compel men to consider and make explicit the fundamental principles of the structure and organisations of society, and thus to produce those energetic and audacious developments in political theory which we have to consider.

We have, then, to deal with three great subjects—first, the nature of the principles implicit in feudalism, and the effect of these principles upon political ideas; second, the characteristic political conceptions of the eleventh and twelfth centuries as related to the development of the general political and social structure of Western civilisation; and thirdly, the forms and theories of the relations of the temporal and spiritual authorities. It is indeed true that we cannot isolate these various aspects of mediaeval life and thought from each other, but they do in some measure really represent the operation of different forces, and we have to consider how far it may be true that they tended to give rise to different conceptions or principles. We shall have to make the effort finally to bring our reflections upon them together, and to form some unified view of their effect upon the principles of mediaeval life, but for the time being we have found ourselves driven to deal with them separately.

We have found that the adequate treatment of the subjects has required so much space that we have decided to deal with feudalism and the general political ideas in this volume, and with the relations of the temporal and spiritual powers in the next.

We deal with feudalism first, not because it was in our judgment the most important element in the structure of mediaeval society, but because it has often been thought to have been so, and because this at least is true, that whatever its influence may have been, it represented a new element in civilisation. In dealing with it we shall be obliged to transcend the limits of time which we have set to the general scope of this volume. For the significance of feudalism in relation to political theory cannot adequately be discussed without taking into account the great feudal law books of the thirteenth century; and, what is more important, the system of feudalism represents an organic development culminating in the latter years of the thirteenth century, which cannot be understood unless we take account of the whole process of its development. We are, of course, aware of the risk that we run of reading back the conceptions of the thirteenth century into the eleventh and twelfth, and we shall do our best to guard against this risk.
PART I.

THE INFLUENCE OF FEUDALISM ON POLITICAL THEORY.

CHAPTER I.

PERSONAL LOYALTY.

There is perhaps no subject in mediæval history which is so difficult as that of feudalism. Its origins are still obscure and controverted, its development belongs largely to the tenth century, and there are few periods of mediæval history where the sources of our information are so scanty and so fragmentary, and in the literature which has survived there is only a little that can be said to bear directly upon feudalism. And, finally, its real nature and essential characteristics have been so confused by the laxity of literary usage that it is difficult to say what is meant by the word.

Feudalism is a system of personal relations, of land tenure, of military organisation, of judicial order, and of political order. It affected the life of every class in the mediæval community, from the villein to the king or emperor, and it even affected profoundly the position of at least the greater clergy, the bishops and abbots. There are, indeed, few aspects of mediæval life which were not touched by it, and it is therefore natural that it should be thought that it must have profoundly modified both the institutions and the political ideas of the Middle Ages.

It is not our part here to deal with the first of these
subjects, the influence of feudalism on the institutions of the Middle Ages, its direct effects upon the forms of the great constitutional development which culminated in the Parliament of Edward I. and the States-General of Philip the Fair, and the parallel developments in other European countries. We cannot even attempt to summarise the results of the work of the constitutional historians, for any summary would probably mislead rather than illuminate. But it is possible to say that while feudalism left for centuries deeply marked traces on the social and political structure of European society, and while the great systems of national organisation did indeed take into themselves elements which belonged to feudalism, they also represented principles which in their essential nature were independent of and even contradictory to some specific characteristics of the feudal system. In the end the king or the parliament, or both, came to be directly related to all the individuals who compose the State, and in their authority the local and personal authorities and jurisdictions of feudalism were finally lost. The royal justice at last absorbs all feudal justice, in the administrative authority of the crown all the areas of feudal administration are merged, and the legislative authority of parliament asserts itself as supreme over all feudal traditions and customs. The king and the parliament represent the nation, and the unity of the nation finally transcends all the separatist tendencies of feudalism.

It may even be said that the best example of this can be found in that country where at first sight feudalism might seem to have triumphed, for the unity of the German kingdom was finally destroyed, and the great fiefs became practically autonomous provinces. But it was not feudalism which triumphed, but territorialism. In the territorial areas there developed the same centralised authority and administration as in England or France, and it was no doubt that very fact which accounts for the failure of the constitutional movement of the close of the fifteenth century.

We have to deal here not primarily with institutions, but with the question how far feudalism affected the political ideas of the Middle Ages, how far its influence coincided with the traditions which they inherited, and furthered the development of social and political ideas which were already present, or how far it may have tended to neutralise or modify them. We must be prepared to find that the influence of feudalism was very complex, and that it may have tended in different directions.

We begin by pointing out what may seem a paradox; that feudalism represents two principles which in their ultimate development may seem contradictory, but which yet affected the minds of the men of the Middle Ages at the same time. The first principle is that of personal loyalty and devotion, the second is that of the contractual relation.

The first principle is that which is represented especially in the poetic literature of the Middle Ages, and which has thus passed naturally enough into the literary as distinguished from the historical presentation of the Middle Ages in modern times. We are all familiar with the romantic representation of mediæval life as dominated by the sentiment of chivalrous loyalty and devotion. How much of exaggeration there is contained in this we shall presently see, but there are elements of real truth in it. And, more than this, these sentiments have a real and permanent importance in political as well as in social life. Human life in its deepest and largest terms cannot be lived upon principles of utility and contract. Whether in the family or in the nation the actual working of human life is impossible without the sense of loyalty and devotion.

This is the first principle of feudalism, and the second may well seem contradictory to it. For nothing could seem further apart than the conception of personal loyalty and the conception of bargain or contract as the foundation of human relations. And yet there is no escape from the conclusion that in the last resort feudal relations were contractual relations, that the vassal was bound indeed to discharge certain obligations, but only on the condition that the lord also discharged his obligations to the vassal. Here again it is evident that we are dealing with a principle which is reasonable and just, for in the long run human relations are impossible unless there is some reasonable recognition and fulfilment of mutual obligations.
The principles may seem contradictory, and indeed they were hard to reconcile, but it is also true to say that they were not only held together and constantly reconciled in practice, but also that the political thinkers of the Middle Ages were aware of certain great rational principles which lie behind these conceptions, and in which they found a reasonable reconciliation of them.

For this is the truth about feudalism. At first sight it seems very strange and unintelligible. We find it difficult to understand how men could think and act thus, but if we are a little patient we find it becoming intelligible, and finally we see it not as wholly unnatural and abnormal, but as representing a phase of social and political development which lies indeed behind us, but whose conditions we can understand, and we shall see that in a measure these apparently strange principles have a continuing significance even among ourselves.

The difficulty of understanding feudalism has been immensely increased by the habit of conceiving of it as a homogeneous system, complete and perfect at some definite time and place. It becomes much more intelligible when we begin to see that under the one term there are contained ideas which were very different from each other, and that as it had slowly grown up, so it was perpetually developing and changing. The feudal idea as it is presented to us in the epic or romantic poetry is something quite different from that which is represented by such a characteristic set of law books as those which make up the Assizes of Jerusalem, or by Beaumanoir, and when we look a little more closely we begin to understand this, and to see that the conceptions of the epics and romances of the twelfth and thirteenth centuries represent sometimes the tradition of the past, sometimes an elaborate and artificial convention rather than the actual reality.

There has indeed often been a very serious misunderstanding even among scholars as to the value of the artistic representation of manners and customs. In some poetry, as for instance in the earlier mediæval epic, the picture of external life and manners of men and women, is highly realistic, and supplies us with very valuable information as to the conditions of contemporary society. In other forms of literature, and especially in the romance of the twelfth and thirteenth centuries, it is evident that we are dealing with an art which is in great part, in its relation to the circumstances of life, conventional and traditional, and which even in its essential sentimental or emotional interest represents an abstraction of human life, valuable indeed and profoundly moving and significant, but still an abstraction rather than a realistic treatment. The great fighting man of the epic literature, and the frank, high-hearted, and sometimes implacable woman, upon whom often the whole movement of the story depends, these are real figures of men and women, and they live in the real world. But the romantic hero or heroine, absorbed in their emotions, far removed from the actual circumstances of daily life, are placed in a world which is mainly unreal and conventional. The transition from the Beowulf or the Icelandic Sagas to the Arthurian romance is the transition from idealised and heroic reality to an elaborate convention.

It is necessary to use the evidence of mediæval poetry with great caution, and to make careful distinctions between the value of different forms of it as illustrating the customs and ideas of any one time.

We cannot here attempt to discuss in detail the origin of feudalism, the subject has been handled with great learning by a number of historians, but we can say with great confidence that its origin was extremely complex. Comitatus, Commeudatio, and Beneficium, these are the main elements of the relation of lord and vassal, and each of these had an important part in the development of the whole system. From the Comitatus there came the devotion of the band of followers to their leader in war, the almost indissoluble tie which united the "companion" to his chief in faith and loyalty, and this may have been the first, as it was certainly among the most important, of the elements out of which the feudal relation grew. It

1 Cf. e.g., Waitz, Brunner, Fustel de Coulanges, Floss, &c.
is this aspect of the relation that we find specially illustrated in the epics and romances, while its influence can also be traced in certain principles of the feudal law books. The process of Commendation by which a hitherto independent person became dependent on some powerful man or ruler in return for the protection that he could afford to him, was probably the means by which the feudal relation was most widely extended. The gradual transformation of a relation, which was originally almost wholly personal, into a great system of land tenure on the basis of military or of "base" service, which in its turn became a system of political relations, this is connected with the Beneficiun. It is out of these complex and incoherent elements that the feudal system was gradually formed; something of each goes to make up the whole system as we see it from the tenth to the thirteenth centuries, and they are all represented in the literature and legal systems of these times.

It is not necessary to deal at length with the conception of personal loyalty and devotion, it will be sufficient to indicate its nature by means of an example from the literature of the twelfth century.

One of the most interesting illustrations of the influence of the conception is to be found in the French Chanson de Geste, the 'Raoul de Cambrai,' which belongs probably to the latter part of the twelfth century. When Raoul is knighted he takes as his squire Bernier, the illegitimate son of Ybert of Ribemont. Raoul obtains from the King of France a grant of the lands of Vermandois, which had belonged to Ybert's family, and invades the country in spite of the protests of Bernier. He sacks and burns the town of Origny with its monastery, and the country in spite of his brutal and overbearing character, in spite of the wanton murder of his mother and the other nuns of Origny, Bernier feels that he has committed an unheard-of crime in turning against his lord, to whom he feels himself bound by ties even more sacred than those of nature.

Illustrations of the personal loyalty and devotion of vassal to lord could be indefinitely multiplied from the mediaeval poets, but no useful purpose would be here served by doing this. Only it is important to remember that they do not represent a principle peculiar to France, but rather a universal and highly significant aspect of the organisation of European society in the Middle Ages. The feudal relation was not one of mere dependence, or of mere advantage, but one of faith and loyal service, and the whole conception is admirably summed up in the famous phrases of the letter of Fulbert of Chartres, written in 1020 A.D. to the Duke of Aquitaine. He that swears fidelity to his lord must have in his mind these

vengeance. Through all his life the thought of what he had done haunts him, and there is a tragic fitness in his end, for after many years Raoul's uncle kills him near the place where long before he had killed Raoul.

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jurisdiction

26 THE INFLUENCE OF FEUDALISM. [PART I.

six words, "Incolumb, tutum, honestum, utile, facile, possible," he must do what he can to keep his lord’s body unharmed, to keep his secrets and strongholds, to maintain his rights of jurisdiction and all his other dignities, to keep his possessions safe, to see that he does not make that difficult or impossible to his lord which is not easy and possible. Fulbert adds that these obligations are mutual, and we shall have more to say upon this point presently.  

These conceptions were not merely traditional or merely ideal, and we should observe that they have their place also in the more technical expression of feudal principles in the law books, and as late as the thirteenth century.

We have in the Assizes of Jerusalem a very full treatment of the mutual obligation of vassal and lord to which we shall constantly have to recur; for the moment we can fix our attention on one passage in the work of Jean d’Ibelin, which forms a very important part of the Assizes. In this passage he has described the mutual nature of the obligations of lord and vassal, and then points out that there are some obligations which are peculiar to the vassal. The vassal owes his lord reverence as well as faith, and must do some things for him which the lord is not bound to do. He must be ready to act as a hostage to deliver his lord from prison, and if in battle he sees his lord disarmed and unhorsed he must if necessary give him his own horse in order to enable him to escape from danger, and again he must be ready to act as security for his lord’s debts to the extent of the value of his fief.  

The lord must indeed in his turn do all that he can to help and deliver his vassal who has thus imperilled himself for him, and to compensate him for the losses he may have suffered; but there is a real and marked difference in the nature of the obligations, they are indeed mutual, but they are not quite the same, and the element of reverence, which the vassal owes, is distinctive and important. It is noteworthy that both Glanvill and Bracton, while describing the feudal obligations as mutual, both treat the element of reverence which the vassal owes as distinctive.

The principle of personal devotion and fidelity to the lord forms, then, a very important part of the tradition of medieaval society, and we must take careful account of it in trying to estimate the characteristic conceptions of the Middle Ages with respect to the nature of political association. And we must also observe that we have here something quite different from those principles of political relation and obligation which we have so far considered. These sentiments of personal

1 Fulbert of Chartres, Ep. 58: "Qui domino suo fidelitatem jurat, ista sex in memoria semper habere debet: Incolumb, tutum, honestum, utile, facile, possible; videlicet, Incolumb, ne sit domino in damnum de corpore suo, Vel de munificentibus per quas tutus esse potest. Honestum, ne sit ei in damnum de secreto suo, vel de munificentibus per quas tutus esse potest. Ut autem fidelis hanc nomenclam habeat justam est sed non ille sacramentum meretur. Non enim sufficit abstine a male nisi fiat quod bonum est. Restat ergo ut in eadem sex suprema dicta consilium et auxilium domino fideliter praestet, si beneficio dignus viserit vo, et salutus esse de fidelitate quam praebuit. Dominus queque fidelis suo in his omnibus vicem reddere debet: quod si non fecerit, morito conscribitur maleficus: sicut ille si in corum previactions vel faciendo vel consentiendo, deprehensus fuerit, perfidus et perfidus.

2 Facile

3 Glanvill, ix. 4: "Mutus qui dem debet esse dominii et homagii fidelitatis connexio, ilius quantum homo debet dominio ex homagio, tantum illi debet dominum ex dominio præter solam reverentiam."

4 Bracton, De Legibus et Consuetudinibus Angliae," l. 35. 2 (fol. 78): "Est fiaque tanta et talis conexio per homagium inter dominum et tenentem, ut quod tantum debet dominus tenere, quantum tenens dominio, præter solam reverentiam."
Personal Loyalty.

Loyalty must not be confused with the principles of political society either in the form in which they had come down from the ancient world through the Fathers, or as they were implicit in the political structure of the Teutonic societies, so far as we have considered them hitherto. It is no doubt true that in the Teutonic societies, as distinguished from the developed political organisations of the ancient world, there survived traditions and sentiments which were related to the conception of the chieftainship of a tribe, and one of the chief difficulties in dealing with the history of feudalism is to disentangle the tribal from the feudal sentiment. In some mediaeval states, and especially in the German kingdom, the influence of tribal sentiment and tribal loyalty is difficult to measure, and it is probably true to say that the feudal relation only partially overlaid it.

However this may be, these sentiments of personal loyalty and devotion to the immediate lord to whom a man had sworn his faith and service constitute a new element in the tangle of ideas and organisations, out of which there slowly emerged the national state of modern times. And it was an element which was very difficult to reconcile with the national idea and the national constitution. The loyalty of the vassal to his immediate lord was one of the most characteristic elements of the chaos of the tenth century, and it was only very slowly that this loyalty was transferred to the national king.

If we turn back again to the French epics of the Middle Ages we sometimes find that they represent alongside of the profound devotion of the vassal to his immediate lord an almost unmeasured contempt for the king or overlord, and we can find an illustration of this in the same Chanson de Geste, the ‘Raoul de Cambrai,’ which we have already cited. The death of Raoul, which we have already described, is followed by a long conflict between his house and that of Bernier, until, after a long struggle, Gautier, the nephew of Raoul, and Bernier are reconciled with each other. The King of the French is vexed at the reconciliation, and both parties then turn on the King and denounce him as the real author of the feud. When the King threatens to take his father’s lands from him,
CHAPTER II.

JUSTICE AND LAW.

We have dealt with that aspect of feudalism which would seem to present a conception of social or political relations very different from those which we have hitherto considered, and we must recognise that we have here a principle which has exercised and still exercises a great influence in the actual working of political and social relations. When, however, we set out to examine the structure of feudal society more completely, we find that this principle of personal obligation and fidelity is only one of many principles, and that the normal conditions of mediaeval society were not determined by such considerations alone. No doubt the feudal system as a whole did materially affect the development of the method of government in the Middle Ages, but our own impression is that it did not really alter the conception of the nature of political society to the extent which might be supposed, and that in the end its influence was in the main to strengthen the normal tendencies in the development of constitutional order.

There is still a vulgar impression that in the Middle Ages men looked upon authority as irresponsible, that they conceived of the ruler as a person who exercised a capricious and almost unlimited authority over his subjects, and that men had little knowledge of, or care for, any rational principles of social organisation.

We have endeavoured in the first volume to point out how wholly incorrect such an impression proves to be when confronted with the energetic and abundant literature of political thought in the ninth century, and in the last volume we have dealt with the carefully considered theories of government of the Civilians and Canonists, especially of the twelfth century. It may be imagined that while this is true, the feudal system, in its insistence upon the merely personal element in social relations, had undermined these reasoned judgments, and had diverted the attention of practical men from the consideration of the principles of political order. It is no doubt true that the compilers of the feudal law books were primarily practical men, trying to set down the details of the customs and regulations of mediaeval society, and not theorists in jurisprudence or politics; but this in some ways only brings into sharper relief the fact that the system which they were describing embodied very important and more or less determinable principles, and that they were in a large measure conscious of these principles and tenacious in maintaining them. As we shall see, so far from its being true that they conceived of authority as something arbitrary and capricious, they conceived of it as a thing very sharply defined and very severely limited. The truth is that the characteristic defect of the system of mediaeval society was not that it left too much liberty for arbitrary and capricious action, but that it tended to fix both rights and obligations to such an extent as to run the risk first of rendering government unworkable, and secondly of rendering the movement and growth of life impossible.

It is of course perfectly true that mediaeval society often seemed to oscillate between an uncontrollable and arbitrary despotism, and an anarchical confusion, but this was due, not to the want of a clear conviction of the rights and duties of rulers and subjects, but to the absence of an effective instrument of government. The history of mediaeval society constantly impresses upon us the conviction that the real difference between a barbarous and a civilised political system lies in the fact that the latter has an almost automatically working administrative and judicial machinery, while the former is dependent upon the chance of the presence of some exceptionally competent and clear-sighted individual ruler.

The truth is that the men of these times were in no way inferior to us in their sense of reverence for law, or in respect...
for the great principles of human life, of which law is the embodiment, but that they had no efficient civil service and police to secure the smooth execution of law. They apprehended very clearly the principles of political and social order, but it has taken all these centuries to work out an adequate instrument for giving them practical effect.

To the men of the Middle Ages, as to every serious thinker upon politics, the principle which lies behind every form of the authority of the state is the principle of justice. The justification of authority is that it represents the principle of justice; the purpose of it is to maintain justice. There is a passage in one of the French epics of the twelfth century which is very characteristic of the temper and judgment of the Middle Ages. The purpose of God, the writer says, in making the Assizes of the Court of Burgesses of Jerusalem: “La dame ni le sire n’en est seignor se non dou dreit,” and “mais bien sachis qu’il n’est mie seignor de faire tort.” 1 The authority of the lady or lord is only an authority to do law or justice —for the phrase implies both—they have no authority to behave unjustly. Here is a great principle stated with certain epigrammatic force. It is true that this principle was not novel, but corresponds with the traditions of Roman and Canon law, and no doubt arose directly out of tradition, but rather that the whole contents of the Assizes show very clearly that it was not merely formal tradition, but rather that the organisation of such a typical feudal state as the kingdom of Jerusalem represented the effort to secure its reality.

It is worth our while to consider the character of the whole passage from which these words are taken. If any man or woman, knight or burgess, has obtained a judgment of the court, and the king or queen endeavours to prevent its execution, this is a sin against God and their oath. For the king has sworn to maintain the good usages and customs of the kingdom, to protect the poor as well as the rich in the enjoyment of their rights. If he now breaks his oath he denies God, and his men and the people should not permit this, for “la dame ni le sire n’en est seignor se non dou dreit.” 2

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and well defined is the general conception of the nature of political authority. The feudal lawyers do not generally discuss abstract principles, but it is easy to see that behind the detail of regulations there lay the assumption that these represented some principles of what was reasonable and equitable, that political authority represented moral and religious as well as purely legal obligations.

Some of the law books, and especially the Assizes of the Court of Burgesses, were strongly influenced by the revived study of the Roman law, and in these we find a more definite attempt to deal with the abstract nature of justice. These Assizes begin with a paraphrase of the first title of the Institutes of Justinian, and it is interesting to see how the compiler blends religious and legal conceptions to express his meaning. 1

The whole conception of the feudal lawyers is summed up in a very important and significant passage in Bracton's treatise on the laws of England. The king, he says, must, at his coronation, swear three things—first, that he will do what lies in him to secure that the Church and all Christian people may have peace in his time; secondly, that he will forbid rapine and wrong-doing among all classes of the people; thirdly, that in all his judgments he will ordain equity and mercy as he hopes for mercy from God. The king is indeed elected for this very purpose, that he should do justice to all men, and that through him God may distribute His judgments, for it would be useless to make laws if there were not some one to enforce them. The king is God's vicar upon earth, and it is his duty to divide right from wrong, the equitable from the inequitable, that all his subjects may live honestly, and that no man should injure another.

In power, indeed, he should excel all his subjects, for he should have no equal nor superior, specially in administering justice. For the king, inasmuch as he is God's vicar and servant, can do nothing except that which he can do lawfully. It is indeed said that what pleases the prince has the force of law, but at the end of this law there follow the words, "cum lege regia, quae de imperio lata est," &c., that is, not everything is law which may be thought to be his will, but only that which is determined upon with the intention of making laws, with the authority of the king, with the counsel of his magistrates, and after due deliberation and discussion.

The authority of the king is the authority of law (or right), not of wrong. The king, therefore, should use the authority of law (or right) as being the vicar and servant of God on earth, for that alone is the authority of God; the authority of wrong belongs to the devil, and not to God, and the king is the servant of him whose work he does. Therefore when the king does justice he is the vicar of the eternal King, but the servant of the devil when he turns aside to do wrong. For the king has his title from the fact that he governs well, and not from the fact that he reigns, for he is a king when he governs well, but a tyrant when he oppresses the people entrusted to him. Let him therefore restrain his authority by the law, which is the bridle of authority, let him live according to law, for this is the principle of human law that laws bind him who makes them, as it is said, "digna vox males- tate regantis est legis se alligatum principem profiteri," and again, "Nihil tam proprium est imperii quam legibus vivere," and "malius imperio est legis submittere principatum," and "merito debet retribuere legi, quia lex tribuuit ei, factit enim lex quod ipse sit rex." 1

1 'Assises de la Cour des Bourgeois,' 1: "De justicie et de droit de le commenceum de se livre devons dire. Tout premièrem devons quere justi- tie, por son droit donuer a chascun homme et a chascune femme; car en Latin justicie se desceve en ci : 'Justitia est constans et perpetuas voluntas ius sum cuique tribuendui.' 'Con- stans,' ce est, ferm doit estre en fei et en justice, car celuy qui est ferm en fei et en justice, cil vit et non mora- mie. Car ce dit l'Escriture en la lei: 'Justus ex fide vivit' ce est, le juste home si vit par fei. Eencement justicie doit estre eterna, c'est a dire permiable, car David dit : 'Justitia Dei manet in seculum seculi,' c'est a dire la droiture de Dieu est a tous jours per- duraible. Done de fei et de justice devons aver matiere tout premiere- ment, si que par fei et par justice puissons rendre son droit a chascum home et a chascume fomu.'

1 Bracton, 'De Legibus et Consuetu- dibus Angl.' iii. 9. 2 (fol. 107): "Debet enim in coronatione sua, in nominate Jesu Christi præstito sacra- mento, hæc tria promittere populo sibi subditto. Imprimis, se esse pra- ceptatorum et pro viribus operum impensum, ut ecclesia Dei et omni populo Christiano verum pax omni suo tempo observaret. Secundo, ut
Bracton's words are an admirable summary of the principle that all authority represents some essential principle of justice and equity, that an unjust authority is no authority. We shall frequently have occasion to refer to this passage, as it contains much which requires comment. It is obvious that his phrases represent many influences besides that of feudal tradition and custom, he is well acquainted with some important passages

raeplicatio et omnes iniquitates omnia
bus gradibus interdicit. Tertio, ut in omnibus iudiciis spectat in praepri-
plieat et miercordiam, ut indulgent
et saum miercordiam alementis et miercific Deus, et ut per iustitiam suam
saepe SAces gaudentes universi.

3. Ad hoc autem cestus est rex et electo, ut iustitiam faciat univer-
e et ut in Dominus sedeat, et per
ipsum sua iudicia disemunat, et quod
iustitiam suam et secundum.

Separare autem debet rex (cum sit Dei vicarius in terrâ) ius ab inuaria, aiuam ab iique, ut omnes
sibi subiecti honeste vivant, et quod
nullus alius possit, et quod uniusque
quod sumue fuerit, recta contributione
reddeatur. Potest vel omnes sibi
subditos debet praebere. Parem
autem habere non debet, nec multo
foris superiores, maxime in iustitia
exhibenda, ut dicatur vere de eo,
Magnus dominus noxer, et magna
vitus eius etc. Liest in iustitia re-
pienda minimo de nego suo compar-
tur, et liest omnes potentias praebat,
tamen (cum cor regia in manu Dei
esse debet), ne sit effrenata, fravum
apportion tempereant, et lora moder-
antia ne cum effrenata sit, terratur
ad inuaria. Nihil enim aliquid potest
rex in terra. Cum sit Dei minister et
vicarius, nihil id solum quod de ilre
potest, nec obstat quod dicitur, 'quod
principis placet, legis habet vigorem',
(Dig., i. 4. 1), quia sequitur in fine
legis, 'cum leges regis, quod de imperio
ius lae est, id est non quasque de
voluntate regis temere praepriptum
est, sed quod magistri suorum con-
llio, regis autorum praestante, et
habita super hoc deliberationes et
adscripta, recta fuerit definitum. Po-
testas iuua suas iuris est, et non
inuaria, et cum ipso sit auctorius,
non debet inde inuaria sua ad
occaio, unde ius nostrum, et
etiam qui ex officio suos abhibere
necesse habet, id ipsum in prorsis
persona committere non debet.

Exercere iuris debet rex potestatem
iuarius, sicet Dei vicarius ut minister in
terrâ, quia illa potestas solius Dei est,
potestas autem inuaria diaboli et non
Dei, et cujus honor operae fecerit rex,
eius minister est, cujus opera fecerit.
Ius dicat iustitiam, iuris est
regis externi, minister autem diaboli
domini declinet ad inuaria. Ius dicat
exem rex a bene regendo, et non a regando, quia rex est dum bene regit,
yrannus dum populum sibi creditum
violenta opprimit dominatione (cf.
Isisore, Etym., i. 3). Temperat iuris
potest corn suam per legem, quia
frenum est potestas, quod secundum
dem hominum, quod legis sese ligant
latorem, est alii

'ignis vexa manifesta regi-
nantia est legis sollicite aflatum
se principem profitteri' (Cod., i. 14. 4),
Homo, nihil quam proprium est imperii,
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in the Roman law, either by direct knowledge of the Corpus
Juris, or through the intermediary of great civilians like Alph.,
and he is also much influenced by certain aspects of the tradi-
tional tradition, and especially by reminiscences of St Isidore of Seville.
But his position is fundamentally that of all feudal law; what-
ever may have been the importance of the principle of personal
loyalty and devotion in medieval society, it was no part of the
thought or feeling of serious and practical men that these
obligations were independent of reason and justice.

No doubt the adjustment of these principles to each other
has always proved and will always prove difficult, and, as we
shall see, a good deal of the complexity of feudal law arises from
the difficulty of finding an adjustment of traditional sentiments
with the practical needs of an organised and civilised community,
but this had to be effected, and it was found in the
gradual transference of the conception of loyalty from the
individual lord to the nation and its head.

"La dame ni le sire n'en est seigneur se non dou dreit." Here is the whole principle of government in a phrase, but the
phrase itself suggests to us that this is not a merely abstract
principle, that the conception of right or justice is not a
merely abstract principle but that it had also a practical
embodiment. To the medieval mind the law was the practical
form of justice, and it is in the due maintenance of law that men
secured the security for justice and for all good in life. There
is an excellent statement of this conception in the prologue
to one of the Norman law books, the 'Summa de Legibus',
which is thought to belong to the middle of the thirteenth
century. The author looks upon law as created in order to
restrain men's unbridled desires and the conflicts which
would cause if unchecked; it is God, the lover of justice, who
has created princes in order that they may restrain the discord
of men by definite laws.1

1 'Summa de Legibus,' Prologus:
'Cum inequivata cupiditate ma-
leva humanum genus arderi suo
insecabilis tenere irretium, discordias
genras ad dissensiones, a finibus
hominum pacem et concordiam penitus
restituens, si non eius anxios im-
petus, legum frence constretis fascibus,
iuris severitates renunneat; quam ob
rem rex pacificus, iustus dominus et
To the feudalist, indeed, law is in such a sense the foundation of authority, that there is no law there is no authority. In the terms of a famous phrase of Bracton, "There is no king where wills rule and not law."

Bracton is indeed careful to maintain that all men are under the king, while he is under no man, but only under God; but he is under the law, for the law makes the king. And he is under the law precisely because he is God's vicar, for Jesus Christ whom he represents upon earth willed to be under the law that he might redeem those who were under the law; and thus the blessed Virgin Mary, the mother of the Lord, did not refuse to submit herself to the ordinances of the law. The king should do likewise, lest his authority should be unrestrained; there is no one greater than the king in administering justice, and therefore he should be as the least in receiving the judgment of the law.

We shall have to recur to this passage, and to deal with some sentences which follow those we have here cited, as well as with other passages related to this matter. In the meanwhile it is sufficient to observe the emphatic assertion that kingship is impossible without law, and that the king is not only under God but also under the law. It may perhaps be suggested that the evidence of Bracton as to the principles of feudalism cannot be accepted without much caution, for his work belongs to that time when feudal relations were giving way before national. Caution is no doubt necessary, but in this case we need have no scruple in taking Bracton's phrases as representative of the general system of feudal law, for these are precisely the principles which are set out in all the earlier feudal law books.

It is this principle which is emphatically expressed in the forms attendant on the coronation of the mediæval king. We have in the first volume dealt at some length with the great significance of the coronation oath in the earlier mediæval societies; it was equally important in the feudal State. Jean d'Ibelin describes at length the circumstances attendant on the succession to the kingdom of Jerusalem. The king is to swear that he will help the Patriarch of Jerusalem and protect the liberties of the Church, that he will do justice to widows and orphans, that he will maintain the ancient customs and assizes of the kingdom, and that he will keep all the Christian people of the kingdom according to their ancient and approved customs, and according to the assizes of his predecessors in their rights and "justises," as a Christian king and a faithful servant of God ought to do. And what the king swears all the men of the kingdom are also to swear, that they will hold and maintain the good usages and customs of the kingdom.
This principle of the loyal observance of the law is well expressed in another place where Jean d'Ibelin says that the kings and nobles of Jerusalem should be wise, loyal, and good administrators of justice: they must be loyal, for they must loyally keep and govern themselves and their people, and must not do or suffer to be done disloyalty or falsehood; they must be good administrators of justice, for they must uphold the rights of every man in their several courts and lordships.  

The same principle is again tersely expressed in one of the Norman law books. When the Duke of Normandy is received as Duke he must swear to serve the Church of God, and to keep good peace and justice according to law; and again, in the most important of the feudal law books of Germany, the Sachsenspiegel, when the king is elected he is to swear to uphold the law of the kingdom, according to his power.

We have already dealt with the important passage in which Bracton sets out the same principle in relation to the coronation oath of the King of England, and Bracton is only commenting on the immemorial customs attendant on English coronations, customs which had not been in any way interrupted by the Norman Conquest.

The law is then to the feudal jurist the expression of the principle of justice, and it is supreme in the state, the king himself is the servant of the law.

What is then the source of law, what is the authority which it represents? It is here perhaps that it is most difficult for the modern to understand the Middle Ages, while it is to the failure to do this that we may attribute most of the mistakes which have been made with regard to the nature of the medieval State and the conception of government in the Middle Ages.

Above all things we must, if we are to make our way at all, discard the common conception of sovereignty, the conception that a law represents the mere command of a lawgiver, or even of a community. This conception, whose value in regard to modern times we cannot here discuss, is wholly foreign to the Middle Ages. To them the law was not primarily something made or created at all, but something which existed as a part of the national or local life. The law was primarily custom, legislative acts were not expressions of will, but records or proclamations of that which was recognised as already binding upon men. The conception of legislation had perhaps already appeared in the ninth century, but if so it had in the main died out again in the tenth and eleventh.

Bracton, indeed, in a well-known passage based on Glanvill, claims that while other countries use "leges" and "jus scrip-
tum,” England alone uses unwritten law and custom.\(^1\) His phrase probably is related to the fact that there were people in some parts of Europe who lived under Roman law, and possibly to the great development of the influence of the Roman jurisprudence since the rise of the law school of Bologna in the twelfth century. While, however, we can in part explain Bracton’s saying, and while it was no doubt correct about England, it is a curiously inaccurate view of the nature of law in the other European countries.

If we turn from Bracton to his great contemporary, Beaumanoir, in France, we find that he asserts boldly that all pleas are determined according to custom, and that the great feudalities like the Count of Clermont, and even the King of France himself, are bound to keep them, and cause them to be kept; and Beaumanoir states the two tests by which it can be determined whether a custom is legally binding. The first is that the custom is general, and has been observed without dispute as far as man’s memory goes, the second is that there has been a dispute about the matter and that there has been a judgment of the Court about it.\(^2\)

1. Bracton, i. 1. 2 (fol. 1): “Cum autem fere in omnius regionibus utatur legis et iure non scripto et consuetudine. In ea quidem ex non scripto ius venit, quod usus comprobavit.”

2. Beaumanoir, xxiv. 682: “Pour ce que tuit li plei sont demené selon les coutumes, et que cest livre generalment paroie selon les coutumes de la conté de Clermont, nos diron en cest chapitre briement quel chose est coutume, tant soit ce que nous en aion plus perle especialement en aucuns chapitres, selon ce quil convenoit es cas de quoi nous parlions. . .

Coutume si est approuvee par l’une de voie, dont l’une des voie si est, quant elle est generous par toute la conté et maintenne de si loc tan comme il peut souvienir a home, sans debat; si comme quant aucuns hom de poeste connost une deu, on li fet commandement qu’il ait paiz des vij jours et vij nius, et au gentil home desd. xv jors: ceste coutume est si clere que no ne la vi enques debatrir. Et l’autre voie que l’en doit connoistre et teur pour coutume si est quant debas en a esté, et l’une des parties se vouloit aider de coutume, et fu approuve par juge ment si comme il est avenu mout de fois en parties d’oys et en autres queroles. Par ces voie peut on prouver coutumes, et ces coutumes est li cuncus tenus a garder et a fere si garder a ses sougés, que nus ne les corrampe. Et se li cuncus meimes les vouloit corrompre ou souvrir qu’elles fussent corrompues, ne le devrait pas luis souvrir, car il est tenu a garder, et a fere garder les coutumes de son roiaume.”

Perhaps, however, the most illuminating view of the place of custom in medieval law may be found in the account of the origin of the Assizes of Jerusalem which is given by Jean d’Ibelin and Philip of Novara. The story is historically very improbable,\(^1\) but it is none the less important for us, for it represents in a very vivid fashion the conceptions of these jurists. Jean d’Ibelin tells us that when Godfrey of Bouillon had been elected as head of the newly conquered state of Jerusalem, he, with the advice of the Patriarch and princes and barons, and the wisest men whom he could find, appointed a certain number of wise men to inquire of those who were in Jerusalem what were the customs of their various countries, and to put these into writing. When this had been done the collection was brought before Godfrey and the Patriarch and notables, and he then with their counsel and consent selected such of the customs as seemed good to him, and made Assizes and usages, by which he and all the people of the kingdom were to be governed.\(^2\) He relates further how the Kings of Jerusalem with the same advice and consent added from time to time other Assizes and altered the old ones, after inquiring from those who came to the Holy Land about their customs and usages, and how several times the Kings of Jerusalem sent to other countries to inquire directly about their customs.\(^3\)

We have here a very suggestive account of what these jurists

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2. Jean d’Ibelin, i.: “Il . . . ault par le conseil du patriarque de la sainte cite et episle de Jerusalem, et par le conseil des princes et des barons, et des plus sages hommes que il lors put avere, sages homes a enquere et a savoir des genz de diverses terres qui il est en Jerusalem les usages de leur terres; et to tout quelquic que il est en a ce faire en porent savoir se nprendre il mirent et firent mettre en escrit, et aportent en écrit devant le duc Godfrois; et il assembla le patriarque et les autres avant dia, et lor mostra et fis lire devant caus cel écrit; et après, par leur conseil et par leur auri, il concueilli de ciasc escrit ce que bon li sembloit, et en fist assises et usages que l’on devait tenir et maintenir et user en royaume de Jerusalem, et par lesquels il et ses genz et son people et toutes autres manieres de gens alains et venans et demorans en son royaume fussent gouvernes, gardés, tenus, maintenus, et menées et justiées a droit et a raison et dit royaume.”

looked upon as a great legislative action. The circumstances indeed were unparalleled in medieval history, for the Kingdom of Jerusalem represented the establishment of a Western and Christian state in an alien and infidel country, while the Crusaders were not a homogeneous body, but were drawn from many different Western countries. They were therefore, as the authors of the Assizes thought, compelled to create a system of law for themselves, to proceed to a large and comprehensive effort of legislation. It is the more significant that in doing this they, according to the tradition, endeavoured scrupulously to ascertain the customary laws of the various national societies from which the Crusaders came, and formed their own laws by a process of selection and conflation from them.

The whole story illustrates very vividly the fact that the medieval conception of law was dominated by custom, for even when the jurists thought that the Crusaders had to legislate for a new political society, they conceive of them as doing this by the process of collecting existing customs, only selecting and modifying as far as was necessary to bring them into some sort of harmony with each other. The Assizes of Jerusalem were, in their estimation, primarily written customs. And it is of interest to observe that when, as they thought, the great compilation was lost, when Saladin conquered Jerusalem, and when therefore they could no longer consult the text of the written customs, they at once fell back upon the unwritten customs of the community, and that this administered a justice based upon their own customs.1

The first element in the conception of feudal law is that it is custom, that it is something not made by the king or even by the community, but something which is a part of its life. We can, however, see that at least as early as the thirteenth century there began to reappear the conception of laws as being made, not that the idea of custom as law disappears, but that there gradually grew up alongside of this the conception that laws could be made under certain conditions and by suitable authority. It is difficult to say how far the development of this was due to the pressure of circumstances compelling men deliberately to make new laws, or to modify old ones, how far it may have been facilitated by the revived and extended study of the Roman jurisprudence, and by the systematic development of the Canon law, which in this matter represents the same principles as the Roman law, and was indeed no doubt greatly influenced by it. Whatever may have been the circumstances which produced this great change, it is of the first importance in the history of political theory to observe the fact of the change.

We have here arrived at the beginnings of the modern conception of sovereignty, that is, of the conception that there is in every independent society the power of making and unmaking laws, some final authority which knows no legal limits, and from which there is no legal appeal. We cannot here consider how far, and in what sense, this conception was

1 Jean d'Ibelin, iv.: "Les assises doivent etre tenus fermente en totes choses; et de ce de qui l'on ne sera certain qui soit assise, doit l'on tortoir selon l'usage et la longue acostumance. Et de ce que court aura fait esprit ou connaissance ou recourt qui soit assise, doit estre tenu et maintenu comme assise; cue les assises ne peurent estre en plusieurs choses prises, que par le long usage, ou par ce que l'on l'a veu faire et user, comme assise; et ce est maniere de lei, et doit estre et est tenu ou reaumes de Jerusalem et en celui de Chypre minus que leis ne de creteralas."
present to the political thinkers of the ancient world. Still less can we here consider what is the real character of the modern theory, how far indeed it has been thought out completely and adequately, how far it still represents a somewhat crude and inorganic conception of society, a somewhat crude and partial apprehension of certain elements in the nature of the state.

It is at any rate quite certain that the modern conception as a whole was not only unknown to the Middle Ages, but that it would have been to them almost unintelligible. For to them the law of any particular state represented, in the first place, the customs of the community, which had not been made, but were part of the life of the community; and, in the second place, so far as they reflected upon the principles which lay behind these customs, they conceived of them as related to and determined by the rule of justice; and, if and so far as they went further, they conceived of the law of the state as subservient to the natural law and the law of God.

It remains true that at least in the thirteenth century the conception of definite legislative action begins to appear, and we must therefore now consider the terms or forms of this legislative action as it is presented to us by the feudal jurists.

We begin with a phrase of Glanvill which bears upon its face the influence of the revival of Roman law, and which is yet also clearly mediaeval in its principle. The laws of England, he says, though unwritten, may properly be called "laws," for the law says that whatever the Prince pleases has the force of law; that is, we may properly call these "laws" which have been promulgated on doubtful matters with the counsel of the chief men and the authority of the prince. We may put beside this some sentences from the Norman 'Summa de legibus' of the middle of the thirteenth century. "Consuetudines" are customs observed from ancient times, approved by the prince, and maintained by the people, which

Glanvill, Prologue: "Leges namque anglicanas, licet non scriptas, leges appellari non videtur ab absurdum, quia primum lex sit, quod principi placet, legem habet vigorem" (Dug., 1. 4. 1), "qui leges super dubium in consilio consiliis, procerum quidem consilio, et principis accedente authoritate, constat esse promulgatas."

This conception of law is characteristic of the whole mediaeval tradition. It is for the prince or king to issue or promulgate laws, and without his authority this cannot be done; but to make his action legitimate he must consult the great and wise men of the nation; and the people or whole community has its place, for they have to receive or observe the law. This is the conception which we find in the political writers and in the legislative documents of the ninth century, and it is evident that it continued to be the conception of the feudal lawyers of the twelfth and thirteenth centuries. It may have some relation to the definition of law by Papinian. It is possible that the terms of the phrases which describe the part of the people in legislation may be related to the principle laid down by Gratian, that no law is determined to whom any thing belongs. Laws (leges) are institutions made by the prince and maintained by the people of the province, by which every dispute is decided. And again, laws and institutions were made by the Norman princes with great industry, by the counsel and consent of the prelates, counts, barons, and other prudent men, for the wellbeing of the human race.

In these passages the conception of the authority of law is related first to custom, but the writers are aware that there are forms of law which have an immediate origin of a different kind, which have been made after due deliberation. The force of these laws is derived from the authority of the prince, the counsel and consent of the great men, and the observation, or reception, or maintenance of them by the people: it is difficult to find an exact rendering for the phrase "a populo conservati."

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1 'Summa de Legibus,' x. 1: "Consuetudines vero sunt mores ab antiquitate habitis, a princibns approbatis, et a populo conservatis, quid, cuius voluntate, vel ad quem pertinent limitantes. Leges autem sunt institutiones a principibus factae et a populo in provincia conservate, per quas contentiones singulae decidentur; sunt enim leges quasi instrumenta in iure ad contentionem declarationem veritatis."

2 Id., Prologue: "Quoniam ergo leges et instituta, que Normannorum principis non sine magna provisione instituta, quibus terras promulgavt, per quas contentiones singulae decidentur; sunt enim leges quasi instrumenta iure ad contentionem declarationem veritatis."

3 4th year, Dig., 1. 3. 1. pp. 225-239.
valid, by whomsoever promulgated, unless it is accepted by the custom of those concerned.\(^1\) A similar doctrine was held by some at least of the civilians of the twelfth and thirteenth centuries.\(^2\)

The same principles, again, are stated by Bracton in the passage of which we have already cited the first words. While in almost all other countries men follow the laws (leges) and a written "jus," England alone uses not written law but custom; it is not, however, absurd to call the English laws "leges," for that has the force of law (legis) which has been justly determined and approved, with the counsel and consent of the great men, the approval ( sponsione) of the whole commonwealth and the authority of the king. And again, in another place, he says, that such English laws and customs, by the king's authority, sometimes command, sometimes forbid, and sometimes punish transgressors, and inasmuch as they have been approved by the consent of those who are concerned with them (utentium), and confirmed by the oath of the king, they cannot be changed or abolished without the common consent of all those by whose counsel or consent they were promulgated, although they may be improved (in melius converti) even without this consent, for to improve is not to destroy.\(^3\)

There is one great feudal lawyer whose position requires some special examination, and that is Beaumanoir. For his phrases are, at least at first sight, a little ambiguous. In some

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3. Bracton, 'De Legibus,' i. 1. 2 (fol. 2): "Cum autem fere in omnius regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto et consuetudine. In ea quidem ex non scripto ius venit, quod usus comprehendit. Sed absurdum non est leges Anglicanam, iecit non scriptas, leges appellare, cum legis vigorem habeat, quia quid de consilio et de consensu magnum atque reipublica communi sparsione, authore regis regis, primum principis et consensu iustitate promulgata. In melius converti possunt, atiam sine consensu eorum consensu, quia non destituit quod in melius commutavit."

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\(^1\) Beaumanoir, xlv. 1453: "Comment que plusieurs estat de gent esoient maintenants, vous est qu'au commencement tuit furent franc et d'une meisme franchise; car chasteaus set que nous descendimes tuit d'un pere et d'une mere. Mes quant li pueples commencen a croiser, et guerres et maillent furent commençes, par orgueil et pour envie, qui plus regnent lors l'ét plus encor que mesure ne fust, le communedes du

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\(^2\) Cf. Digest, i. 4. 5; 2. 11; 4. 11; Institute, i. 2. 2.
The phrases are remarkable both for their democratic conception of human nature, and of the source of authority, and for their sharply marked conception of the legislative power of the king, and if they stood alone we might have to conclude that Beaumanoir's theory of the nature of law was different from that which we have so far seen to be characteristic of the feudal jurists. But the phrases do not stand alone, and in order to form a complete judgment upon his theory we must examine some other passages in his work. The first is one in which Beaumanoir is careful to point out that while every baron is "souverain" in his own barony, the king is "souverain" in all the kingdom, and has thus the general care of the whole kingdom, and therefore he can make such "établissements" as he thinks well for the common good. The words represent an important development of the conception of the national monarchy, and they attribute the supreme legislative power to the king; but it should be noticed that he holds the power because he is responsible for the care of the whole kingdom, and exercises it not for his own ends, but for the common good. The last phrase is important, and is constantly repeated, the legislative power must be used for the common good.

In other passages we find, however, phrases which add another principle to these. The king may make "établissements" only for his own domain, and in this case they do not concern his barons, who must continue to administer their lands according to the ancient customs. When, however, the "établissements" are general, they are in force throughout the kingdom. But such "établissements" are made "par tres grant conseil,"

1 Beaumanoir, xxxiv. 1043: "Pour ce que nous parlons en cest livre, en plusieurs lieux, du souverain, et de ce qu'il peut et doit faire, il aucun pourroit entendre, pour ce que nous nommons consus ne dус, que ce fust du roi, mais en tous lieux que li rois n'est pas nommo, nous entendons de ceux qui tiennent en baronie, car certains barons est souverain en sa baronie. Voix est que li rois est souverain par dessus tous, et a de son circel, le general garde de tout son roiaume, par quoi il pot faire tous establissemens comme il li plait pour le commun pourfit, et ce qu'il establist doit estre tenu. Et si n'a plus il grant dessus li que ne puisse estre en sa court par defaute de droit ou pour faus jugement, et pour tous les cas qui touchent le roi."
2 Cf. id., xlix. 1512: "Mes li rois le peut bien faire quant il li plait et quant il voit que c'est li commun pourfit,"

and for the common good. Again, in another place, the king may indeed make new "établissements," but he must take great care that he makes them for reasonable cause, for the common good, and "par grant conseil."

Beaumanoir does not anywhere explain what precisely he means by the words "par grant conseil"; but it would seem most natural to understand them as referring to the need of consultation with some body of persons qualified to advise the king. We must then at least correct our first impression of Beaumanoir's theory of legislation. He would seem to place the royal authority in a more isolated position than is general in the feudal jurists, he may be more influenced than they are in general by the newly recovered conception of the legislative power of the emperor in the Roman law, and may possibly, though on this we can express no opinion, represent some conception of monarchy which was developing specially in France at that time. But, on the other hand, in his insistence upon the need of reasonable cause, on the "grant conseil," and on the principle that legislation must be for the common good, he comes very near to the general principles of the other feudalists.

We are therefore justified in the conclusion that the feudal conception of law is first that of custom; and secondly, that so far as men began to recognise the necessity of actual legislative action, they conceived of the law as deriving its authority not from the will or command of the ruler alone, but also from the counsel and consent of the great or wise men, and the assent of the whole community.

1 Id., xlviii. 1499: "Mais quant li Rois fet aucun establissement espe- cialement en son domaine, si baron ne leissent pas pour ce a user en leur terras, selon les anciennes coustumes. Mes quant li establissemens est generaux, il doit coudre par tout le roiaume. Et nous devons croire que tel establissemont est fet par tres grant conseil et pour le commun pourfit."
2 Id., xlix. 6: "Tout soit il ainsi que li Rois puisse faire nouveaux establis- semens, il doit mout prendre garde qu'il les face par raisonable cause, et pour le commun pourfit, et par grant conseil."
3 Cf. p. 104 (note 4).
CHAPTER IV.

THE MAINTENANCE OF LAW.

The feudal jurists held clearly and maintained emphatically that the relations of men to each other are determined by the principles of justice, that the law is the form and expression of justice, and that it is in the strict observance of the law that men find the security for the maintenance of justice. The principle is clear, but it may be said that this was little more than formal, that the king might indeed swear to administer justice and to maintain the law, but there was no method by which this obligation could be enforced. How far this was from being true we shall see as we examine more closely the principles of the structure of feudal society.

We shall do well to remind ourselves of a very noticeable phrase in that passage in the Assizes of the Court of Burgesses of Jerusalem which we have already quoted. If the lord should break his oath and refuse to minister law and justice to his people, they are not to permit this.1 This is a blunt expression of the principle which underlies the structure of feudal society, and the relations of lord and vassal. But feudal law did more than recognize the principle, it provided a carefully constructed machinery for carrying it out.

We must turn from the principle of the supremacy of law to the method of its determination and enforcement. That is, we must examine the nature of the feudal court, and the relation of lord and vassal to this, and we begin by examining these questions as they are presented in the

1 See p. 33.

Assizes of Jerusalem. Jean d'Ibelin draws out with great care the nature of the mutual obligations of lord and vassal. He expresses in the highest terms the fidelity which the vassal owes to his lord, the service and help which he must render to him, the secrecy which he must maintain about his counsels, and the respect which he owes to his wife and daughter,1 and he enumerates those distinctive obligations which the vassal owes to his lord, which we have already mentioned,2 but at the same time he insists that the lord is bound to his vassal by the same faith which the vassal owes to him, and that he may not touch his vassal's body or his fief except by the judgment of the court.3

These are the principles of the relation between lord and vassal, but they are not mere abstract principles, they are legally enforceable. If the vassal fails to discharge his obligations, and the lord can establish this by the judgment of the court, the vassal will lose his fief, and the lord can treat him as a traitor, and as one who has broken his faith.4 On the other hand, if the lord breaks his faith to the vassal, the vassal can bring the matter before the court, and if the court decides in his favour, it will declare him to be free from his obligations, and he will hold his fief without service for his lifetime.

1 Jean d'Ibelin, 196.
3 Jean d'Ibelin, 196: “Le seigneur ne doit mettre main, ne faire mettre main et cors ni fief de son home, si ce n'est par l'engart ou par la connaissance de sa court; et est tenus à son home, se me semble, par la foi qui est entr'as de totes les choses avant dites de quel home est tenus à son seignor; car entre seignor et home n'a que la foi, et la foi deit entre conçe par gardée entre caus de choses avant dites.”
4 Id. Id.: “Et qui faut vers son seignor d'aucunes dites avant dites choses, il met sa foi vers lui; et se le seignor l'en peut prouver par recort de court, il pors faire de lui et de ses choses comme d'ome ayant de fief mentie... Et qui defaut à son seignor, je crei que il perdra à sa vie le fief que il tient de lui.”
5 Id. 206: “Se home ment sa foi vers son seignor ou le seignor à son home... et de laqiu des choses deux dites que l'un mesprend vers l'autre, il met sa foi vers l'autre. Et se le seignor en metting son home, il est encheu en sa merci de cors de fief et de de quel home il a, et se il en viant avoir droit et il le requiert à sa court qu'elle li connoise quel droit il en doit avoir, je cuit que la court conoistra qu'il en peut de cors faire justice, selon ce que le mesfait sera, de trauons ou de fief mentie, et que il peut son fief et totes ces autres choses prendro et faire en comme de chose de traitor ou de fief mentie.”
Neither lord nor vassal can take the matter into his own hands, but must submit his complaint to the court, and abide by its judgment. It is the court which is the judge in all cases of dispute about the relative rights or duties of lord and vassal.

It is thus important to ask what was the composition of the feudal court. It was the court of the lord, and one might naturally enough think that it was the lord who decided the matters brought before it. But this was not the case; the court was composed in principle of all the vassals, and the judgment of the court was the judgment of its members. It was even by some disputed whether the lord was properly speaking a member of the court at all. Jean d'Ibelin's work contains a very interesting and significant discussion of this subject. He is dealing with the question how a man is to claim a fief which he, or his ancestors, have held, and says that the man is to appear before the lord and say by his advocate that he, or his ancestors, have held the fief, and that if the lord doubts this he is prepared to prove it "par le recourt de partie des homes de votre court." The lord may reply that proof must be "par privilege ou par recourt de court," and that proof "par la recourt de partie des homes de la court" is not valid, for there could be no court unless the lord himself or his representative were present. To this the vassal replies that on the contrary the lord may not sit in the court, "as cegars ne as connoissance ne à recors que il font"; the vassals are to sit without the lord, and when they have arrived at their decision, it is to be reported to the lord as the judgment of the court. Jean d'Ibelin does not formally pronounce a judgment upon the whole question, but he is clear that the presence of the lord is not necessary to constitute a proper court, at least in cases concerning claims or recourt, celui qui le retract on la court dit. Suro la court a ce fait. Et por ce que la court le fait, si est cleere chose que les homes sont court en aucun cas sans le seigneur, et qu'es saule il le sont en aucun cas sans seigneur, ni se n'asse as usage qui vaile en en cas les homes de la court, dont le fief mult, ne puissent et deuvent renderor en la court ce il en vau celui qui requiert la sasume du fief et son ancestrer sans et tenant ou usant de ce que il requiert com de son fief, ne autrement que par le recourt des homes de celle court ne peut l'on prover la sasume de lui ou de son ancestrer sans fief, si que il requiert. Et selo cesse qui est devant dit, il ne semble que la court devroit esperger que le seigneur a chose dite que il dee demorger que il ne face au requerent le recourt que il la requiert. Que se autrement ester, moult à enver pore l'on prover nullas sasume de fief de lui ou de son ancestrer, por que moult de gens perdres leur droit et leur raser par defaut de recourt de court, laquel choice seroit contre droit raison et tort apert."

Chap. IV.

THE MAINTENANCE OF LAW.

to the tenure of a fief. In another passage he describes the proper procedure of the court when the king or his representative is not present. The court, then, whose duty it is to enforce upon lord and vassal alike the due observance of

1 Jean d'Ibelin, 206: "Et se l'homme aint son seigneur en court que il a mes pris vers lui de se fief, et il en requiert a aver droit par cegarr ou par connaissance de court, je sent que le court cegardens ou conostrera que l'homme est queind vers lui de sa fief, et a son fief sans ser vaso tot sa vie. . . . Ne l'un ne peut de ce atendre l'autre, se n'est par reconnais-

2 Id. 257: "Et quant cest est ensemble por jugement ou por recourt faire ou por consell ou por avouement, sans le roi ou sanz celui qui est en son lieu, il (i.e., the Constable) peut et doit demander l'avus de chacun, ou faire le demander au mareschal, ou le vaut, et peut desstrare chacun de dire ou de son agiuer si comme il est usage: et peut combeneder a retrare l'esgar ou la connaissance ou le recourt ou l'avouement que la court a fait, auquel que il vodra ou deus de la court.
these obligations, is indeed the court of the lord, but its judgment is the common judgment of all those concerned.

It may, however, be urged that this is very well in principle, but what sanction could there be for such a comprehensive control over lord and vassal, what power was there which could enforce the observation of the decisions of the court? This question may seem to us, from our modern standpoint, one of great difficulty, but the compilers of the Assizes of Jerusalem had what seemed to them a perfectly simple and clear answer.

The matter is dealt with both by Jean d'Ibelin and by Philip of Novara, but the treatment of the latter is the more complete. He has set out, in a passage to which we shall have to return later, the relation of the overlord to the sub-vassals, as declared in an Assize of King Amauri, and then explains the position of the mesne vassals in case of dispute between them and the overlord. The king, he says, recognised, when the Assize was established, that all his liegemen, whether they held of him immediately, or of his vassals, were bound in faith to each other, and could demand aid each of all the others, and he draws out the significance of this in detail. If a vassal makes some claim upon his lord and demands that the matter should be brought before the lord's court and the lord refuses, the vassal may call upon all his peers to go to the lord and demand that all should be brought before the lord's court, and the lord refuses, the vassal may call upon all his peers to go to the lord and demand that he should allow the matter to be brought before the court. If the lord refuse to listen to them, they must declare to the lord that they will discharge none of their obligation to him until this has been done. And thus also if the case has been brought before the court and the lord refuses to carry out its judgment, the vassals are to renounce their service to him until this has been done. And again, if the lord or his repre-

1 Philip of Novara, 52: "S'il avenit que aucun des homes liges venist devant le chief seignor en la Haute Cour, et il feist aucune requete et le seignor delaisnit, et l'ome li requist esgart de cort et le seignor ne li feist aver ou s'en delivast par esgart de cort mesmo ; ou s'il avenit que l'ome ne le laissast entrer devant seignor et aussi le delivast on do venir a son droit, l'ome peut venir a ses pers li ou il les porra trouver, et requerre lor, par la foi que il la doivent, comme a lor peer, qu'il veingent avant li seignor o lui et li requerent que il le maint sur sa cort comme son home, et se il li a requist esgart, que il le face aver ; il y doivent aler et faire ce l'ome lor a requist. Et s'il avenit que le seignor ne vostoit otroier ne faire lor requête, il doivent et peuvent dire au seignor, que il ne feren rien par lui tant qu'il ait fait lor requête. Par trei fois il doivent ce dire, et il ait deo demander sa cort dist et altroie que il sentiboient que il estoit l'assise. Et s'il avenit que le seignor ne fust otroier, il doit aver a son home, et se il h a requist esgart, que il le face aver ; il y doivent aler et faire ce ce que il sentiboient."

Jean d'Ibelin maintains the same principles, and it is worth while to notice the emphatic phrases he uses with respect to the case of a lord putting his vassal in prison without the judgment of the court. In such a case his friends and relations may summon all his peers to accompany them to the lord, and to demand his release or the judgment of the court. If the
lord refuses, they are to rescue their peer by force, unless the lord resists in person; in that case, as they cannot bear arms against him, they are each and all to renounce all service to him till he has set their peer at liberty, or has submitted the case to the judgment of the court.1

The principle of the authority of the court in enforcing their mutual obligations upon lord or vassal is to the compilers of the Assizes of Jerusalem perfectly clear and obvious, and the whole body of the vassals is bound to maintain this authority even against the lord. This is perhaps even more clearly brought out by Jean d’Ibelin in another passage, in which he maintains that if the court has given a judgment against the lord in the case of a man who is not a vassal, and the lord refuses to carry this out, such a man may lay the matter before the vassals and adjure them to compel the lord to carry out the judgment. The vassals are then to go to their lord and request him to do this, and if he refuses they are to declare to him that they are bound to maintain all service to him until he has carried out the judgment of the court.2

1 Jean d’Ibelin, 201: “Et se le seignor ne le fait delivrer a leur resqueste, ou ne dit chose par que il ne le doit faire et tel que court l’esgard ou conoisse, tos le homes ensemble deviennent aler la où il seurent que il est arresté et deliverer le à force ou autrement, se le croz de leur seignor no lor defent as armes, contre le quel il ne pevont ni ne deviennent porter armes ne fair chose a force. . . . Et se le seignor le defent contre eux as armes ou autrement à force, il li deviennent dire. “Sire, voz estes nostre seignor, ne contre vostre cors nos no portermes armes, ni ne ferions chose à force. Et pourquoi voz nos defendes à force à deliverer nostre per qui est pris et emprisonnes sans esgard ne sans connoissance de court, voz voz gajons toz ensemble et chacun par sei dou service que nos vous devons tant que voz ais de nostre per tel deliverer ou fait deliverer, ou dite raison por quel voz no le devés faire et tel que court l’esgard ou conoisse.“

2 Jean d’Ibelin, 244: “Et por ce que nos somes homes de vostre court et que nos somes tenus de garder et faire garder à nos poirs l’usor de la court dont nos somes, et de maintenir les assizes et les usages dou rei-nume de Jerusalem, nos toz ensemble, et chacun par sei, voz gajons dou service que nos vous devons, tant que voz ais a tel,” et le moment, “tenu et fait par tout et partout ce que vostre court, dont nos somes homes, a esgard ou conseu ou recordor, ou dit en la court tel raison que le court esgarder ou conoisse que voz ne le devés faire.”

This was then the method by which the authority of the laws and customs of Jerusalem was to be declared and enforced. The court was the supreme judge, and the lord, that is, the King of Jerusalem, had to submit to it; if he refused to do this the ordinary relations between him and his vassals were for the time suspended, and they were to renounce all their service to him until he submitted to the court and its judgments.1 The compilers of the Assizes justify their opinion by citing two cases in which, as they say, the vassals of the kingdom of Jerusalem had taken such action.2

It may perhaps be urged that the Assizes of Jerusalem represent an extreme and even fantastic development of the principle of the obligation of the king or lord to govern according to law, and that their principle of the supremacy of the court over the king or lord was eccentric and unparalleled. It is indeed true that in their detail they represent a particular and local attempt to create a method of control over the ruler, a method which, however good it may seem in theory, was not likely to produce an effective system of government; and we cannot look upon this method as being more than one of the many experiments in government which were being made in the twelfth and thirteenth centuries. But we are in this work concerned rather with the principle which lay behind such experiments than with the experiments themselves. If we are content to consider them from this standpoint we shall find these experiments immensely interesting, and shall also find that these principles are reflected more or less clearly and completely in many at least of the feudal law books.

In those compilations of the feudal law of Lombardy which are known to us as the ‘Consuetudines Feudorum,’ and which belong substantially to the twelfth century, the principles of the relation of lord and vassal are set out with great clearness. The obligations of the vassal must be discharged by him, and if he

1 Cf. Jean d’Ibelin, 203, 204, 205; Philip 266, 210, 213, 214, 219, 239; Philip of Novara, 40, 42.
2 Cf. Jean d’Ibelin, 203, 204; Philip of Novara, 41, 42.
refuse or fails to carry them out, he will lose his fief. On the other hand, it is laid down with great emphasis that no vassal can be deprived of his beneficium except for a definite and proved offence. And it is very clearly maintained that in all cases of dispute about the fief and its tenure between the lord and vassal there is always a proper tribunal to decide, and this tribunal is either the court which is composed of the peers of the vassal or the court of the Emperor. It is noteworthy that the lord has only the same remedy against his vassal as the lord's court, that is, the appeal to the court, and that the court is, if need be, to compel the lord to make restitution to his vassal or to submit himself to the judgment of the court. If the lord should refuse to do this the vassal can carry the case to the higher authority, that is, clearly to the overlord or Emperor.

4 "Constitutiones Feudorum," n.: "Qua supra dictum est, quibus modis feudum adquirunt et resiunt, nunc videamus, quales amittatur. Si eum prelum campestre habuerit, et vasallus eum (dominium) morantem in ipso preehendo dimituent non meruet non ad mortem vulneratum, feudum amittere debet. Item si eodem dominum euratur et id facere laboraverit aut cum uxor eum tatarper luenter vel si cum filia aut cum nepote vel filio aut cum sore dominum consuetuerit, nunc feudum amittere concedetur." Cf. vii. 11.

C. Lehmann, in his edition of the "Constitutiones Feudorum," gives in full the text of two groups of MSS for T. vii., but the differences are not in the case of the passages here quoted of substantial importance for our purpose

3 Id. vi. 10 "Sanctus ut nemo miles sine cogitata culpa beneficium amittat, si ex his culpa vel causa convivitas non fuerit, quae multae sunt vel per fundamentum parum anorum, et reserere solent." 4

The regulations cited in this note and the preceding one are founded upon the "Eluctum de beneficiis regni Italic," of the Emperor Conrad II. (1037 a.)

4 Id., vi. 29: "Dominus vocat militem, quem ab eo feudum possedebit decendo eum in culpam incipiens per quam feudum amittere debeat. Hoc non respondet Quod domino facendum est queritur Respondetur: Cursum vocare debet et in ea de milite alto concurs, quanam cum curam vocare debet spatii estimur curae arbores terminans. Et sic ad tertiam vocationem venit, hoc ipso feudum amittat et illo debet curam dominum mitti in possessionem. Sed si multa unum venient, restitutionem posse solva, aliquam si beneficium et possessionem perdat."

§ 1. Si vero vasillus de domino queritur, invenitur qua feudum malo ordine interdict, dominus perperam responderit, quandamque ad domimum cuncta revertentur competenter egeret ut vel possessionem restituat et adquiescat vel indicem curae se committat. Quod se admonuerit facere debuebatur, cum host vasallus ad aliam maurem potestatem ac et sibi consuevit.

4 "Sachenspiegel," fol. 29. 6. "Wundet ok en man sine rennet, oder slæt he in de nette om det, oder die herre det men, he ne det weder sine truue migt, of die net up we net rehte vulbracht wert." Cf. Glanvill, t. 1.

2 "C. Lehmann, in his edition of the "Constitutiones Feudorum," gives in full the text of two groups of MSS for T. vii., but the differences are not in the case of the passages here quoted of substantial importance for our purpose.


The 'Sachenspiegel,' the most important German handbook of feudal law, which was written before 1232, does not describe in detail like the Assizes of Jerusalem the organisation of the feudal court and the method of securing its authority in enforcing the mutual obligations of lord and vassal, but it contains two very significant passages which are related to the position of the vassal and the control of the king.

In the first of these it says that a man may without violation of his fidelity wound or even slay his lord, or the lord the man, if this is done in self-defence. In the second it lays down the principle that the man who feels himself injured by the "richtere" can appeal to the Schultheiss, and that also the Count Palatine is judge over the Emperor.

The work entitled 'Le Conseil de Pierre de Fontaines' belongs probably to about the year 1253, when its author was Bailli of the Vermandois. Its intention, according to the author, was to record the customs of the Vermandois, and other lay courts, but it consists very largely of citations from the Code and Digest of Justinian, and it has been suggested that it is really a fragment of a French "Summa" of the Code. The author assumes that a vassal has the right to impeach his lord in the lord's court, that is, that the court has authority to judge between the lord and the vassal, but he limits the right to...
questions concerning the fief and injuries inflicted upon the vassal concerning this.1

In the compilation known as the 'Etablissements de St Louis,' we have a more complete treatment of the relations of lord and vassal, which with some important modifications represents the same principles as those of the Assizes of Jerusalem. In the first place, it is very clearly laid down that the obligations of lord and vassal are mutual and must be observed with equal care by both. The vassal who transgresses against this, and is guilty of various offenses against his lord, will justly lose his fief; 2 but then, with equal clearness, it is laid down that if the lord refuses his vassal the judgment of his court, or if he seduces his wife or daughter, then the vassal will be free from his obligation to him and will hold his fief from the overlord.3

Again we find in the Etablissements the same principle as that of the Assizes of Jerusalem, that in cases in the king's court on any matter concerning a vassal's inheritance, the

1 'Le Conseil de Pierre de Fontaine,' xxii. 27: 'Ceste meisme forme qui devant est reconnue de la defaute as ajournes, entendez que l'on doit regarder en la defaute al home qui ses sires pleidoie en sa cort meisme, et quant li homs pleidoie a son seignor en sa cort meisme... 28. Mès se ne crae pas que li home puisse son seignor, ne ne dois, apeler de defaute, lors que del meuf qu'il lui aura droi pue, puis l'omeage, on ses propre choses qui soient du fief... Mes del meuf que li aire feroit a son home en son propre cors, ou en ses propres choses qui ne soient mie del fief, ou que li ne tienoit mie de lui, ou en ses propres choses qui ne soient del fief.'

2 'Etablissements de St Louis,' i. 54:

'Hom qui fuit esqueuose a son seignor si pert ses muebles; ou si il not main a son certain aloe (avoy) par son respect, ou se il li escoue autres; ou se il desment son seignor par mal repleit, ou se il a mise fausse mesure en sa terre; ou se il va defuant son seignor par mal repleit; ou se il a peschi in ses estan, au demain de lui; ou se il a emble ses combes en ses garnes; ou se il gist o sa fame, ou o sa fille, par coi ele soit pucile, il om pert son fief, par quoi il en est prove. Et kreiz et costume n'accorde.'

3 Id., i. 56: "Quan fi sires vese a son home le jugement de sa cort; et il en puisse estre provez, il ne tendra jamais riens de lui, ains tendra de celui qui sera par dons son seignor. Et einsi seroit si se il gissoit o la fame son home ou o sa fille, se ele estoit pucele; ou se li hom avoit aucune de ses parentes et ele estoit pucele, et il laist baissle a garder a son seignor, et il la despucolle, il ne tenroit jamais rien de lui.'

1 Id., i. 78: 'Se li bors est apelez en la cort le roi d'aucune chose qui apar- tienne a héritage, et il die: 'Je ne vuss pas entre jugiez fere par mon pere de ceste chose,' adone si doit l'en les barons semendre a tout le moines juseque a III, et puis la justice foire droit a eos et a autres chasteliers.'

Cf. 'Justice et Pict,' xvi. 1: "Uns des peres de France s'otrois a jugier pardevant le roi, par ceux qui jugier le doivent, et dit que li rois, ne si consens, ne le doivent pas jugier mais il ne doit pas bien. Mes li rois, ne son conseil, sans autres, ne le pent pas jugier c'est a dire que si per doivent estre.'

2 Id., i. 53: "Se li bors a son home lige et il die: 'venez vous en o moi, car je vouai guerrier enseigne le roi li hom avoir aucune de ses parentes et ele estoit pucele, et il laist baissle a garder a son seignor, et il la despucole, il ne tenroit jamais rien de lui.'

3 Adone il doit venir au roi et il doit dire.' 'Sire, mes sires m'a dit que vous li avez vee le jugement de votre court; por ce en sui je venez a vos par savoir en la veirete: car mes sires m'a senoms que je aille en guerre encontre vous.' Et si li rois die: 'je ne ferai ja a votre seignor nil jugement en ma cort,' li hom s'en doit tantost retourner a son seignor; et li sires le doit porvoir de ses despens. Et si il ne s'an voloit aler o lui, il en perdroit son fief par droit. Et si li rois li ait respondu: 'je ferai droit volontiers a votre seignor, en ma cort,' li hom devroit venir a son seignor et dire: 'sire, il rois m'a dit quil vous fers volontiers droit en sa cort,' et si li sires die: 'je n'ancetre ja en sa cort, mais veniez vous en o moi, si comme je vous aisi senoms,' adonques porroit bien li hom dire: 'je n'irs ni mie. Il n'en perdroit ja par droit nule riens de son fief.'

decision belongs not to the king personally, but to the court including the vassal's peers.1 The Etablissements do not indeed contain the same elaboration machinery for the enforcement of the judgments of the court as do the Assizes, but the compiler did not scruple to maintain that in the last resort the vassal, if the King of France refuses to do him justice in his court, has the right to make war upon him, and is entitled to summon his sub-vassals to follow him. Before they obey the summons they must indeed first go to the king and ask whether it was true that he had refused their lord the judgment of the court; if the king denied this and said that he was willing to discharge his lawful obligations, they can refuse to follow their lord, but if his complaint proved to be true, they must then follow him to war, even against the king.2

If we now turn to the greatest of the French feudal lawyers, that is to Beaumanoir, we find that his conceptions of the relation of lord and vassal, while they differ in detail, are substantially the same as those which we have hitherto considered. In the first place, he sets out very clearly the principle that the
obligations of lord and vassal are mutual, as the vassal owes faith and loyalty to his lord, so also the lord owes these to the vassal, and the penalty for a violation of these obligations is the same, in extreme cases the lord will forfeit the homage of his vassal, just as the vassal will lose his fief.1

In the next place, Beaumanoir lays down as clearly as the other feudal lawyers that these reciprocal obligations are protected by a suitable judicial machinery. In cases of dispute between the whole body of the vassals and their lord, Beaumanoir holds that the court of vassals cannot be judge, as they are all parties to the dispute, but they should demand justice of the lord and his council, and if the lord refuses this they should go to the king, as overlord. In the case, however, of a dispute between a single vassal and the lord, the case is decided by the court of the vassal's peers.2 There is always a court which is competent to decide upon disputes as to feudal duties and rights,

1 Beaumanoir, lxi. 1779: "Nous disons, et voici est selonce nostre couteume que pour autant comme li homne doit a son seigneur de foi et de loyauté par la reno de son hommage, tout autant li sires en doit a son homme."  
2 Id., lxi. 1786: "Et quant li homme rendent en sa court contre son homme de ceus desquels il ne la doit pas ravoir, ou il dit qu'il a auncune justice en sa terre par la reno de son fief, que li cuens ne li connoist pas, ains dit qu'el aprant a li par reson de resort... En tous cas ne doit pas li baillys mettre le plet ou jugement des homnes car il meisme sont partie, si ne doivent pas jugier en lor querelle meisme. Donques se tous ples must entre le conte et les hommes, et li homme qui quereient droit, il doivent prendre cel droit par le conte et par son conseil. Et si li cuens leur refuse a fere droit ou il lor fet mauvais jugement, treve le pouent par l'une des II. voies par devant le fief, comme par devant souverains."  
3 Id., i. 45: "Des ples qui muentrent entre le conte d'une part et aucuns de ses hommes singulierement de l'autre part, dont tuit li homne ne se puent pas fere partie, si comme d'aucun heritage ou d'aucune forseture, ou d'aucune querelle, des quelles il convient que jugemens soit fes selon le coutume du pais,—en tel cas peut bien li bailly prendre droit pour le conte par les hommes. Car aussi comme il convient les hommes le conte mener leur hommes par le jugement de lor perso, aussi doit li cuens mener ses hommes par le jugement de ses autres hommes, qui sont leur par, es querello dont tuit li homne ne font pas partie contre lui, si comme il est dit deces."  
4 Beaumanoir, lxi. 1779: "Quant li sires plede en sa court contre son homme meisme, il n'est pas juges ne doit estre au conseil, en sa court, du jugement. Et quant li homme rendent le jugement, s'il le font contre li, apeler en paut comme de faus jugement, et doit estre pres demeurns en la court du seigneur qui li sires tient les homnes de ceux de qui il apel sa du jugement."  
5 Id., i. 44: "Il avient auncune fois que plers must entre le conte et tous ses hommes, si comme quant aucuns des hommes requiert sa court d'aucun cas dont il ne la doit pas ravoir, ou il dit qu'il a aucune justice en sa terre par la reno de son fief, que li cuens ne li connoist pas, ains dit qu'el aprant a li par reson de resort... En tous cas ne doit pas li baillys mettre le plet ou jugement des hommes car il meisme sont partie, si ne doivent pas jugier en lor querelle meisme. Donques se tous ples must entre le conte et les hommes, et li homme qui quereient droit, il doivent prendre cel droit par le conte et par son conseil. Et si li cuens leur refuse a fere droit ou il lor fet mauvais jugement, treve le pouent par l'une des II. voies par devant le fief, comme par devant souverains."  
6 Id., i. 45: "Des ples qui muentrent entre le conte d'une part et aucuns de ses hommes singulierement de l'autre part, dont tuit li homne ne se puent pas fere partie, si comme d'aucun heritage ou d'aucune forseture, ou d'aucune querelle, des quelles il convient que jugemens soit fes selon le coutume du pais,—en tel cas peut bien li bailly prendre droit pour le conte par les hommes. Car aussi comme il convient les hommes le conte mener leur hommes par le jugement de lor perso, aussi doit li cuens mener ses hommes par le jugement de ses autres hommes, qui sont leur par, es querello dont tuit li homne ne font pas partie contre lui, si comme il est dit deces."  
7 Id., lxi. 1883: "Nous par nostre VOL. III.
and his sief and challenge his lord, and in the same way the
lord can renounce his right to homage and can then challenge
his vassal.1

The great English jurist Bracton, as we have already seen,
lays down the general principles of the relation of authority
to justice, and to law as the embodiment of justice, in broader
terms than any of the other lawyers whose work we have been
considering. His work also illustrates very specially a move-
ment of mediæval society which we have not yet had the
opportunity to consider, that is, the gradual supression of
the feudal system of government by that of the national
monarchy.

We have already noticed his statement of the reciprocal
nature of feudal obligations.2 Disputes about these are decided
in the court of the lord, and if that does not do justice the case
is to be taken to the county court, not to a feudal

1 Beaumanoir, lxi. 1734: "Encore
par nostre coutumme, nues ne peut apeler son seigneur, a qui il est homs
de cors et de mains, devant qu'il li a
delesli l'honmage et ce qu'il tient de
li. Donques, se aucuns veut apeler son
seigneur d'aucun cas de crime, ou
quel il chiere apel, il doit ainsi l'apel
venir a son seigneur, en la presence
de ses pers, et dire en ceste maniere.
'Sire, j'ai este une piece en vostra
foi et en votre hommage, et si tenu de
vos teus heritages en fief. Au fief,
et a l'honmage, et a la fo, je renouce,
pour ce que vous m'avés meslet, du
quel meslet je vous a mer a la vendite
apel par apel." Et puis cele renonciation,
renonci le doit faire en la court,
de son souverains, et aimer avant en son
apel; et s'il aple avant qu'il ait
renonci au fief et a l'honmage, il li a
muli gage, ains ammondera a son seigneur
la dianze qu'il li a di a la court, et
l'a la court aussi, est une chascume
amende de la."

Id., lxi. 1735: "Nous disons, et
voirs est selone nostre coutumme, que
pour autant comme li hons doit a son
seigneur de foi et de loyauté par la
recon de son honnage, tout autant li
sires en doit a son hommage, et par ceste
recon pounus nous veoir que puis que
li hons ne peut apeler son seigneur
tant qu'il est en son honmage, li
sires ne peut apeler son hommage
devant qu'il ait renonci a l'honmage.
Donques, se li sires veut apeler son
home, il doit quitter l'honmage en la
presence du souverain devant qu'il
apel et puis peut aimer avant en son
apel." Cf. Summa de legisbibus, lxxii. 1.

2 See p. 27.

3 Bracton, "De legibus et consuetu-
dibus Anglas," iii. 7. 1 (fol. 163); "
Nunc autem diemum ubi terminandi
sunt actiones civiles, qui sunt
in rem vel in personam. Et
seuendum quod curam qui sunt in
rem, alium rei vendiciones per breve
de recto, terminar debeat in curia
baronum vel aliorum, de quibus episcop
putans clamaverit tenere, si plenum
rectum et tenere voluerit vel possit vel

receverit. Si autem voluerit vel ne
possit vel nesciverit, tunc probato a
tenero quod curia domini sui ei
de recto defecerit, transferri potest
placitum ad comitatum, ut viceeomnes
rectum teneant, et sic a comitatu trans-
ferri potest ad magnam curiam, ex
certa causa, si dominus rex voluerit,
et ibi terminari." Cf. pp. 34, 35.

4 Id., i. 8. 5 (fol. 5b): "Non est
enim rex, ubi dominatur voluntas et
non lex."

5 Id., i. 8. 5 (fol. 5b): "Ipse autem
rex non debet esse sub homine, sed sub
do et sub lege, quae lex facit regem. 
Attribuat ignor rex legi quod lex
attribuit; et, videntur dominationem
et potestatem." Cf. i. 14. 4.

6 Code, i. 3. 31.
only a further reason why he should obey the law, for being
God's minister his authority is only that of law (right), not of
wrong (injurie), for this only is the authority which comes
from God, the authority of wrong (injurie) is of the devil, and
the king is the servant of him whose works he does—the vicar
of God when he does justice, the minister of the devil when he
does wrong.1

1 Just so far as the king is to be the vicar of God he
must follow the example of Jesus Christ and the blessed
Virgin, who submitted themselves to the law.2

It is very
significant that Bracton—while maintaining in its highest form
the conception of the divine authority of the ruler, as we have
just seen, he calls him the vicar of God—should use this not
as an argument for an unlimited and uncontrolled authority,
but rather as an additional reason for maintaining that the
king is under the law, and must govern according to law.
Bracton does not hesitate to call the law “frænum potentiae,”
the bridle of power.3

And now lest we should imagine that this means little,
because the king is himself the source and author of law,
Bracton is careful to warn us against a perversion of the
discipline of the Roman jurisprudence. He was familiar with
Ulpian's phrase that the will of the prince has the force of law

2 Exercere potestatem... cum sit Deus minister et vicarius, non id solum quod
deure potest, nec obstet, quod principi placet, leges habet vagamina qua
1

saepe at eum turbis, ne deboinde ad
municipum eascece undis ad ura
nascantur, et eum qui ex uofficio suo
alios profisere nesciebat, id eum in
proposita persona committere non debet.

Exercere... et... turibus et regis
eonter, minister animo deveret. Igu-
tum fuerit usus sed nullius. Id

3 Si eum beatae Dei genetricis, virgo
Mariae, mater domini, quae singulari
præter, regibus, super legem fut, pro
ostendendo tamen humilitate exemplo
legum subi non refugit institutis.

4 Si eum... usus sed nullius.

1 Bracton, 1. 9. 3 (fol. 107): "Nil
id enim ulum potest rex in terris, cum sit
Deus minister... quod... ambigi,
non fuerit usus sed nullius.

2 Id., 1. 6. 5 (fol. 5b): "Et quod sub
leges se decreat, cum sit Deus vicarius,
evidenter apparat ad similitudinem
Iesu Christi cuum eisce gent in terris.

3 Id., 1. 9. 3 (fol. 107b): "Temptet
igur potestatem manis per legem quae
frænum est potentiae."
Bracton uses strong phrases to describe the need of submission to his authority; but here we come upon a somewhat difficult question of interpretation. We have, in the first place, several passages which seem to state very emphatically that the king has no superior, and that no one can judge his actions. In the first of these Bracton, after enumerating the various classes or orders of men in the State, says that all are under the king, and he is under no man, but only under God; he has no equal in his kingdom, much less a superior; the king must be under no man, but only under God and the law, for it is the law which makes him king.¹ In another passage it is said that no one can dispute the king’s charters, nor his actions, not even the “justiciar,” nor can any one interpret them except himself,² and this corresponds with another passage in which it is said that a complaint against the king can only be made by way of supplication to him, for no writ runs against the king, and if he will not correct or amend what is complained of, he must be left to the judgment of God.³

So far we have apparently clear statements of the position of

¹ Id., 5, 5 (fol. 5b). “Sunt etiam suos reges liberis hominum et servitutis potestate subjiciens, et omnes quodem sub eo, et ipse sub nullo, nam tantum sub deo. Parum autem non habet rex in regno suo, quae se aliter praebet praeruptio, cum in re non habeat imperium. Item nec multos fortius superis, nec potentioris habere debet, quae ac esse inferiora ab subjiciens, et inferiora esse esse possunt potentioribus. Ipse autem rex non debet esse sub homine, sed sub deo et sub lege, qua lex facit regem.”

² Id., 9, 3 (fol. 107). “Potestas vero omnes sub deo debet prescellere. Parem autem habere non debet, nec multos fortius superiores, maxime in uirtutis exibendi, ut dicatur vere de eo, magnus dominus noster, et magna uirtus sua, &c.”

³ Ed., 16, 3 (fol. 34). “De cartis vero regum et factus regum, non debent nec possunt iusticem, nec private personae disputare, nec etiam, si in illis dubitato creatur, possunt eam interpretari. Etiam in dubia et obscura, vel si alque dictius ducit intellectus, dominum regum serva in interpretationi et voluntate, cum eum se interpretari, eum esse condere. Et etiam se omnino stat falsa propter causam, vel quale forte signum apparet est adulterium, melius et tunc est, quod coram ipso rege procedat uirum.”

Chap. IV. THE MAINTENANCE OF LAW.

Bracton, but the matter is not as clear as it looks. The last passage cited begins with the words, “Non debet esse maior eo in regno suo in exhibitione urbis, minimus autem esse debeat, vel quasi, in judicio suscipienti, si petat,” and the same principle is set out in a passage in a later Book, “licet in justitia recipienda minimo de regno suo comparatur.”¹ We have just cited the words which immediately precede this. The king should have no equal, much less a superior, especially in administering justice, but in receiving justice he is like the humblest in his kingdom.

In another passage Bracton, in discussing the question against whom the Assize of Novel Disseisin may be demanded, says that this cannot be claimed against the king or prince or other person who has no superior but God; in such a case there is place only for supplication that he should amend his action, and if he will not do this he must be left to the judgment of God, who says “Vengeance is mine, and I will repay.” But then, with a sudden turn of thought, Bracton adds that some may say that in such a case the “universitas regum” and the “baronam regum” may and should correct and amend the king’s action in the king’s court (Curia).²

And this brings us to a passage which seems, at first sight at least, wholly inconsistent with the conception of the position of the king presented in those passages which we first cited. We have just considered the first part of this passage, in which it is laid down that no one may dispute the king’s charters or


² Ed., 9, 4. “Se autem princeps vel rex, vel alius quid superorum non habeatur in dominam, contra ipsum non habeatur remedium per assasum, nam tanto loci sunt supplicationem ut factum suum corrigat et emendet, quod si non fecerit, sufficiat ex proerna quod iam rectum expectet ulteriore, qui dict. huius uindicet, et ego retribuam, nam ut quid dict, quod unam veritatem iuris et baronam suum hoc facio poscit et debeat in curia ipsius regis.”


I must express my great obligations to Dr. Ludwig Ehrlich of Exeter College, Oxford, who kindly allowed me to read some of his preliminary studies for the treatise on proceedings against the king in medieval English law which he is preparing. He has drawn my attention to the passage just discussed, and I have found his studies most suggestive and illuminating. Dr. Ehrlich’s work is now published in vol. vi. of the “Oxford Studies in Social and Legal History.”
acts, but it continues in a different strain. The king has a superior, that is God, and the law by which he is made king; and also he has his court, namely counts and barons, for counts are so called as being the king's associates, and he who has an associate has a master; if therefore the king should be without a bridle, that is without law, they should impose a bridle upon him. 1

It is certainly difficult to reconcile this statement with those in other passages which we have already considered, in which it is said very emphatically that the king is under no man, that he has no equal or superior, except God and the law. 2 It seems most probable that the passage has been interpolated into the text of Bracton's work; 3 but while it is difficult to think that Bracton would himself have used these terms, it is not clear whether he would have repudiated the substance of them. It is true that in the passages which we have just cited he says that if the king refuses to do justice, he must be left to the judgment of God, 4 but against this must be set the phrase

1 Bracton, n. 16. 3 (fol. 34): "Item factum regis nec chartam potest quis judicare, ita quod factum regni deus irretetur. Sed doceo potens quis, quod regis sustitutum fecit, et bene, et si hoc, eaem radiante quod male, et ita imponeo et quod inmunum emendet, ne medeat rex et sustitutum radiantum vivens Deus properatum. Rex autem habet superior, Deum aequium. Item legem, per quam factus est rex. Item curam suam, videlicet comites, et barones, quos comites dicuntur quasi servos regum, et quin habet socum, habet magnum. Et ideo si regis fuerit sine frono, i. sine lego, debet et fratem opponere, nisi ipse notit fuerit, cum rege sine frono. Et tan clamabunt subita et decert, 'Domine Jesus, in charme et frono maxime eorum conserva.' Ad quos Dominus, 'Vocabo super eos gentem robustam et longinquam et ignotam, eum integum incolam, quaestus esse, et evellet radices eorum de terra, et a tabulis indicibus, quae subditos nobis retinet nostros indicium.' Et in fine, Ignotus eorum manibus et pedibus et motit eos in cammum ignis et tenbras exterrit, qui estetus et stridor dentum.' 2 Cf. esp. pp. 67 and 70.

3 Cf. Maitland, 'Bracton's Note-Book,' vol. 1, pp. 28-33, and vol. 1, pp. 252 and 332 of the edition of the text of Bracton which is being brought out by George E. Woodbine, Assistant Professor of History at Yale. Professor Woodbine has come to the conclusion that while the passage is contained in one group of MSS., the evidence cannot be accepted against that of two other groups of MSS., which omit it. Cf., however, Dr Vehil's work just mentioned, pp. 202-205. I am glad to have the opportunity of expressing the great satisfaction which students of medieval law will feel that Professor Woodbine has been able to make such substantial progress with his great enterprise.

4 Cf. i. 5, and iv. 10.

We are, however, not so much concerned with the question whether the words represent the opinion of Bracton, or of some other contemporary writer. There seems to be no reason to think that the words, although interpolated, belong to a later time. They are important to us on account of their correspondence with the principles of other feudal jurists. The principle which they represent is the principle of some of the most important of these. The Assizes of Jerusalem set out very clearly that the king is subject to the law, and that the court is the tribunal to which any one who feels himself aggrieved by the king or lord can appeal, that it is responsible for the maintenance of the law, if necessary even against the king, and they cite cases in which this principle had been carried out in action. 5 The 'Sachsenspiegel' seems definitely to lay down the

1 Cf. m 9, 3.
2 Cf. p. 67.
3 Cf. iv. 10.
4 Id., m. 3 (fol. 107b): "Ignoramus facit est fratrum, vicarios est regis eterni, minister autem dominus domi in munus. Dominus enim res a bono regendo, et non a regando, quae rex est dux bona regis, tyrannus dux populum abs crudelitatem sedentun dominam." Cf. St Isidore of Seville, Etym., xx. 5.
5 Cf. Part II of this volume, chap. v
doctrine that even the king is answerable to one who can judge him. The 'Etablissements of St Louis' are clear that even in the case of the King of France the vassal can demand justice of him in his Court, and that if the king refuses to give this he can make war upon the king, and can require his sub-vassals to follow him. And though Beaumanoir does not commit himself to any definite statement about the coercion of the king, he does emphatically set out the general principle of the supremacy of the court as determining the mutual obligation of lord and vassal.

It is, we think, clear that the feudal system was in its essence a system of contractual relations, and that the contract was binding upon both parties, on the lord as much as on the vassal. Whatever else may be said about it, one thing is clear, and that is that feudalism represents the antithesis to the conception of an autocratic or absolute government.

1 Cf. p. 61.  
2 Cf. pp. 62, 63.  

CHAPTER V.

FEUDALISM AND THE NATION.

It may be urged that the tendency of feudalism was really anarchical and disintegrating, that it tended to arrest or retard the development of the conception of the national society or state, that the principle of the loyalty which the vassal owed to his immediate lord was really inconsistent with the conception of the authority of the whole community and its head. There is a great amount of truth in such a contention, and we must therefore consider the matter in some detail, but briefly.

In an earlier chapter attention has been drawn to the contrast, which finds expression in some of the epic poetry, between the personal loyalty and devotion which the vassal owes to his immediate lord and the indifference and even contempt for the overlord or king. There is no doubt that we have here a forcible expression of an anti-national and disintegrating character in feudalism. The truth is that the feudal system, whatever may have been its remoter origins, took shape during those years when the dissolution of the Carolingian empire and the invasions of the Northmen and Magyars reduced Europe to an extreme confusion, and that its characteristics are related to the absence of such a well-organised government as might give the private man adequate protection. In the absence of strong central or national authorities, men had to turn for protection to the nearest power which seemed to be capable of rendering this. At the same time all those jurisdictions, which had once represented the delegated authority of the Carolingian emperors and kings, tended to become heredi-
tary. When Europe began to recover from the anarchical confusions of the late ninth century and the early tenth century, the new conditions were firmly established, and the great national organisations which gradually formed themselves out of the ruins of the Carolingian empire were at first rather groups of semi-independent territories or states than compacted administrative units. It would be outside of our province to examine the varieties of these conditions as they present themselves to us in Germany or Italy, in France or England. We must bear in mind that the conditions varied greatly in detail; it is enough for our purpose to recognise that in spite of these variations the conditions were substantially similar.

It was the characteristic of feudal society that the local and personal attachments were strong, while the relations to the central authorities were comparatively weak and fluctuating. This is the fact which lies behind the weakness of the overlord or king and the power of the immediate lord. The great feudatories no doubt owed allegiance to the king or emperor, but the vassals of the great feudatories had at first probably no very clearly defined relations to the overlord. We have now to recognise that while this was true, and while in Germany the process of national consolidation was overpowered by the territorial principle, in England and France, and ultimately in the other European states, the national unity triumphed over these disintegrating forces. The truth is that while feudalism was based primarily upon the relations between a man and his immediate lord, the principle of the national state was, though undeveloped, older, and soon began to reassert itself, so that at least as early as the eleventh and twelfth centuries the principle of a direct relation between all free men and the king began to be firmly established. Students of constitutional history will remember the significance of this development, in England and France, and ultimately in the other European states, the national unity triumphed over these disintegrating forces.

Jean d'Ibelin makes it clear that in the kingdom of Jerusalem it was established as law after the war between Amauri I. and Girard of Seeete (Sidon) that the sub-vassals as well as the tenants-in-chief had to take the oath of allegiance (l y ce) to the chief lord, the king, and that he could require the inhabitants of cities and castles held by his vassals to swear fealty to himself.\(^1\) In another passage he lays it down that when any man does homage in the kingdom of Jerusalem to any one else than the chief lord he must not do "l y ce," for no one can do "l y ce" to more than one man, and all the vassals of the vassals are bound to do "l y ce" to the chief lord of the kingdom.\(^2\) In another place again he describes the mode in which the sub-vassal makes allegiance to the chief lord of the kingdom; he is to kneel and, placing his hands between those of the chief lord, is to say, "Sire, I make you allegiance (l y ce) according to the Assize for such and such a fief, which I hold of such and such a person, and promise to guard and protect the home which I hold of such a person, and promise to guard and protect...

\(^1\) The important passages are cited in Stubbe's "Constitutional History of England," section 96.

\(^2\) Ibid., 165: "Et qui fait hommage de chose qui seit ou resiame a autrce que au chief seignor il le doit faire a la maniere desertue devises, mais que tant que il ce la doit pas faire ligece; por ce que nul home ne peut faire plus d'une ligece, et que tous les homes des homes dou chief seignor do reiame il devoient faire ligece por l'asse; et puisque l'on li deit la ligece, l'on ne la peut a autrce faire sans meprendre vera lui."
you against any who may live or die, as I am bound to do by the allegiance (ligeece) made according to the Assize.’ The chief lord kiss him and replies, ‘And I receive you in the faith of God and in my own, as I ought to do in accordance with the allegiance (ligeece) made according to the Assize.’ When they have thus made allegiance the sub-vassals are bound to defend and support the chief lord against every one, and even against their immediate lord under certain conditions. If the chief lord has a dispute or war with any one of their lords, the sub-vassals are to remind their lord that they are the liegemen of the chief lord, and to request him to demand that the dispute should be submitted to the judgment of the court. If the chief lord refuses to do justice in his court, they will follow their lord, but if he refuses to take these steps within forty days, or if within that time he takes action against the chief lord, they will forsake him and support the chief lord.1 Again, Jean d’Ibelin says that if any lord is doing wrong to the chief lord, without his knowledge, the sub-vassals must renounce with their lord, and if necessary must join the chief lord against him.2 Again, the close relation between the chief lord and the sub-vassal is illustrated by the principle that the chief lord is bound to protect him against his immediate lord, if he acts unjustly and without the authority of his court, and to replace him in his fief if he has been unjustly deprived of it.3 These principles are stated in much the same terms also by Philip of Novara.4 It is clear therefore that even in a typical feudal constitution such as that of the kingdom of Jerusalem in the twelfth century, the principle of the supremacy of the central or national organisation over the relations between the vassal and his immediate lord was already fully recognised. It is perhaps scarcely necessary to point out that this principle is clearly set out in Glanvill with regard to England in the twelfth century, but it is worth while to notice that he makes a distinction between the homage which a man may make to different lords for different fiefs, and the liege obligation (ligancia) which he can only make to that lord from whom he holds his ‘capitale tenementum.’ The distinction is not the same as that in the Assizes of Jerusalem, but it is parallel to it. Glanvill makes it clear that in doing homage to any lord, there must always be reserved the faith which he owes to the king, and that the sub-vassal must follow the king even against his lord.5

If we turn to France we find the principle of the reservation

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1 Id., 199.
2 Id., 200.
3 Philip of Novara, 51.
4 Glanvill, ix. 1: ‘Potest autem quia plura homagia diversa Dominis fecere de Feodis diversis diversorum Dominorum: sed unum eorum operet esse prccipuum, et cum ligancia facerit: illi sicuti Domino facendum, a quo tenet suum capitale tenementum in quip homagium facere debet. Fieri autem debet homagium sub hae formae, sicut ut is qui homagium facere debet ita fiat homo Domini sui, quod fidem in portum de illo tenemento unde homagium suum prcestit, et quod eiin in omnibus termere homere servet, salva fide debita domino Regi et hereditibus suis. Ex hae licet quod vassalos non potest Dominum suum infestare, salva fide homagii sui: nisi forte se defendendo, vel nisi ex praecepto principis cum eo iurato contra Dominum suum in exercitum.’
5 Cf. ‘Summa de logibus,’ xii. 1: ‘Fidelitatez autem tenetur omnes residentes in provinciis duci facere et servere... Omnes enim in Normannia tenentur fidelitate principi obseruare. Unde homagium vel fidelitatez allicium nullus debet recipere, nisi salva principis fidelitate; quod eciam est in eorum receptione specialiter exprimendum.’
of fidelity to the king is clearly stated in the thirteenth century by the author of the 'Justice et Plei.' The king, he says, must hold of no one: dukes, counts, &c., may hold of each other, and become each other's men, but always, saving the dignity of the king, against whom no homage is of any authority. "Chastelain," "vavasor," citizens and villains are under others, but all are under the king.1 Again, Beaumanoir sets out very distinctly the principle that the obligation of the vassal to follow his lord in battle does not extend to the case when the vassal is called upon to follow against the overlord or the king.2

The only writer in whom we have found some suggestion of ambiguity about the matter is one of the Lombard civilians of the thirteenth century, who also wrote on feudal law, James of Ardizone. He seems indeed to agree himself with the jurists already cited that the sub-vassal is not bound to follow his lord against another superior, and is not to be punished for this. The phrase is indeed ambiguous, but it leaves upon one's mind the impression that the "alter superior" is the lord's superior.3

1 'Justice et Plei,' p. 16: 1: "La rei ne doit teur de null. Dicte, conte, visconte, baron pouent teur li un des autres et devenir home, sauf la dignité le roi, contre qui hommage ne vaunt reus Chastelain, vavasor, citoyen, vilain, sont soumis à celui que nous avons devant només. Et taut sont soit la main au roi."

2 Beaumanoir, p. 65: "Cul qui sont semont pour audier leur seigneures contre leur anescau ou por audier leurs seigneur à leur messes defende, ne dovent pas contremander ne quere nu delai. Et si n'ont remandent ne ne quereu delai, il ne gardent pas bien lor fou vers leurs seigneures. Et quant il fallent a leur seigneur en tel besoing, il deraissent à perdre leur vie, ne il si se pouent escaper par assasins, puis qu'il soient ou puies et que la guer ne soit contre cel de qui leur seigneur tennent leur hommage, ou contre le conte qui est leur souveins, ou contre le roi qui est par deseur touts."

3 Jacobus de Ardizone—Summa ius feudorum, 69: "Item eascnsurit si dominus vult quod eum aduert et contra dominum ipsum dominum nam si eum offenderet, nes es satis faceret, feudo privaretur, ut in tit. de feu. & benefic. 1. imperialis, § illud, in alienando feudum consensu manner domini debet intervenire, ut in prædicta constat, primo respon & § primo. Vel ducetur quod bene tenetur vasallus adiuvare domini contra alterum superiorem, et non puniatur, quia in servito domini suae fact, argumentum fl. de mor. 1. sed unus, § 1. justitus— in fl. de quia matus notavi supra cadem summa, § item si vasallus vassali, et § ubi vero places. Item servus vassali eausur, si dominus feudi petat ut eum aduert contra dominum servi, in eunus est patefact, cum servus sequendo domini non puniatur,cum necessario patefacto dominus excusatur servus parendo domino (ut fl. sed legem Cornelian de sa. 1. dvsus, § item senator) host dominus debet domini."

Excusatus est vasallus et potius

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It is easy to recognize that the question here raised was a difficult one, and that it would arise specially under Italian conditions; but it is important to observe that even in Italy the principle of the reservation of fidelity to the overlord, or to the prince, was very definitely maintained. We must, however, allow for the great influence which the Roman jurisprudence would exercise upon the judgment of James of Ardizone.

There is indeed no doubt that in the judgment of the feudal jurists of the thirteenth century the king has a full jurisdiction over all persons within his kingdom.

The author of the 'Sachsenspiegel' lays down this doctrine with great clearness and emphasis. The king, he says, is the common (ordinary) judge over all men. Every man has his right (law) before the king, all authority is delegated by him. Whenever and wherever the king is himself present all other jurisdictions are superseded, and all prisoners must be brought before him, any person refusing to do this will be put under the ban, and any man who is aggrieved by a judgment can appeal to the king.1 These phrases are very comprehensive in
their nature, and, while this is not the place to discuss their actual constitutional significance in the administration and judicial organisation of the empire, they are yet of great importance as indicating how far at least in theory the national conception had imposed itself upon the feudal.

The same principle is set out in the 'Summa de legibus,' one of the Norman law books of the thirteenth century. The prince alone has "plena iurisdictio" over all disputes brought to him, and again in another place, the jurisdiction of the feudal lord is severely limited to certain cases, for all "iusstitiatio personarum" belongs in Normandy to the Duke, in virtue of the fealty which all men owe to him; and again, jurisdiction over the bodies of all men, small or great, belongs in Normandy to the Duke, insomuch as they are bound by fidelity and allegiance to him alone.

The author of the 'Justice et Plei,' and Beaumanoir, maintain the same doctrine in France. The author of 'Justice et Plei' is indeed so much influenced by the Roman law that it may be held that he is to be considered rather as a civil than as a feudal, but his treatment of the subject corresponds in principle with that of the feudal jurists. His phrases are noteworthy. The king has jurisdiction everywhere and always, he has plenary authority in everything, while others have it only in part. Again, the count or duke has "justice" in his lands, but under the king who is over him, the king must not indeed deprive him of this, so long as he does right, but the king can interfere to secure justice. The king holds of no one; dukes, counts, viscounts, and barons can hold of each other, and again, each other's men, but always, saving the dignity of the king, against whom homage is of no avail, for all are under the hand of the king.
Beauhamois asserts very emphatically that the king is supreme over all jurisdictions and over all persons. In one passage of great importance which we have already discussed he explains the sense in which he uses the word "souverain," and says that while every baron is "souverain" in his own barony, the king is "souverain" over all, and has the charge of the whole kingdom, and therefore can make "établissements" which are binding everywhere. No one is so great that he cannot be called before the king's court, "pour defaite de droit ou pour faus jugement." 1

The whole conception is summed up by Bracton in an emphatic passage in which he lays down the principle that the king has the "ordinary" jurisdiction and authority over all men who are in the kingdom, for all laws which belong to the crown and the lay authority and the temporal sword are in his hand; it is he who holds justice and judgment, that is jurisdiction, so that it is by his jurisdiction, as being the minister and

seignories et totes justices, sauf le roi, qui est il par deus, à amender le tort qu'il a fait, et sauf ce que li rois a en la duchée, et autres par jutes causes." Ed., i. 16: 1: "Li rois ne doit tenir de nuil. Duc, conte, vicomte, baron, peut tenir li un des autres et devenir home, sauf la dignité li roi, contre qui hommage ne vaut rien... Et tuit sont ess la main au roi." 2

1 Beaumanoir, xxxiv. 1013: "Pour ce que nous prions en cest livre, in plusieurs lieus, du souverain, et de ce qu'il peut et doit faire, li aucun pourroit entendre, pour ce que nous nommons conte ne due, que ce fust du roi; mais en tous les lieus la ou li rois n'est pas nommé, nous entendons de ceux qui tient en baronnie, car chasque barons est souverain en sa baronie. Voirs est que le roi est souverains par desus tous, et a, de son droit le general garde de tout son royaume, par quoi il peut faire tels etablissements comme li plest pour le commun pourfit, et ce qu'il establit
doit entre tems. Et se n'i a nuil si grant dessous li qui ne puet etre tres en sa court pour defaite de droit ou pour faus jugement et pour tous les cas qui touchent li roi. Et pour ce qu'il est souverain par dessus tous, nous le nommons, quant nous parlons d'asome souveraineté qui a li appartient." Cf. xlvii. 1499: "Mes quant li Rois fat aucun etablissement especialement en son demaine, si baron ne lessen pas pour ce auser en leur terres, selon les anciennes coutumes. Mes quant li establissements est genorons, il doit courre par tout le royaume, et nous devons croire que tel establissement sont fet par tres grant conseil et pour le commun pourfit." Cf. also xi. 322: "Qar toute la lais jurisdiction du royaume est tenue du roi en fief ou on arriere fief. Et pour ce peut on venir en sa court, par voie de defaite de droit ou de faus jugement quant il cui de lui tienent aon font ce quil doivent." 1 Bracton, ii. 24 I (fol. 50b): "Nunc autem dicendum est de libertatibus, qui concordare possit libertatem, et quibus, et qualiter transferantur, et qualiter possidendur vel quasi, et qualiter per usum retinentur. Quis? Et scirendum, quod ipse dominus rex, qui ordinarius habet jurisdictionem et dignitatem et potestatem super annes qui in regno suo sunt. Habet enim omnia iura in manu suis, quod et corona et lealitatem pertinent potestatem et materialum gladium, qui pertinent ad regni gubernaculum. Habet etiam ius itinum et iudicium, que sunt jurisdictiones, ut ex jurisdictione sua, eicut Dei minister et vicarius, tribuat uniusque quod suum fuerit"
by law, and the obligation of the contract was determined by law.

Again, we have seen that while feudalism, in its great development in the tenth century, was the result of the operation of forces which were anarchical, or which at least tended to disintegrate the larger political organisations of Western Europe, these tendencies were rapidly checked by the growth of the principle that the feudal jurisdictions were subject to the control of the rising national systems, and that beyond the obligations of the vassal to his immediate lord every individual free man owed allegiance to the national sovereign. We have considered the history of this movement as it is reflected in the feudal law books themselves, and have seen that at least as early as the twelfth and thirteenth centuries it was recognised that the royal or national authority was paramount over all other authorities.

It is no doubt true that feudalism left for many centuries deep traces in the structure of Western society, and even on the theory of political relations, but it is also true that, when we consider the subject in the broadest way, feudalism did not counteract the normal development of the political ideas of Western civilisation, but rather that in the end its main influence went to further the growth of the principle that the community is governed by law, and that the ruler as much as the subject is bound to obey the law.

PART II.

GENERAL POLITICAL THEORY IN THE ELEVENTH AND TWELFTH CENTURIES.

CHAPTER I.

NATURAL LAW AND EQUALITY.

We now turn to the history of the general development of political ideas from the beginning of the tenth century to the end of the twelfth, that is, we can resume the history of these conceptions at the point where we left them in our first volume. We shall in doing this have occasion from time to time to take account of the influence of the three systems of law which we have considered, the feudal, the civil, and the canon law, but our main task is to trace this development in the general literature of those times, and in the principles expressed or implicit in the constitutional development of Europe. For the time being we shall not discuss directly the questions concerned with the relations of the temporal and spiritual powers. These became during this period so important that we propose to devote a separate volume to them.

In considering the theories of the civilians and canonists we have seen how important was the conception of natural law in the Middle Ages, but we must not look for any detailed discussion of this in the literature which we have now to examine, for these writers were for the most part engaged in considering the principles of political society as they emerged in the actual
friendship between men which is so great and natural a
good. 1

The passage is no doubt based mainly upon recollections
of earlier writers, of the Fathers, and, probably through them,
of Stoic writers like Seneca, 2 but it is representative of the
normal judgment of mediaeval thinkers.

We may take as our first illustration from the feudal lawyers
a very notable passage in the 'Sachsenspiegel.' God, says the
author, made all men in His own likeness, and redeemed man
by His passion, the poor as well as the rich; there were no
slaves when the forefathers of the Germans first settled in the
land; slavery, or serfdom, began by violence and capture and
unrighteous force; the law of Moses required all slaves to be
set free in the seventh year; and the author holds that it is
not in accordance with the truth or the will of God that one
man should belong to another. 3

1 Ratherius of Verona—'Praequentium.' I. 10: ''Attende Deum in
principio creationis humanae dizisse: 'Cresci et multiplyamini,' . . . ut
intelligas homines non hominibus, sed voluntatibus, postis et piscibus esse
pradatores, omnesque a Deo natura equalis conditor, sed inequalitate
morum facientes, aliis alios intantum supponit, ut pluramque aliqui domi-
centur etiam melioribus. . . . Nota vero tu, quiesquis es, qui de facto
aliis gloriaris abusive sanguinis: eum omne hominum genus in terris simil
surgat ab ortu, et non ex alio, sed ex cadit massa compositus, ex uno
patrie, ex eademque, qua servorum quilibet, aliis matri creatus. Quia si
crescit in Christo quodque nummum sumus, uno sericit gesto redempti, eodemque
baptismo renat: quiesquis eadem
fraternitas unitatem easteris se pro
ponendo sindiare nittiur, paternitatem sine
dubio illius, redemptissimem et
reparatione quoque, quae eum illi
efficium, quantum in se est, annul-
sumit, et ut suum, abnegare pro-
barur. Verum si solummodo in hac
Deo parte discernimus, si meliores
alii in operibus bonis, et humiles
inveniuntur: convincitur melior esse
qui tibi servit humiliter, quam tu,
qui eum despicis arrogantem; nobilior,
qui tibi, quod promisit, exhibit
fideliter, quam tu, qui eum decepis
nendacter; genoricior, qui tua
nature custoditis, proprium non
deseris eructum, quam tu, qui vitis
vitia nutritious vim arsitet mag-
nunque et naturali violatur bonum.''


3 'Sachsenspiegel,' ill. 42. 1: 'Got
kommter den man na ime selven gebelidet,
unde hovet ink mit den marte
geleideet, den enen also de anderen,
imo is die arme also bevas als die
riek . . .

1. Do man ok recht itat satte, do ne
was nen dietsman, unde waren ai die
ludo vri, do une vorderen her to
lando quamen. An minen inne
ne can ik is nicht upgenomen ne
der weracht, dat jemn das andere
sole sin; ok ne hebbe wies nen or
kunde. . .

4. Den seveden manet gebet
We may put beside these phrases a passage from Beaumanoir in which he sets out the same principles, but in different terms. All men, he says, were at the beginning free, and of the same freedom, for all men are descended from one father and mother; slavery (or serfdom) arose in many ways, such as that men were taken prisoners in war, or sold themselves into slavery on account of their poverty, or because they could not defend themselves against the unjust violence of lords; however men may have become slaves it is a great act of charity that a lord should set his slaves (or serfs) free, for it is a great evil that Christian men should be in the servile condition.¹

be ok to haldene, unde dat sevede jar, dat het dat jar der lounge, so solde man ledich laten unde vri alle die gevangen waren unde in egenscap getogen, met alsogedaneme gredede als man me vungan, of me ledich unde vri welden wesun. Over sevenweef seven jar quam dat vultegate jar, dat het dat jar der vreuden, so muste alle manbik ledich unde vri wesun, he wolde oder newolde.

5. Ok gat uns got orkundes mer an einem penanne, dar man mene bede besoche, do he sprak iestot den kuesen suus beldes geweldich, unde godes helde gevst gode. Dat is uns kundich von godes worden, dat die mensche, godes helde, godes wesun sol, unde se me andere saennane to segt danne gode, dat he weder goe duct.

6. Na rechter warheut so hevet egenscap begin von gelvange, unde von vengensse, unde von unrechter walt, de man von aldere in unrechte warheut getogen hevet, unde nu voro recht hebben wol.“

 Cf. ‘Schwabenspiegel,’ 57. 2. “Wir han daz von der schrift, daz neman sol eugen sm. Doch ist et also dat komen mit gewalt unde mit twancad, das et nu recht ist daz eugen hute sm.”

 Cf. id., xlv. 1438 “Par toutes ses choses sont servitudes venues avantage selo le droit naturel chasseurs est franc, mes cele naturelle franchise est corrompue par les acquissions dosses dites.”

 Cf also Bracton, i. 3 (fol. 5b): “Et parquelques manieres qu’il asen venu, nous pouvons entendre que grant aumone foi li autres qui les cete de servitude et les met en franchise, car c’est grand maus quant nus creaisiens est de serve condition.”

¹ Beaumanoir, xlv. 1453: “Com-
CHAPTER II.

THE DIVINE ORIGIN AND NATURE OF POLITICAL AUTHORITY.

In the first volume of this work we have examined the characteristic elements of the theory of the origin and nature of political authority as it is set out in the literature of the ninth century, and we think that enough has been said to make it clear that as soon as we find any literary treatment of political conditions and ideas, we find that there were very clearly fixed in the minds of the men of the new mediaval civilisation some highly important conceptions of political origins and obligations. We have in the last volume endeavoured to examine the relation of the revived Roman law, and of the new system of Ecclesiastical law, to these conceptions, and in the first part of this volume we have considered the bearing upon them of Feudalism. We must now inquire how far these conceptions can be said to have been continually present to men's minds in the centuries from the tenth to the twelfth, and how far they were modified or developed.

We are entering upon the study of an age in which the structure of society was very rapidly growing and changing, and we have to inquire how far and in what manner men's conceptions of the principles of the political order changed with it. If our interpretation of the political theory of the ninth century is at all correct, the main features of that theory are to be found in three principles—first, that all authority, whether Temporal or Spiritual, is ultimately derived from God; second, that the supreme authority in political society is that of the law, the law which represents the principle of justice and third, that the immediate source of all political authority is the community, for law is primarily the custom of the community, and there can be no legitimate authority without the election or recognition of the community. We have to inquire how far these principles continued to control the conception of political society, and in what manner they were modified or developed.

During the tenth century and the earlier part of the eleventh we should infer, from the fragments of the literature which have survived, that there was not very much active political speculation; we can indeed gather from occasional phrases the general nature of the conceptions which were current, but it may be doubted whether men did generally do much more than repeat the commonplaces of the ninth century tradition. These commonplaces were not, however, unimportant, and in some respects they seem to represent real and intimate convictions.

It was the great constitutional and ecclesiastical conflicts of the latter part of the eleventh century, continued in the twelfth, which compelled men to consider these traditional presuppositions more closely, and from the middle of the eleventh century we have an abundant and important body of literature in which we can discern with great clearness the main features of an energetic and determined political speculation.

We must begin by considering the question how far in the period with which we are now dealing it was doubted or denied that the secular authority was derived from God, and this will lead us on to the closely related question whether the State was or was not conceived of as having a moral function and purpose.

As we have seen, the principles of the divine source of political authority, and of the moral function of government, were most emphatically laid down by the Fathers,\(^1\) and maintained by the writers of the ninth century.\(^2\) It has been suggested that these conceptions were really undermined by the influence of St Augustine, especially as expressed in the 'De Civitate Dei,' and that the effects of St Augustine's mode

\(^1\) Cf. vol. i. chaps. 11, 13, 14.

\(^2\) Cf. vol. i. chaps. 17, 18.
of thought are clearly traceable in the Middle Ages. We cannot here discuss the real and complete meaning of St. Augustine, the subject has been handled with great care and restraint by Reuter. The question with which we have to deal is whether there was among the political theorists of the eleventh or twelfth centuries any important tendency to think of the secular power as lacking the divine authority, and as representing a principle of evil rather than of good.

The discussion centres round some phrases of Pope Gregory VII. (Hildebrand), their meaning and their influence. Some writers have attached a very great importance to these, and have considered them to be representative of a clear and dogmatic theory, which as they have thought was of great importance in the Middle Ages. And no doubt Hildebrand’s phrases are emphatic and startling. The best known of them is to be found in his famous letter to Hermann, the Bishop of Metz (1081): “Quis nesciat: reges et duces ab ipsis labueisque principium, qui, Deum ignorantes, superbia, rapina, perfidia, homicidii, postremo universi spe sacerdostis, mundi principes, semper in cupidinum præsumptionem pene sceleribus, mundi princeps et principum, habitant, super pares, scilicet principum.

Norway, in 1078, he describes the true dignity of the royal title with the appropriate virtues, and to make it manifest that that justice, in virtue of which he reigned over his subjects, also reigned in his heart. Again, in writing to Harold, King of Denmark, in 1077, he admonishes him to keep the honour of the kingdom committed to him by God with all diligence, and to make his life worthy of it, in wisdom, justice, and mercy, that God may be able to say of him, “By me this King reigneth.” And again, in writing to Olaf, King of Norway, in 1078, he describes the true function of his royal authority as being to help the oppressed, to defend the widow, and to love and defend justice with all his might.

Perhaps the most notable passage is contained in a letter to Henry IV., he bids him to know that he rightly holds the royal power, if he obeys Christ the King of Kings and defends and restores the Church.

be united in concord, that, as the human body is ruled by its two eyes, so the body of the Church may be ruled and enlightened when the two authorities agree in the true religion.

In a letter of 1074 to Henry IV., he bids him to know that he rightly holds the royal power, if he obeys Christ the King of Kings and defends and restores the Church.

In a letter to Swyn, King of Denmark, in 1075, he prays him to administer the authority entrusted to him, according to God, to adorn the dignity of the royal title with the appropriate virtues, and to make it manifest that that justice, in virtue of which he reigned over his subjects, also reigned in his heart. Again, in writing to Harold, King of Denmark, in 1077, he admonishes him to keep the honour of the kingdom committed to him by God with all diligence, and to make his life worthy of it, in wisdom, justice, and mercy, that God may be able to say of him, “By me this King reigneth.” And again, in writing to Olaf, King of Norway, in 1078, he describes the true function of his royal authority as being to help the oppressed, to defend the widow, and to love and defend justice with all his might.

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in which Hildebrand urged upon William the Conqueror, in 1080, the duty of obedience to the papal authority, inasmuch as the Pope would have to give account to God for him in the day of judgment; he prefaced this exhortation to obedience by a very explicit statement that God had appointed two authorities greater than all others to rule the world, the apostolical and the royal.  

It is clear that if we are to arrive at a complete and just view of the conception of kingship and secular authority held by Hildebrand, we must not isolate the phrases of the two letters to Hermann of Metz, but must consider them along with the sentiments he expresses at other times. If, then, we examine the circumstances under which the two letters to Hermann were written, we find that the purpose of both was to refute the arguments of those who maintained that it was not lawful or proper for the Pope or any one else to excommunicate the king or emperor. Hildebrand was primarily concerned to demonstrate the absurdity of this view, and he justifies his action by three considerations—first, the general authority of binding and loosing given by Christ to Peter, from which no one is exempt; second, the precedents which he cites of such excommunications in the past; and third, by a comparison of the dignity and authority of the temporal with the sentiments he expresses, we find that the purpose of both was very explicit statement that God had appointed two authorities greater than all others to rule the world, the apostolical and the royal.

We have then here one aspect of Hildebrand's conception of the nature of secular authority, stated sharply and without qualification, but in a context which is highly controversial. In the other passages which have been cited we have a very different view. In these he describes secular authority as being derived from God, and as finding its true character in the defence and maintenance of justice, and he hopes that there may be a true concord and agreement between the "sacerdotium" and the "imperium," the two authorities which God has appointed to rule over the world.

These two conceptions may seem at first sight, especially to those who are unfamiliar with the Stoic and Patristic tradition, inconsistent and irreconcilable, but this is merely a confusion. For, in this tradition, government, like the other great institutions of society, such as property and slavery, is the result of men's sinful passions, is also the necessary, and, in the Christian conception, the divine, remedy for sin. Men in a state of innocence would neither need coercive government, nor would they claim to rule over their fellow-men; while in the state of sin and ambition, the result of sin, and represents sinful greed and ambition, and yet is also the necessary, and, in the Christian conception, the divine, remedy for sin. Men in a state of innocence would neither need coercive government, nor would they claim to rule over their fellow-men; while in the state of sin and ambition, the result of sin, and represents sinful greed and ambition, and yet is also the necessary, and, in the Christian conception, the divine, remedy for sin. Men in a state of innocence would neither need coercive government, nor would they claim to rule over their fellow-men; while in the state of sin and ambition, the result of sin, and represents sinful greed and ambition, and yet is also the necessary, and, in the Christian conception, the divine, remedy for sin.

1 Gregory VII., Registrum, vii. 25: "Credimus, prudentiam vestram non latere; omnibus alii excellenteres apostolicam et regiam dignitatem hoic mundo, ad eius reginam, omnipotentem Deum distribuisse. Sicut enim, ad mundi pulchritudinem ocults carnis diversis temporibus presentandum, solom et lunam omnibus creaturarum dispositui luminaria; sic, ne creatura, quam sui benignitas traheretur pericula, providit, ut apos-

2. Stoics, Epicureans, and Platonists. (See, for instance, Seneca, Ep., iv. 2; Irenaeus, Adv. Haer., v. 24; St Augustine, De Civ. Dei, v. 15, xix. 15; and Doctrina Christiana, i. 28; and vol. i.)
they were resented even among those who were not prepared to defend the investiture of bishops with ring and staff by the secular authorities. For instance, Hugh of Fleury, in a treatise addressed to Henry I. of England in the early years of the twelfth century, protests indignantly against the phrases which had been used by Hildebrand in these letters about the origin and character of the royal authority, and maintains that such opinions are absurd, and contrary to the apostolic doctrine that all authority is from God, and that there is a divine hierarchy of authority and obedience not only on earth, but also in heaven.¹

The phrases of Hildebrand were resented, and, considering their highly controversial context, this is not surprising. Is there now any reason to think that the conception which is expressed in these phrases was maintained by other writers of this period as representing a complete and exclusive theory of the origin and nature of temporal authority? There are a very few passages in the contemporary literature which deserve our attention.

In a fragmentary treatise written in the middle of the eleventh century by a French churchman attacking the action of the Emperor Henry III. with regard to the Papacy, especially no doubt in view of the deposition of the Popes at the Council of Sutri, the author severely condemns the emperor as having claimed jurisdiction over the Pope, and urges that the emperor does not occupy the place of Christ, but that it might rather be said that he holds that of the devil, when he uses the sword and sheds blood.²

Again, in a treatise written by a certain Berneald, apparently in the last years of the eleventh century, he urges that if the Popes have authority to depose Patriarchs, they have the same authority over secular princes whose dignity seems to have been created rather by men than by the divine institution.² Cardinal Deusdedit, in one of his treatises, speaks of the royal authority as arising from human institution, with the permission indeed of God, but not by His will, and he refers to the demand of the Israelites for a king, as related in 1 Samuel.³

The first of these passages is very drastic, and if we had any reason to think that it represented a generally current view, would have considerable significance; but as we shall see presently, some of the strongest papalists take the very opposite view of the use of the temporal sword.⁴ The phrases of Berneald and of Deusdedit do not represent anything more than the conception that the temporal power is not derived immediately from God, but is directly the creation of human will and authority.

What was, then, the normal view of these centuries as to the source and nature of secular authority? There can really be

¹ De Ordinando Pontificum, 'Auctor Gallicus'; "Nec mirum sacerdotalen auctoritatem quam Deum ipse per se ipsum constituit, in humausmodi causis regiam pretendere potestatem, quam sibi humanae prefecit ad inventio, so quidem, non tamen, volente. Nam de primo regae populii sui, quem sibi petit epi propheta principatum, ait ad cunodem: "Non te, mecum, eque populo meo constituerim Saul regem." (1 Sam. xv. 7.)
² Deusdedit, 'Libellus contra invasores et symnonicos', iii. 12: "Nec mirum sacerdotalen auctoritatem quam Deum ipse per se ipsum constituit, in humausmodi causis regiam pretendere potestatem, quam sibi humanae prefecit ad inventio, so quidem, non tamen, volente. Nam de primo regae populii sui, quem sibi petit epi propheta principatum, ait ad cunodem: "Non te, mecum, eque populo meo constituerim Saul regem." (1 Sam. xv. 7.)
³ See p. 103.
no doubt whatever about this to those who are at the pains to make themselves familiar with the literature of those times. The writers of these centuries are practically unanimous in maintaining that the authority of the king or emperor is derived from God. The principle is clearly expressed by those who wrote before the development of the great conflict between the Papacy and the Empire in the latter part of the eleventh century, but we also find it maintained with equal clearness during the great conflict both by imperialists and papalists.

In a commentary by Bishop Atto of Vercelli, which belongs to the second half of the tenth century, we find a very interesting and very emphatic statement of the divine authority of the secular ruler, whether he was Christian or pagan. Again, in a report of the sermon of the Archbishop of Mainz at the coronation of Conrad the Salic, which Wippo gives in his life of Conrad, the Archbishop is represented as referring to the same phrases of St. Paul, and as speaking of God as the source of all human dignity, who had appointed Conrad to be king over his people; the king is the vicar of Christ. The same conception is maintained by Peter Damian, one of the most illustrious of the reforming Italian churchmen of the middle of the eleventh century. In a letter to Archbishop Anno of Cologne, he speaks of the "regnum" and "sacerdotium" as being both derived from God, and of the need which each has of the other. In another place he draws out in some detail the complementary relation between the spiritual and the temporal authorities. The duties of the different members of the Church, for they are both within the Church, are not the same. The duty of the priest is to nourish and cherish all in mercy, the duty of the judge is to punish the guilty, to deliver the innocent from the power of the wicked, to be diligent in carrying out the law, and in maintaining equity; he should always remember the words of the apostle, "Wouldest thou have no fear of the power? do that which is good, and thou shalt have praise of him, for he is God's minister to thee for good. But if thou doest evil, be afraid; for he beareth not the sword in vain." (Rom. xiii. 3, 4.) Peter Damian is clear that the authority of the secular power in administering justice and punishing crime is derived from God.

The writers whom we have just cited belong to the period...
before the great conflict had broken out, but the same principle
is maintained by writers of all shades of opinion during the
great struggle. It is needless to cite the declarations of the
extreme imperialist writers, for this principle is one of the
main foundations of their argument against the papalists, and
we shall presently have to consider some of their phrases in
detail, when we discuss the conclusions which some of them
wished to draw from this principle.

It is, however, very important to observe that this principle
was held with equal firmness by writers who did not belong to
the imperialist party, and even by the extremest papalists.
Gerhoh of Reichenberg, one of the most important writers of
the middle of the twelfth century, was certainly no partisan
of the secular party, rather, vehemently maintained the liberty
and authority of the Church, but he was also very clear in asserting
the divine origin and authority of the secular power. In one of
his treatises he condemns in the strongest terms any attempt of
the ecclesiastic to draw to himself the secular authority, on the
ground that this would be to destroy the authority which had
been set up by God Himself. Again, no writer of the Middle
Ages is clearer than John of Salisbury as to the limits and
conditions of the royal authority, and the right of resistance to
the tyrant, but he is equally clear that the authority of the
prince comes from God, and has the divine sanction.

1 Gerhoh of Reichenberg, De Investigatione Antichristi, 1. 72:
"Quin etiam, sicut aliquando cessis quadam postulativa et ecclesiastica,
presumpta, ista de contra cum sacerdotio quoddam in se cessatum ac superesseareum
imaginatur... Quod autem quid est alium, quam potestatem a Deo constitutam destruere et
ordinatio Dei resistere? Audiant pontifices prescriptum in Domino: 'Vocdi que sunt cessarit cessari, et
quae sunt Dei, ut, si regalia ecclesiae in regibus tradita tenere
volunt, regibus inde iustam ac de
cestant homen exhibeat. Audient
item apostolum: 'Deum timete, regem
honorisitato.'"

2 John of Salisbury, Policraticus, iv. 1: "Est ergo, ut eum plurique
diffinientes, principis potestas publica, et in terris quadam divine
majestatis image. Procul dubio magnum quid
divina virtutis declaratur iisce principibus, dum homines mutibus eorum
collas submittunt, et securi puerumque
ferendas praebeat servicia, et impulsa divino quaque timet quibus
ipse iustiti distant. Quod ferum post
arbitrium, nisi nutu faciente divino. Omnis
stetim potestas a Domino Deus est, et
cum illo fuit semper, et est ante evanum.
Quod igitur princeps potest a Deo
est, ut potestas a Domino non recedat,
sed ea utitur per subpostam manuum, in omnia doctrinas facere clement

ties aut justitiae suae. Qui ergo resistat
potestatu, Dei ordinariam resistit, penes
quem est, auctoritas confendendi eam,
et cum vult, audere vel minus eam.

1 Again, in another passage he
quotes with approbation a sentence from a letter of Pope
Innocent I., which asserted that the exercise of criminal justice
by the secular power was founded upon the authority of God
Himself.

And again the same principle is maintained by Honorius
Augustodunensis. In his treatise entitled 'Summa Gloriar,'
which is in the main a vindication of the
great dignity of

papa Innocentius in decretis suis cap.
xvii. hos, per quorum ministerium
ertestis et principes pravos penitentiales
et pros defendent, a resit immunes ostent
undici: 'Quem est super nos,
homem qui potest baptismum adminis
traverunt aut tormenta sola execu
aut etiam capitalis pronuntiant
terroritatem. De his nihil
minoribus difinitum. Minimorum enim
da potestas has esse concessa et
propter vindictam noxiorum
Laubentum quod auctoritatem eorum
esse concessum est, nec honor officio debitis
postes est impenitens. Quisquis ergo
uti instituta dignitatis postmodum eum
ostentat impietem, potest praevaricator
sae se propter se factum esse existat.'

1 Id. id., 38: "Unde sanctissimus

We shall presently have occasion to examine in detail the
political theory of Manegold of Lautenbach, the most incisive
writer of the investiture controversy, and the most unsparing
critic in the Middle Ages of what he conceived to be the
illegitimate pretensions of the imperialists. While, however,
he emphatically repudiates what he held to be the false inter
pretation of the apostolic doctrine of the divine nature of
secular authority, he traces this error to a confusion between
the office of the king, which he evidently conceives to be sacred,
and the position of an individual king who may have justly
feit his authority, and cannot then claim obedience in the
name of the apostolic authority. And again in another passage
he quotes from a letter of Pope

The passage is from Innocent I.,
Ep. 6, and is also cited by various
the spiritual as compared with the temporal authority, he held indeed that the authority of man over man was not primitive, but established to restrain men’s sinful passions, but he is also clear that it was established by God.1 And in another chapter of the same work he sets this out with great emphasis. The royal authority is indeed inferior in dignity to the priestly, but the royal authority must, in those matters which belong to it, be obeyed, not only by the laity, but by the clergy; and he quotes St Peter and St Paul as teaching plainly that it was instituted by God for the punishment of the wicked and the reward of the good.2

1 Honorius Augustodunensis, ‘Summa Gloriosa,’ 29: ‘Deus namque non prefecti primum hominem hominis, sed bestiis et brutis animalibus, quia his qui irrationalitatis et bestialiter vivunt, judices tantum praeberti sunt, quales eos eos per timorem revocans ad insanias hominum manet in timorem. Unde idem Deus per Noe Sem et Iafeth pecusteri filii posterioritati prefecti, quia nimirum pecantes sacerdotio his discipulis. Unde at quo pius faceret, ipse diceret: dum se ne quis in divinam malificatorem, laudem vero honorum.’ In quibus verbis considerandum est, quod reges et iudices ob solam vindictam maioris constitutionis, quae laudem ferri bonis dignatur. Justi enim reges et iudices solos impios et iniquos puniunt, injustos autem ferri laudibus exsolvunt. Beatus etiam Paulus ad subjectionem principum hortatur dicans: ‘Omnia anima potestatibus subditoribus subdita sit.’ Et ne putes potestates per hominum casu constitui, subiungit: ‘Non est enim potestas nisi a Deo.’ Quia vero aliquando præceptor populi populi maius iudices constitutur, eodem in Job legitur: ‘Qui regnum facit populum, populum solam vindicat, solam autem habebis.’


There can really be no doubt whatever as to the normal conceptions of the political theorists of the eleventh and twelfth centuries as to the origin and nature of the temporal power. The phrases of Gregory VII. in his letter to Hermann of Metz are no doubt at first sight startling, and it is not surprising that they have led to some misunderstanding, but it is clear that they only represent one aspect of his own conception of the state, and that an examination of his correspondence makes it clear that he had no intention to deny that political authority was derived from God. And we hope that it is now evident that the political theorists of all schools of thought recognised that, if man in a state of innocence would have needed no coercive authority, man under the actual conditions of human nature requires such an authority both for the suppression of wrong and injustice and for the maintenance of righteousness.
CHAPTER III.

THE MORAL FUNCTION OF POLITICAL AUTHORITY.

The normal conception of the Middle Ages was then that the temporal as well as the spiritual power derives its authority from God. We must now observe that this principle found its rationale in the moral purpose or end of temporal authority. Such occasional and controversial phrases as those of Hildebrand might leave the impression that secular authority had no other purpose than to minister to the ambitions and to satisfy the desires of the ruler. But this was very far from being the real principle of the Middle Ages; to these the authority of the king or emperor was divine, because it was his function to secure the establishment and maintenance of justice.

It is true that St Augustine had entangled himself in a position which in some places at least led him to deny that the state must find its essential and distinguishing quality in justice. There is no trace of this conception in the writers of the tenth, eleventh, and twelfth centuries; the passages in St Augustine's writings which support it are not, as far as we have seen, ever quoted. On the contrary, the constant principle set out by the mediaeval writers is that the maintenance of justice is the essential function of the ruler.

We can find this represented first in some references to the beginnings of organised society. Such references are scanty and contain nothing new or important, but, such as they are, they all represent the beginning of the authority of man over man as due to the need of order and of some method of restraint upon men's evil tendencies. Gerbert (Silvester II.), for instance, says that:

1 St Augustine, 'De Civitate Dei,' xix. 21, 24. Cf. vol. i. pp. 165-170.

Again, Othloh of St Emmeran points out that it is impossible that men should live together in peace unless there is some system by which some are subjected to others. Again, the history of the Bishops of Cambrai, a work which belongs to the eleventh century, commences with a brief account of the beginnings of city life—men, as it was said, at first wandered about like the wild animals, without any government of custom and reason, pursuing blindly the satisfaction of their desires; it was only when they began to come together into cities that they learned to keep faith and to maintain justice, and to live in obedience to each other. These phrases obviously represent formal literary traditions, and are not in themselves of much importance, but they may serve as an introduction to our consideration of the theory of the function or purpose of the state.

We begin by observing that the principle of the just end of the state, which was, as we have seen, very firmly maintained by the

1 Silvester II. (Gerbert), Ep. xi.: "Cum constet post primorum parentum varietatem in liberi arbitrio abutis tenensionem genitis hominum et sententias addiitum, ut et homo capillus aliarum secundum Psalmographi vocem superponatur, ac compessendae sollicitate hominum voluptatis illicitos appetitus, et legibus non modo foerentibus, verum etiam ecclesiasticis obedientiam regulis ac rationibus."

2 'Gesta Pontificum Cameracensium,' i. 1: "Urbibus quondam adiunctis etiam sinicis et cebicitidem se primum ab unius ac eorum exitissae dictur, ut homines passim ritu ferarum obserantes, quibus neque nos, neque cultus ratione magistrum regebatur, meliaque divinum aut humanum sapientiam, sed propter errorem atque incessantiam eae se temperaria dominatrix animi cupители ad se expleandam viribus corporis abutere pernicios satellitibus, illi invanam homines instructis urbi maximens in unum conviverent, sedem colere et justiam retinere desinerent, et alii parere sua voluntate consueverent; ac non modo labores exerpiendos communis commodi causa, sed etiam vitam amittendam estimerent."

Cf. Alcuin, 'Dialogus de Rhetorica et Virtutibus'; Cicero, Tusc., v. 2; and vol. i. p. 211.
political writers of the ninth century, continued to be held in the tenth and eleventh. In the 'Collectio Canonum' of Abbo, the Abbot of Fleury, which is inscribed to Hugh and Robert, Kings of the French (i.e., before 997), he quotes as from a Council of Paris a passage from that treatise 'De Duodecim Abusivis Seculorum,' which was much used in the ninth century; the justice of the king is to oppress no man by force, to judge without favour of persons, to be the defender of strangers and children and widows, to put down vice and crime, to maintain the poor with alms, to set just men over the affairs of the kingdom, to defend his country against its enemies, and to hold the Catholic faith.¹

Ratherius of Verona gives a terse statement of the qualities which make a true king, and without which he may have the name but cannot have the reality of kingship; these are prudence, justice, courage, and temperance, the man who possesses these qualities, though he be but a peasant, may not improperly be said to be a king, while the man who lacks them though he held the universal monarchy of the world could not.

¹ Abbo, Abbot of Fleury, 'Collectio Canonum,' iii. 9: "Unde ex libris qui ex conciliis sui temporis effecti sunt cum subjektis episcoporum, quanta facile est reperiri, expressim libro II. cap. I. post aliquas 'Justitia regis est neminem animarum, etc.,'" Esto rex, &c. 'Rex non potest consistere, nisi sanc. horis extra, est et est, nisi sine, &c.'

This passage comes from the 9th section of the treatise 'De Duodecim Abusivis Seculorum,' to which reference is made in vol. i. pp. 222-224. I am glad to have the opportunity to draw the attention of English students to the excellent monograph upon this subject which was published at Munich in 1908 in 'Testo und Unteruehrungen,' 34, I, by Siegmund Hellmann.

The examples of the political theorists of the ninth century continued to be held until the time of the great conflict between the papacy and the empire. They were not changed by that conflict. Neither the imperialists nor the papalists had any doubt whatever that the true function of the king was to maintain and set forward justice. The papalists might use the principle to justify opposition and resistance to what they conceived to be an unjust authority, and the imperialists to repel attacks upon what they conceived to be the legitimate claims and authority of the temporal ruler, but they were at one in maintaining that this was the true purpose of all authority.

There is an excellent example of the principles of the imperialist writers in the work called 'De unitate ecclesiae conservenda,' which was written against the Hildebrandine tradi-
tion, in the last years of the eleventh century, possibly by
Waltram, Bishop of Naumburg. The author's treatment of
the questions concerning the relations of Temporal and Spiritual
power is important, and we shall have occasion to deal with
the treatise again in this connection, but for the moment it is
easy to observe that in discussing the nature of the State
he cites those passages from the 'De Civitate Dei,' in which
St. Augustine has preserved Cicero's description of law as being
the embodiment of justice, and of the state as that which
exists to maintain law and justice. 1

1 'De unitate ecclesiae conservanda,'
i. 17 - “Res publica semper dicitur, studying and
quod sit res publica, aut semper sacrum
Augustinus in ipsa xixna libro de
non est, non esse rem
magnitudine ulla
vatitatis communione sociatum.
Quodd autem diciturs consensum, dis-
putando explicat, et hoc ostendet gener-
aliter justicia non possit rem publicam.
‘Ubi ergo,’ inquit, ‘justitia vero non est, nec
res ista possit esse, quod enim minime
faicit, quod autem fit
miserum, nec una
mea potest esse, non eum
ursum vel patam vel qualibet
qua hominum constitutae.
Quoniam ubi non est vera
justitia, ulla consensus
sociatus est hominum non
potest esse, etideo nec
populus; et si non
populus, nec res publica, sed quaelibet
magnitudine quae
populi nomen digna non est. Ac
hoc si
res publica res populi et populus non est,
qui consensus ulla sociatus non est,
non est autem us, ubi nulla
justitia est, procul dabo
colligatur, ubi justitia
non est, non esset rem
publicam. Justitia
populi porro est ea virtus, qua
sua cuque dis-
tribuit.” Ex longa
supra idem Augusti-
nus in libro u de
civitate Deus introdu-
cens sententiam vel
Scipione vel Tullum
de re publica. ‘Sicut in
fidibus,” inquit, ‘a
tribus atque
cantu ipso ac
vocibus concensus est quidam
tenendum
in distinctis
sociis, quem
immunatione
atque discentur
aurae erudite
fierent,
non posse quae
simul acers
et congruus,”

The same conception that the essential character of kingship
is to maintain justice is expressed in that treatise of Hugh of
Fleury to which we have already referred. 1 He has a very
high conception of the nature of the royal authority, he cites
both the Pauline doctrine that all authority is from God, and the
Gelasian principle that there are two powers by which the world
is ruled, the royal and the priestly, while Christ Himself was
both King and Priest, 2 and he reproduces the phrases of Amb-
assador and Cathuls, that the king has the image of God the
Father, while the bishop has that of Christ, and maintains that
the king has authority over all bishops in his kingdom. 3
At the same time he maintains very emphatically that the
function of the legitimate king is to govern his people in justice
and equity, to protect the widows and the poor; his chief
virtues are sobriety, justice, prudence, and temperance. 4
These illustrations will be sufficient to make it clear that
those who belonged to the imperialist party were quite clear
that the function or end of the temporal authority was to
maintain justice. It is more important to observe that the
same principle was firmly maintained by the papalists and
anti-imperialists. We have already seen that Manegold of
Lautenbach maintained the ultimate divine origin of the
temporal power, while, as we shall see presently, he held that
it was derived immediately from the community. He was
perhaps the most vigorous assailant of Henry IV. and the most

1 See p. 98.
2 Hugh of Fleury, ‘Tractatus de
magistro potentata et
sacerdoti dignitate’,
1. 2. Cf. vol. i, pp. 149, 215.
3 Id. 1, 3; “Usum et
imperam suam regnum
suasum episcopam,
sumpto Patris
decreto: ‘Oculus
futurus et peius
clauus, et rem
quod naseobem
diligenter investigabam.’
Debet praeclare
Deum omni potenti,
qui multa
mallea cum presens, toto
multe
auctore
et
sacram
se
sanc-
tam tota viribus
defendere. Oportet
utam cum
populum
turum, et
vindicata
protectorum, et
emolumento
et
am

4 Id. 1, 6; “Porro
legitimi regni
officium est populum
in justiti in
rectitudine
equalitatem
eque
universitas
sane

[PART 2]

CHAP. III.] MORAL FUNCTION OF POLITICAL AUTHORITY. 111

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[PART 2]
radical theorist of the nature of government in the eleventh century, he had as little respect for the arbitrary king as any political writer of the seventeenth century or of the French Revolution. But he founds his opinions, not on the theory that secular authority was a thing illegitimate or improper, but on the principle that as the royal authority excelled all other earthly power in dignity, so it should also excel them all in justice and piety. He who was to have the care of all, to rule over all, should possess greater virtue than all, in order that he might administer his power with the highest equity. The people had not set him over them that he should act as a tyrant, but that he should defend them from tyranny. Again in another passage Manegold urges that the chief distinction between human nature and that of other living creatures is that it is possessed of reason, and that therefore men consider not only what they should do, but why they do it. No man can make himself king or emperor; when therefore the people set one man over them, they do it in order that he should give to every man his due, that he should protect the good, destroy the wicked, and administer justice to all.\(^1\)

Berthold of Constance in his Annals expresses the same principle, but in terms derived ultimately from St Isidore of Seville. The true king is he who does right, while the king who does wrong will lose his kingship; or rather, he is no king, but only a tyrant.\(^2\) Lambert of Hersfeld, in his account of the

\[^1\] Manegold, 'Ad Gebelardium,' 30: "Regalis ergo dignitas et potentia sunt omnes mundanae excelldit potestate, me ad eam manu trandum non flagi traevimus quique vel turpissimus est constituerandum, sed qui se loci et dignitate, sua seculorum et dignitatis, naturae superet et petitat. Necesse est ergo, qui omnium euram generem, omnes debet gubernare, maiores graui vitandum super etetos dobeat splendere, tractare sub poesitatem summum equitatem libertatem studiis administrare. Neque enim populus rursus eum super se exaltat, ut liberum in se exerceret tyrannisque facultatem concedat, sed ut a tyrannidae secenterum et improbitate defendat."

\[^2\] Id. ad. 47: "In hoc namque natura humana ceterum præstat annuementibus, quod capax rationis ad agenda quæque non fortasse causas prorsus, causas rerum naturæ insinuant nec tantum, sed quæ agatur, sed eur aliquid agatur, intendat. Cum eum nullus se imperatorem vel regem creare possit, ad hoc unum aliquid super se populorum exaltat, ut usi ratione inspiciat super et regat, quæque sum distributa, non fuerint, inspicios permutat, omnibus videantur instituerum impendat."

\[^3\] Berthold of Constance, 'Annales,' 1077 A.D. (p. 207): "Becie igitur demands put forward by the Saxons and Thuringians, in the rising of 1073 against Henry IV., represents them as acknowledging that they were indeed bound by their oath of allegiance to Henry, but only if he used his authority for the building up, and not the destruction of the Church of God, if he governed justly and lawfully according to ancestral custom, if he maintained for every man his rank and dignity and law.\(^1\)

Again, in the twelfth century John of Salisbury asserts with great emphasis that the Prince is entrusted with his great authority, is even said to be "legis nexibus absolutus," not because he may do unjust things, but because it is his essential character to do justice and equity out of fear but from love of justice. Who would speak of the mere will of the prince in regard to public matters, when he may not will anything but that which law and equity and the public interest requires? The prince is the minister of the public utility and the servant of equity, and is the representative of the commonwealth, because he punishes all injuries and crimes with equity.\(^2\)

We have been compelled to give some space to the consideration of the questions discussed in these two chapters.
only because there has been some uncertainty as to the position of the political theorists of the eleventh and twelfth centuries, and this uncertainty has arisen owing to the supposed influence of some aspects of St Augustine's theories of Church and State. We shall have to consider the nature of this influence more closely when, in our next volume, we deal with the theory of the relations of the spiritual and temporal powers, and we hope that we shall then be able to see more precisely what influence St Augustine may have exercised. In the meanwhile it is, we hope, quite evident that the conception that the political theorists of the eleventh and twelfth centuries doubted or denied either the divine origin of the State, or the principle that its end and purpose was an ethical one, namely, the maintenance of justice, is a complete mistake. No such doubt was seriously entertained, and the theorists were all convinced that as temporal authority came from God, so also its purpose or function was to maintain the divine justice in the world.

CHAPTER IV.

THE THEORY OF THE "DIVINE RIGHT."

It is we hope now sufficiently clear that substantially there was no doubt in the great formative period of the Middle Ages which we are now considering—that is, in the eleventh and twelfth centuries—that the State was a divine institution, that political as well as ecclesiastical authority was derived from God, and had an ethical or moral, as well as a material function. We hope to consider the systematic theories of the thirteenth century in a later volume, and cannot here anticipate our discussion of them.

This conception, which, as we have shown, was fully admitted even by the most determined papalists, found its most emphatic expression when the king was called the Vicar of God. The title was not so far as we have seen used by any of the more strictly papalist writers during this period, though it had been frequently used by the Churchmen of the ninth century, but if the phrase was not actually used by them, the conception which it expressed, that the authority of the king is derived from God, was unreservedly admitted.

We have now to consider how far this principle may have been interpreted, in the period which we are now considering, as implying that the authority of the king or ruler was in such a sense divine that resistance to him was under any and all circumstances unlawful. We have endeavoured to set out the origin of this conception in our first volume; as far as we can judge, it seems to us clear that the conception was substantially

The writers of the ninth century inherited both traditions, and they cited the phrases which belong to both, but it is clear that while they might use the phrases of St Gregory, they were governed rather by the tradition of St Ambrose and St Isidore, and that while they looked upon the secular authority as a divine institution, it was to them divine only so far as it represented the principles of justice and the authority of law.

These two principles were inherited by the men of the Middle Ages. What did they make of them? How did they relate them to each other? We have seen that both parties, in the great conflict of the temporal and spiritual powers, maintained that all authority, whether ecclesiastical or secular, came from God, and that they were at one in maintaining that the function of authority was to uphold justice and righteousness. But there were some who maintained that while this was true, yet the king was answerable only to God, that there was no authority which could judge him, and that the subject must therefore submit even to injustice and oppression, looking only to the just judgment of God to punish the oppressor and to defend the innocent.

As we shall presently see, there are traces of this view even before the outbreak of the great conflict between the Papacy and the Empire, but, not unnaturally, in the great conflict, some imperialists, in their anxiety to lay hold of every instrument of defence against the Popes, tended to assert this view with much greater emphasis.

In the tenth century Atto of Vercelli, in one of his letters, maintains very dogmatically that it is an impious thing to resist the king, even though he is unjust and wicked. As St Gregory the Great had done, he cites the example of David, his veneration for the Lord's anointed, and his refusal to lift his hand against him, and he alleges the example of the submissive tone of St Gregory in writing to the Emperor Maurice. He also quotes a passage, which he thinks comes from the writings of St Chrysostom, in which it is said that while it is true that the people elect the king, when he is once elected they cannot depose him, and some canons of a Council of Toledo which condemn revolt against the king, under penalty of excommunication. And, in a passage from another treatise of which we have already cited some words, he explains away a passage of Hosea which seems to imply that there might be kings who had not derived their authority from God, and maintains that even in matters of religion a good man must not resist the king, but must submit patiently to persecution however unjust.

1 Atto of Vercelli, Epistle I.: "Non leo est regalem impugnare majestatem, nisi inusta in aliquo videatur. Dei enim ordinatio est; Dei est dispensa. Profanum est enim violare quod Deus ordinat. . . . Sane acsiendum, quia cum Deus omnipotens utilem populo principem donare dignatur, iustum est ut eius hoc pietsi ascervant, et grates exinde dignas percevant, si autem adversus fuerit, suis hoc impudent peccatis, ipsumque flagitare non desinant, ut hoc secundem multitudinem misericordiae sua propitius disponat. Nam deiendorus vel impurgandus nullum modo est a populo, qui iam ordinatus est a Deo. . . . Venerabilis etiam Ioannes Chrysostomus in quadam homilia sua ait: 'Sicut enim vidimus in istis mundiibus regis quomodo in primis quidem nemo potest facere se ipsum regem, sed populus eligi sibi regem, quem vult: sed cum rex ille fuerit factus et confirmatus in regno, iam habet potestatem in hominibus, et non potest populus iugum de suo servire.'

2 Id., 'Exp. in Ep. Pauli ad Romans,' xiii.: 'Cur autem subditus esse debeamus ostendit, subiungens: 'Non est enim populus nisi a Deo.'
In a commentary on the Psalms by St Bruno, who was Bishop of Würzburg from 1034 to 1048, the words, "Against Thee only have I sinned" (Ps. li. 4), are interpreted as meaning that while a private person who commits an offence transgresses against God and the king, the king transgresses only against God, for there is no man who can judge his actions.1

The excommunication and deposition of Henry IV. by Gregory VII. raised in its most acute form the question which had already arisen with the great Saxon revolt of 1073, the question how far revolt against the royal authority was a thing legitimate, and more especially the question how far such a revolt was consistent with the Christian conception of the

divine nature of secular authority. We do not yet discuss the question of the relation of the spiritual authority to the temporal, though it must be remembered that this was always present to men's minds.

The imperialist party did not necessarily or always take up the position that the temporal power was in such a sense sacred, that it could never under any circumstances be justifiable to revolt against it, but it was natural enough that some of them should have recourse to that tradition of the Church. In Henry IV.'s reply to the bull of deposition of 1076, he denounces Gregory VII.'s arrogance and audacity in venturing to raise his hand against him who had been anointed to the kingdom, while the tradition of the holy Fathers taught that he could be judged by God alone, and could be deposed for no crime, except for that of departing from the faith; the Fathers indeed had not judged or deposed even the apostate Julian, but had left him to the judgment of God.2 Berthold of Constance, in his Annals for the year 1077, relates how some of the clergy were continually proclaiming that neither the Pope nor any other authority could judge kings, whatever might be the crimes of which they were guilty, even if they were heretics.3 Berthold himself holds this conception to be absurd, but his evidence is only the more important.

The source of this opinion is obviously in the main the tradition of some of the Christian Fathers, and especially of St Gregory the Great. There is a very good example of this in a treatise written about 1080 by Wenrich, the head of the educational school at Trier, afterwards Bishop of Vercelli, in the name of Theodoric, the Bishop of Verdun, who was at

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1 M. G. H., Legum, Sect. IV. Const., vol. i. 62 (1076): "Me quoque, qui licet indignus inter christos ad regnum sunt unctus, testigivi, quem sanctorum patrum tradito soli Deo indicandum duxit, nec pro aliquo crimen, nisi a fide quod ab initio vitiosus, deponendum esset; cum etiam Julianum apostatam prudentia sanctorum patrum non sibi sed soli Deo indicandum deponendumque commiserit."

2 Berthold of Constance, 'Annalen,' 1077 a.D. (p. 296): "Tunc vero qua heresidum et seminarii erat clericorum, pertinaces nonnulli passim concionati sunt, in reges quemquam hereticos et canitis falsoque facinusque retulerunt, quos etiam in agris ab aliquo crimine a sacris seque non pecuniae sed virtutis regni divinorum, nec non omnium profanes et sacrilegos, nec ipsos pape nec aliquos magistraturas iudicium et sententiam cadere non debere."
that time one of the supporters of Henry IV. It is a protest against Gregory VII.'s action in deposing Henry IV. and encouraging the German princes to revolt against him. He maintains that such conduct was contrary to the law of God, and urges the example of the humanity and courtesy of Gregory the Great, who even when he reproved the authorities of the State was careful to address them in terms befitting their dignity, and protested that he recognised that he owed obedience to kings, and acted in this spirit even in regard to actions of which he disapproved. When the emperor required him to promulgate a law forbidding the reception of soldiers into monasteries, he protested against it as contrary to the law of God, but he carried out the imperial order for its promulgation.1

Another example will be found in the treatise 'De unitate ecclesiae conservanda.' The author was a determined partisan of the cause of Henry IV. against the Hildebrandine party, and contrasts Hildebrand's conduct with that of Gregory the Great. Hildebrand was careful to address them in terms befitting their dignity, and protested that he recognised that he owed obedience to kings, and urges the example of the humility and courtesy of Gregory the Great. Hildebrand maintained that the conduct of the ruler, lest men should transgress against God who gave them their authority.1 He looks upon the successive deaths of Rudolph of Suabia and of Hermann of Luxemburg, who had been set up against Henry IV., as examples of the judgment of God upon those who revolted against their lawful king, who had received his authority from God, for neither the princes nor the people of that party could destroy that authority.2

The same principles were maintained by others of the imperialist party. In the work known as the 'Liber Canonum contra Henricum quartum,' which, as it is thought, was compiled in the year 1085, the supporters of Henry IV. are represented as bringing forward the authority of St Augustine and Gregory the Great, with true humility, called himself the servant of servants, and in his book on 'Pastoral Care' he set out the conduct of David as an example to all good subjects who have bad rulers. David would not take advantage of the opportunity to slay his persecutor, but repented that he had even cut off the skirt of his cloak; and the author cites the words of Gregory the Great, in which he condemns even criticism of the conduct of the ruler, lest men should transgress against God who gave them their authority.1

1 Werrius, Scolasticus Treverensis, Epistola, i. 3.

2 Id. id., 4: "Hoc plane lacte nutritus beatus papa Gregorius in verbis, in moribus, in ipsius denique suis interpretationibus humiliatatem et manum studium ubique rededit. Hinc est quod in sublimi loco posita persona, quaeruntur victores vel ostium infames, dignitatem tamen vocabulis, appellat, reverendi allocationibus honorat, protestat eorum quibus potest verbi astellere et exaltare non dissimilat. Summam pontificem obedientiam se regi bus debere protestat et assertit, ea debiti necessitate ad ea, qua multis indulgo ipse probat, pro tempore tele manda aliquando discutit, que tamen ipsa quantum sibi disiecta sunt, adopta opportunitate, salva in omnibus praevar acceptance, aperte innotescit. Unde cum legem de milibus ad conversionem minime recipiendis imperator promulgari iussisset, legem quidem latam, quam Deo adversari videbat, statim exhorruit, sed tamen illum ex iussione principis ad omnium notitiam ipse, qui eam inprobabat, insanuare non distuit. Expleta humiliiter, obedientiam ad eundem imperatori: 'Ego,' inquit, 'iussione subditus eadem legem per diversas tiam tamen partes feci transmitti; et quia lex ipsi omnipotentis Deo minime concordet, eoque per suggestionis mea paginam serenissimis dominis manifestavi. Utrique ergo que debui essevel, qui et imperator iussidiam praebui et pro Deo quidem sensi non tacui.'

We have drawn attention to the importance of these words of Gregory the Great in vol. i. p. 125. The influence of these words of Gregory are again illustrated by the use made of them by the author of the 'Tractatus Ebercnoises,' iv. (M. G. H., 'Libelli de Lite,' vol. iii. p. 811).

1 'De Unitate Ecclesiae Conservanda,' ii. 1: "Unde et Gregorius papa cum easdem summis pontificis et virtutum artifix, in tantum se infra omnes humiliavit, ut primus ipse in epistolis suis servorum servorum Dei se appellaverit et hoc humiliatis nomen ad posteros quoque transmisit. Quia in libro pastoralis cura proposito de bonis substanti et malis rectoribus exemplum Saeuis et David, ut certe, dux eamdem eundemque tuiam et imperatori obedientiam praebui et pro Deo quidem sensi non tacui.'

2 Cf. id., ii. 15: et vol. i. p. 152, 153.

3 Id., i. 13: "Duo enim reges, unus post annum, substituti sunt nostri temporibis a parto principium, et partem regni tenere non potuerunt, non totum: quod sic iis sibi 'totum' habet magnum mysterium in unitate filiolum. Sed quia hoc conscionam et hoc opus ex hominibus erat, dissolutam est, quod ex Deo non erat, quoniam post breve temporis spatium ipsum quoque principem regis utique amiserunt, et unus in praelio, alter in expugnatione unius castellorum miserabiliter perierunt, superstite eo cui potestas data est a Deo, quem aliquis postea nec principes nec populos partis illius dissolvere potuerunt ut illo modo, quando quidem ipsi quoque regi possint iam donante Deo filii succedere in regnum, sicut ipse patribus suis succeedit in regnum."
St John Chrysostom to prove the impropriety of the action of Hildebrand in excommunicating Henry IV. The passage cited from St Augustine affirms the divine origin of the temporal authority, and the duty of obedience by Christian men even to an unbelieving emperor such as Julian. The passage attributed to St John Chrysostom is the same as that quoted by Atto of Vercelli, and sets out the principle that, while no man can make himself king but only the people, when the king has once been elected and confirmed the people cannot depose him.\(^1\) These words are again substantially reproduced in the collection of Epistles, &c. of the Cardinals who were in opposition to Hildebrand and Urban II.\(^2\)

Again, Sigebert of Gembloux, in a letter written in the name of the clergy of Liège about the year 1103 against Pope Paschal II., urges that even if the emperor were such as the papal party represented him to be, his subjects must submit, for it is their sins which merited such a condemnation to Hildebrand and Urban II.\(^3\)

The most complete statement, perhaps, of the doctrine of non-resistance, and of the conception that the king is responsible only to God for his conduct, which is to be found in the literature of this period, is contained in the treatise written by Gregory of Catino in the name of the monks of Farfa, probably in the year 1111. He maintains very emphatically that the royal or imperial authority could not be condemned or overthrown by any man. The authority of the saints both of the Old and New Testaments showed that rulers must be endured rather than condemned; no one of the saints and prophets and other orthodox Christians had ever ventured to condemn or depose a king or emperor, even though he had been unjust or impious or heretical. That wisdom which is Christ said, ‘By Me kings reign,’ and by Him therefore alone can they be condemned. Saul and David sinned, but neither

Samuel nor Nathan ventured to condemn them. Many kings and emperors both before and after the coming of Christ were wicked and heretical, but none of the prophets, or apostles, or saints condemned them or attempted to take from them the obedience and dignity which was their due, but left this to God, and endured their persecutions for Christ’s sake; even Christ Himself, while He lived in the flesh, condemned no man. Gregory then relates a number of examples of the conduct of the Christian Fathers, as illustrating this principle, and it is noteworthy that he points out quite correctly that Pope Gregory II. restrained the Italians when they wished to revolt against Leo the Iconoclast and to set up another emperor. Finally, summing up the whole matter, he urges that it is God only, the Almighty creator of kingdoms and empires, who can grant them or take them away, and that he who resists the powers that have been ordained by God resists the ordinance of God.\(^4\)

1. \footnote{Gregorii Catinensis, ‘Orthodoxa defensoris imperialis.’ 7. ‘Sublimiores vero potestates, id est regia vel imperialis magnitudo, a Deo aut permissa aut constituta, aut a quoque condemnatur aut destruuntur. Sanctorum habebant auteritates plurimorum et in testamento veteri et in nova gratia evangeli, qui magis h multis sunt sicutiam etiam panis attamen, qui Deo honor et deprecavit.’}

2. \footnote{Ibidem, ch. vi. pro imperatore nostro dicimus. Sed hoc dicimus, quod, etiam si tali essem, tamen sum principi nobis patetum quia, ut tali nobis principetur, pecando meretur. Est omni concordantia, qui nobis invito est amplissime, quorum eorum concordantia, id est, non solum a Deum, sed etiam a nobis, sed precibus ad Deum.}

3. \footnote{Hoc est, quod Deus regnum suum tenet, et non subisset, si quis hominibus suam potestatem privaret.}

4. \footnote{Qui dicit: ‘Per me reges regnant.’ Per ipsum ergo solus condemnandi sunt, per quem solum regnare nesciuntur. Si quis vero id, quod soli Deo regnum est, voluerit condemnare, nonnam evadit punitione. Denique Saul persecut, et Deo recessit, et Deus ab eo, et tamem propheta Samuel non illum condemnare a se aseus est. David quoque regem tribus possessis criminebus delinquentem propheta Nathan non condemnatus, sed magis penitentiam recepit. . . . Haec si omnes disceintur historia vel leges, contra hoc nostrum dictum non inveniendum est. Nam multi regum et imperatorum et ante post apostolici.}

5. \footnote{Gregorii Catinensis, ‘Orthodoxa defensoris imperialis.’ 7. ‘Sublimiores vero potestates, id est regia vel imperialis magnitudo, a Deo aut permissa aut constituta, aut a quodque condemnatur aut destruuntur. Sanctorum habebant auteritases plurimum et in testamento veteri et in nova gratia evangeli, qui magis h multis sunt sicutiam etiam panis attamen, qui Deo honor et deprecavit.’}

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CHAPTER V.

JUSTICE AND LAW.

We have so far endeavoured to make it clear that the political theory of the eleventh and twelfth centuries held firmly to the principle of the divine origin and authority of government, and the conviction that its function was to maintain righteousness and justice. In the last chapter we have seen that with some writers, and especially among those who were engaged in defending the imperial position in the great conflict with the papacy, the principle of the divine nature of government sometimes passes into the conception that the authority of the ruler was in such a sense divine that it could never be resisted, whether it was used justly and wisely, or foolishly and unrighteously, and that the king was responsible for his actions to God only.

This conception was not unimportant, and indeed in later times, and especially in the seventeenth century, assumed a considerable significance. But it was not the normal theory of the Middle Ages, and we must now consider aspects of the political ideas and principles of those times which were both more completely developed in theory, and also much more closely related to the actual political and constitutional movements of these centuries.

As we have already seen, there were two traditions which had come down from the Fathers—the one, with which we have just dealt, that the authority of the king was always sacred, whether it was used justly or unjustly, the other, that as the function of kingship lay in maintaining justice and righteousness, he was no true king who did not behave justly, who did not govern himself and his people under the terms of righteousness and
equity. In the first volume of this work it has been pointed out how fully this conception was developed, and how firmly it was held in the ninth century, and as we shall presently see it was equally firmly maintained in the eleventh and twelfth centuries.

There was a related principle which had governed men's minds and controlled their actions in the earlier Middle Ages, which has also been fully dealt with in the first volume, and that is the principle that the just order of the State is embodied in its law, that to govern justly is to govern according to the law. We have in the first part of this volume considered the high development of this conception in the feudal organisation of society, and in the principles of the feudal lawyers; we have now to consider its place in the general political theory of this period.

And finally, we have in the first volume considered the early stages of the conception of the authority of the ruler as representing the authority of the community, and as being dependent upon the faithful discharge of the obligations which he had undertaken, we must now consider the rapid development and the great importance of this principle in the Middle Ages.

We have already pointed out that the writers of the period with which we are dealing are united in maintaining that the ambiguities of St Augustine had no effect upon them. We must now observe that this principle was constantly drawn out to the very important conclusion that where there was no justice there was no King, but only a Tyrant. This distinction between the King and the Tyrant was indeed one of the most important of the political conceptions of the Middle Ages. The distinction is the same in principle as that of Aristotle, but it was not from him that it was drawn, at least directly. Directly it came to them from St Isidore of Seville and the writers of the ninth century, and it is probable that it is Cicero from whom St Isidore derived it.

The most complete statement of the conception is to be found in the 'Policraticus' of John of Salisbury. We shall have to discuss his political theory in detail presently, but we may begin by noticing some words in which he expresses this principle. This, he says, is the only or the supreme difference between the tyrant and the prince, that the prince governs the people according to law and obeys the law himself, the tyrant is one who oppresses the people by violence, and is never satisfied unless he makes the law void and reduces the people to slavery. The essence of kingship is respect for law and the just rights and liberties of the people, without them a man may have the name, but not the reality of authority. We can trace the significance of this conception through the whole political literature of the Middle Ages.

We have seen its great importance in the ninth century, and even in the scanty literature of political theory in the tenth and early eleventh centuries we find the essential principle firmly maintained. We have already referred to a passage in the 'Praeclarissimum' of Ratherius of Verona which has this meaning, but it is worth while to look at it again. There are certain qualities without which a man may indeed have the name but not the reality of kingship; the king must be prudent, just, brave, and self-restrained; the man who possesses these qualities, though he were a peasant, may not improperly be called a king—without them, even if a man held the dominion of the whole world, he could not justly be called a king, for when a man governs ill he loses his authority. We
may put beside this a phrase from the "Proverbs" attributed to that Wippo, from whose life of Conrad the Salic we have already quoted. The king, he says, must learn and hearken to the law, for to keep the law is to reign.¹

We have begun by citing these phrases, not because they are in themselves specially important, but only in order that we may be clear that these principles were not merely thrown out in the great conflicts of the eleventh and twelfth centuries, but that they represent the normal convictions of mediæval society, which were continuous with those of the ninth century. It is true that these great conflicts forced men to consider over again their principles, and to determine what practical action they were prepared to take in order to enforce them; the political development of European civilisation from the middle of the tenth century to the end of the thirteenth was indeed almost incredibly rapid, and it would be absurd to imagine that the ideas or principles embodied in these constitutional developments were not themselves greatly modified, or enlarged, in the process; but at least, as we understand it, the movement of ideas was continuous and organic.

The principle that unless the king is just and rules according to law he is no true king is the first principle of the mediæval theory of government, and was firmly held even before the great political agitations of the eleventh and twelfth centuries compelled men to think out the real nature of their political convictions. While, however, this is true, it is also true that these great disturbances had in a very high degree the effect of stimulating political reflection, and it is no doubt to this that we owe it that, after the comparative silence of the tenth century, we suddenly find ourselves, in the latter part of the eleventh century, and in the twelfth, in face of a great production of political pamphlets and treatises.

It is not our part here to trace the political and constitutional movements of the several European countries, but the history of political ideas would be unintelligible if we were not to bear in mind something of the general nature of these movements. We must not make the mistake of imagining that the interests and energies of the European people were concentrated upon the struggle between the Papacy and the Empire, or the related conflicts of Church and State in the various European countries. No doubt these were not only of high importance in themselves, but they had a great influence in stimulating political thought. And yet it may be doubted whether they had, taken by themselves, any serious effect on the constitutional development of European civilisation. We hope in the next volume to examine the questions related to these conflicts in detail, and to consider the nature of the oppositions or difficulties which lay behind them. But the political or constitutional development of Europe was not caused by them, or dependent upon them.

All this is familiar to the students of the constitutional history of the European countries, but it is sometimes forgotten by those who are not well acquainted with this.

The history of the political theory of the Middle Ages was organically and continually related to the development of the political civilisation of Europe; no doubt, as we have constantly endeavoured to show, it derives its terms, and much of its substantial tradition from the past, but it was shaped and moulded in the actual movement of these times.

It was with the political agitations and revolts of Germany in the latter part of the eleventh century that active political speculation and controversy began. We cannot here deal with the real nature of the circumstances which lay behind the great revolt of the Saxons and Thuringians against Henry IV. It is enough for our purpose to observe that it raised at once the fundamental questions as to the nature and conditions of political authority. We have cited the words of Ratherius and Wippo as illustrating the commonplaces of literature before the great movements of the eleventh century; with the outbreak of the Saxon revolt against Henry IV. in 1073 these commonplaces assumed another aspect, and became the foundations of a rapidly developing political theory.
We have already referred to the terms of the demands which Lambert of Hersfeld attributes to the Saxons and Thuringians in the revolt of 1073, but we must now consider these a little more closely. They demand that he should do justice to the Saxon princes whose properties he had confiscated without legal process, and that he should do this in accordance with the judgment of the princes, that he should put away from his court the low born persons by whose counsels he had administered the state, and should entrust the care of the great affairs of the kingdom to the princes to whom this belonged, that he should dismiss his concubines and restore the queen to her proper position, and that he should do justice to those who asked for it. If he would do these things they would with ready minds obey him, under those terms which became free men born in a free empire, but if he would not amend his ways, they as Christian men would not associate with one who was guilty of the worst crimes. They had indeed sworn obedience to him, but only as to a king who would uphold the Church of God, and would rule justly and lawfully according to ancestral custom, and would maintain the rank and dignity, and hold inviolate the laws proper to every man. If he violated these things they would not hold themselves bound by their oath, but would wage a just war against him as a barbarian enemy, and an oppressor of the Christian name, and would fight till their last breath for the Church of God, for the Christian faith, and for their own liberty.\footnote{1}

\footnote{1} Cf. pp. 112, 113.

As we have just said, we are not here concerned with the real nature of the revolt of the Saxons and its ultimate causes and character, it is not difficult to recognize even in this passage something of the complexity of the situation, and we cannot feel any confidence that these particular principles were urged by the leaders of the revolt against Henry IV. in these terms. We must indeed take them rather as representing the ideas and theories and, probably, the literary reminiscences of Lambert. But they are not the less significant on that account. The passage contains some constitutional conceptions with which we shall deal later, but in the meanwhile we can fix our attention on the sharp and definite character of the distinction between the king to whom men swear allegiance, and the unjust ruler who sets at naught the law and rights of his subjects, and to whom therefore men are under no obligations. It is the history of this conception which we must trace farther.

We may put alongside of this passage from Lambert the terms of a speech which Bruno, the author of the 'De Bello Saxonico,' puts into the mouth of Otto, who had been Duke of Bavaria. It is represented as addressed to the Saxons at "Normeslovo" in 1073. He exhorts them to rise against Henry, and urges upon them that the castles which Henry was building were intended to destroy their liberty, and in fiery terms he asks whether, when even slaves would not endure the injustice of their masters, they who were born in liberty were prepared to endure slavery. Perhaps, he says, as Christian men they feared to violate their oath of allegiance to the king; yes! but they were made to one who was indeed a king. While Henry was a king, and did those things which were proper to a king, he had kept the faith which he had sworn to him whole and undefiled, but when he ceased to be a king he was no longer such that he was a vellum hominis, qui fidem christiamam capitabilius flagitiis producidisse, comunione mussarii, . . . Sacramente se si fidem dixisse, sed si ad adhesionem, non ad destructionem ecclesie Dei, rex esse vellet, si iuste, si legitime, si more maiorum rebus moderaretur, si sumu cuique ordinem, sumu dignitatem, suas leges tutas inviolataeque manere pateretur. Sin ista prior ipse temperasset, suoiam sacramenti huius religione non teneri, sed quasi cum barbaro hoste et christiani nominis oppressore iustum deinceps bellem gesturos, et quas ultimae vitalis caloris scintillae supersecesset, pro eclesie Dei, pro fide christiana, pro libertate etiam sua dimicatos."
should keep faith to him. He had taken up arms, and adjured them to take up arms, not against the king, but against the unjust assailant of his liberty, not against his country, but for his country, and for that liberty which no good man would consent to lose except with his life. 1

Lambert of Hersfeld sets out the same principle, but in more technical terms. He represents Otto as urging at another time that herein lay the difference between the king and the tyrant, that the tyrant compels the obedience of unwilling subjects by violence and cruelty, while the king governs his subjects by laws and ancient custom. 2

Berthold of Constance in his Annals for the year 1077 relates, as we have already mentioned, 3 how on Henry's return to Germany after his absolution by Hildebrand at Canossa, many of the clergy maintained that no one could judge or condemn a king however wicked and criminal. Berthold himself holds that this opinion is absurd, and cites, though without mentioning his source, St Isidore of Seville's phrases, that the king holds his title while he does right, if he acts wrongly he loses it; and maintains that those who do wickedly and unjustly are really tyrants, and are only improperly called kings. 4 The same phrases are again quoted by Hugh, Abbot of Flavigny, in defending the deposition of Henry IV. 5

Herrand, Bishop of Halberstadt, writing in the name of Louis the Count of Thuringia about 1094 or 1095, expresses the same conceptions, but in a more developed form, in his answer to a letter of Waltram the Bishop of Naumburg. Waltram had urged the authority of the words of St Paul: "Let every soul be subject to the higher powers, for there is no power but of God." Herrand replies that Waltram was misinterpreting St Paul, for if every authority was from God how could the prophet (Hosea viii. 4) have spoken of princes who reigned, but not as of God. They were willing to obey an ordered power, but how could such a government as that of Henry IV, be called an order at all; it is not order to confound right and wrong. Again, in a later passage, answering Waltram's contention that concord was useful to the kingdom, Herrand replies that it was absurd to speak thus of a society which could not be called a kingdom, for a kingdom is something rightful; could that be called a kingdom where innocence was oppressed, where there was no place for reason, for judgment, or for counsel, where every desire was reckoned to be lawful? Such a kingdom should rather be called a congregation of the wicked, a council of vanity, the dregs of iniquity; in such a kingdom concord is unprofitable. Among good men indeed concord is praiseworthy, but among evil men it is blameworthy; what man in his right mind would speak with approval of a concord of robbers, of thieves, of unclean persons? 6


3 See p. 119.

4 Berthold of Constance, 'Annales,' 1077 a.d. (p. 297): "Recte ait gerere non mons regis tenetur, aliquam amantur, unde est hoc vetus elogium: 'Ree ens, si recte facta, si non facies non esse.' Si autem nec rustique judicent, nec peerie descendat, neque regulam offerit ut vel sola saltum nominate ingenio, quam erat, secta potius majori et insigni alius, et sanae ethicorum superlativas, vitis faceremus et luxuriae libertatem nefas facere, omnibus omnibus et potestatem exercere, crudelitatem dominande, maestate populorum supprimam, et sumum supprexum deservit, et ad intermedium usque consumant, cur non magno propria tyrann in humano fortes sumus, quam abusus et abique rei venierent reges sunt nuncupandi." 5 Hugo, Abbas Flavmannonis, Chronicon, n. fol. 111.

6 Herrandus, 'Epistola,' 11: 'Ad subscriptorem dominii Henrici, quem imperatorem dicunt, vos invitat, et in quantum intelligere datur, ut per eum subsidium susces, quas apostolico argumento necessitatatem impromis, deces.' Omnes auctoritates superintendat subsidia sua, non est enim potestas nas a Deo. Qua ordinata remustit, quam apostolae sententiam te male intelligere, peus interpretari decemus. Si enim omnes potestas a Deo est, ut tu intelligas, quod est, quod de quibusdam dict Domnus per prophetam: 'Epis regnaverunt, et non ex me, principes extiterunt, et non cognavi.' Prævidens per Spiritum sanctum apostolus tuque omnibus heresies in ecclesia emergere, quia 'bonum malum, malum bonum' dicerent, qui 'tenebras lucem et lucem tenebras' ponenter, quia de sententias voratas occasione inducendi errores captassent, eum praecune nas et 'No est potestas nas a Deo ut connectatur reprob intellectus amputaret: 'Qua sententiam, inquit, a Deo ordinata sunt.' Da igitur potestatem
The distinction between the true king and the tyrant, between just and legal authority, which was the characteristic of the true commonwealth, and mere violence and unjust power, was indeed firmly fixed in the minds of all medieval thinkers, and we find it clearly set out even in the writings of those who were the strongest upholders of the imperial or royal authority. We have already had occasion to discuss the opinions of Hugh of Fleury as represented in his treatise on the royal and sacerdotal powers, addressed to Henry I. of England. We have seen how stoutly he maintains, against the apparent meaning of certain phrases of Hildebrand, that the authority of the king is from God, and that he even repeats those phrases, which had been used by Ambrose and Cathulphus, in which the king is described as bearing the image of God, while the bishop bears that of Christ. And while, as we have seen, he holds very clearly that the function of the king is to maintain justice and equity, he also urges that the honour due to those in authority must not be measured by their personal qualities, but by the place which they hold, and that therefore even heathen rulers must receive the honour due to their position.

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And yet he also warns kings and princes and tyrants that those who refuse to keep the commandments of God are wont to lose their power and authority, and that it frequently happens that the people revolt against such a king.  

The author of the controversial pamphlets which have been published as the 'Tractatus Eboracenses' sets the temporal power higher perhaps than any other writer of the Middle Ages, and in a strange phrase which has some resemblance to that of Hugh of Fleury he speaks of the priest as representing the human nature of Christ, while the king represents the divine nature. But even he recognises that there have been kings who were no true kings but only tyrants. He does not indeed say that they are to be resisted, but he is aware of the distinction between the true and false king. In another passage he makes the distinction very clear between the authority which is always good, and the person of the ruler who may be evil. Our Lord had bidden men give to Caesar that which was Caesar's. He did not say, render to Tiberius that which is positis honorum, et mala quam nobis ingenerant aequammiter toleramus, nee Deo injuriam facere videamus, qui illos ordinam titulum super homines ex talti atque sublimavit, licet illi indigenti sordem quo fruantur. 

1 Id. id., i. 9: "Porro ipsi reges et principes atque tyranni, dum Deo subesse et eis praecepta custodiri reidunt, dominazioni sua vim et potentatem plenamque solent angustiare, sicut primus homo dominationis sua vigorem et dignitatem praerogativam post suam transgressionem cogitare et suscipere."

2 Tractatus Eboracenses, iv. (M. G. H., 'Libell. de Lice', vol. iii. p. 596): "Sacerdos quique aliam praefaturum in Christo naturam, id est hominem, Rex aliam, id est Dei. Ille superiori quem equalis est Deo patri, isto inferiore quem minor est patrie."

3 Id. id., i. 9: "Similiter et de ceteris regibus servitium divinum, et in spiritu Dei venerunt et virtute, non de illis qui regnaverunt et non ex Deo, quorum non reges, sed tyranni fuerunt et in spiritu maligno et contrariis virtute venerunt. Quorum unus fuit Otiosus, qui, quomodo per superbia usurpavit sacerdotium, lepra perpeusus est, quomodo non crat Christus Domini, nec cum Domino unus est spiritus, sed egenatus spiritus huius mundi."
Tiberius; render to the authority, not to the person, the person may be evil, the authority is just, Tiberius may be wicked, but Caesar is good. Render, therefore, not to the evil person, to the wicked Tiberius, but to the just authority, to the good Caesar, that which is his.¹

If these are the judgments, even of those who defended the temporal authority against what they conceived to be the unreasonable claims of the spiritual power, we need not be surprised that the supporters of the political or ecclesiastical opposition pressed them still more emphatically. We shall have occasion presently to deal with the position of Manegold in detail, but in the meanwhile we may observe how sharply he draws the distinction between kingship and tyranny, and how emphatically he states the conclusion that the ruler who governs tyrannically has no claim whatever upon the obedience of his people. The people, he says, did not exalt the ruler over themselves in order that he should have freedom to tyrannise over them, but in order that he should defend them from the tyranny of others. It is therefore clear that when he who was elected to restrain the wicked and to defend the good, actually becomes evil, oppresses the good, and is guilty of that tyranny which it was his duty to repel, he justly falls from the dignity which was granted to him, and that the people are free from their subjection to him, inasmuch as he has violated that agreement in virtue of which he was appointed.²

As we have already said, the conception of the fundamental difference between the king and the tyrant is developed more


² Manegold, "Ad Gebhardum," xxx.: "Necece est ergo, qui omnium curam geste, omnes debet gubernare, malum gratis virtutem super ceteros debet splendere, traditam sibi potestatem summo equitatu librarine studaret administrare. Nonque enim populus idea eum super se exsulat, ut liberam in se exerceris tyrannidem facultatem concedat, sed ut a tyrannide ceterorum et improbitate defendat. Atque, cum ille, qui pro concessid praevia, probis defendendis eligatur, pravissim in se fovere, bonos conterere, tyrannidum, quam debuit propulsare, in subiectos cepit ipse crudelitatem et exercitare, nonne clarum est, merito illum a concessa dignitat eader, populo ab eius domino et subiectione liberum existere, cum pactum, pro quo constitutus est, concedit illum prion irrupisse l... Ut enim imperatoribus et regibus ad tuenda regni gubernacula fides et reverentia est adhibenda, sic certa, sic firma ratione, si tyrannide exercere cruoriet, atque omni fidei lesione vel pietatis iactura nulla fidelitas est vel reverentia impendenda."

¹ John of Salisbury, "Policraticus," iv. 1: "Est ergo tiranni et principis hae differentia sola vel maxima, quod hic legi obtinent, et eius arbitrio popularum regi cius se credit minimum, et in rei publica numeriis exerciciis et oneibus subordens legis beneficio sibi primum vendecat locum, in cuoce praefertur ceteris, quod, cum singuli tenentur ad singula, principi onera imminent univere. Unde merito in omnium subditorum potestas conferetur, ut in utilitate singularum et omnium exsurgere et faciienda ibi ipsi sufficit, et humane rei publicae status optimae disponatur, dum sunt alteri alterius membre. In quo quidem optimum vivendi duorum naturam sequiurum, quod macrocosmi sit. id est, mundi minoris, hominis silicet, sensus universi in capite collocavit, et ei st uniuersa membra subjicit, ut omnis recte moveatur, dum sunt capitus sequatur arbitrium. Tum ergo et tactis privilegiis apex principalis exstiliret et splendescit, quod et quant sibi ipse necessaria creditur. Recto quidam, quis populo nihil utilius est quam ut principi
For the definition of the tyrant we must turn to a later passage, where we find it said that the philosophers have described him as one who oppresses the people by violent domination, while the prince is one who rules by the laws. The prince strives for the maintenance of the law and the liberty of the people; the tyrant is never satisfied until he has made void the laws and has reduced the people to slavery. The prince is the image of God, and is to be loved and cherished; while the tyrant is the image of wickedness, and often it is meet that he should be slain. The origin of tyranny is iniquity, and it is this poison of unrighteousness and injustice which is the source of all the troubles and conflicts of the world.¹

It is specially important to observe that to John of Salisbury the essence of the distinction between the tyrant and the prince lies in his relation to law. In other places he enforces the principle in very interesting phrases. There are some, he says, who whisper or even publicly proclaim that the prince is not prince, and that what he may do personally is not the same as what he can or may do in virtue of his power. It is specially important to observe that to John of Salisbury law; that is, not merely that which he, as legislator, has

¹ John of Salisbury, "Policraticus," vol. 17, p. 138. "Procedant nume delectatores potentatum, suaventur aut, si hoc param est, publice praestentur praecepta non esse legum subiectum, et quod e pluribus, non modo in re secundum formam, sed et in ratione magis, leges habere vigerent. Regem quomquem usque ad subtrahunt, se volunt et audient, exigit et faciunt, ego, non modo haec, sed et in mundo sedet et praeferat, nemo haec tenere et confirme. In quo enim, inquit, quae nunc fallit nunc, uidelicet, necesse est eam reformare. Et certe ignotum gravis imus, in his quae presunt fiet, eo quod mensura bona conferta cogitat et superfluas re fundatur in annis eorum. Nee tamen dispensationem legis subtraho magis, sed perpetuam praeposent aut prohibitionem habentium habenda. Hic eorum non, nisi nonnumquam arbitrari sub-pesendo. In his statu dumtaxat quae mobilis sunt, dispensatio verborum auctori, in tali tamen usque domus auctori, actu eosque et alios quosque possidet, nemoque cogitare de fructibus producendis."
It is important to observe, in considering these passages, how much John of Salisbury is affected by the revived study of the Roman law; his reference to Vacarius, and the progress of the influence of the Roman jurisprudence in England, in spite of the attempts to restrain it, is well known; and the effects of his own study are very clearly illustrated in the passages we have just discussed. He is evidently gravely concerned to find a just meaning for such phrases, as that the prince is "legibus solutus," or "quod principi placuit legis habet vigorem," for evidently they had, by some, been used to defend the conception that the prince was not subject to the law, and that even his capricious desires might override the law. Such conceptions seem to him monstrous and impossible. The will of the prince which is to have the force of law can only be that which is in accordance with equity and law. He is only free in relation to law in the sense that his true character is that of a man who freely obeys the law of equity. It is specially interesting to notice his phrase about the result of withdrawing the prince from the authority of the law, that the true result of this is to make him an outlaw—that is, a person to whom all legal obligations cease.

To appreciate the significance of these principles of John of Salisbury completely, we must bear in mind not only the traditions which we have considered in this chapter, but also the whole tradition of the feudal lawyers, culminating in the dogmatic affirmation of Bracton that the king is under the law. It is evident that John approaches the discussion of these questions formally through the medium of the Roman law and other literary traditions, but that his actual judgment corresponds with and expresses the effects of the political traditions and the practical circumstances and necessities of his own time.

The legitimate prince or ruler is thus distinguished, in John of Salisbury's mind, by this, that he governs according to law.
seems at least doubtful whether it is lawful for a man to seek the death of him to whom he is bound by fidelity and oath, and he mentions with approbation the conduct of David who would not use violence against Saul, and of those who in oppression pray to God for deliverance.1

When, however, we have allowed for certain qualifications, it remains true that John of Salisbury maintains very emphatically that the tyrant has no rights against the people, and may justly and rightfully be slain. He deals with the matter first at the end of the third book, and says that it is not only lawful to kill the tyrant, but equitable and just, for it is right that he who takes the sword should perish by the sword. That is, he who usurps the sword, not he who receives it from the Lord. He who receives his authority from God, serves the law, and is the minister of justice and the law, while he who usurps the crown Domus, cuius quoddammodo gestabat magnenim, vocaverunt. Amplus quodem adaequamin, etam tyrannam gentium reprombat aeterno ad mortem minstri Dei sunt et Christi Domini appellantur. Unde profeta; 'Ingredientur portas Babylonos duces,' videlicet Curias et Darnus, 'ego enim mandavi sanctificatae nos et vocavi fortes meos in ira mea et exultantes in gloria mea.' Ecce quae sanctificatos vocat Medos et Pernas, non quod sancti essent, sed Domini adversus Babylonem implebant voluntatem. Aliae quoque. 'Ecce ego adducam,' inquit, 'Nabugodosozer servum meum, et quis bene mehi servivit apud Tiram, dehinde Egyptum.' Omnes autem potentes bona, quoniam ab eo est a quo solo omnia et sola sunt bona. Utens tamen interdum bona non est aut patruata sed mala, licet quod ad universatem sit bona, illo incensu qui bene utitur mala nostra. Sunt enim in pictura fucus aut niger color aut aliqua alius per se considerandum indecausa est, et tamen in tota pictura decret, nec per se quasdam inspecta indirecta et mala, relata ad universatem bona apparent et publia, eo omnis sibi adpastante eum omnem opera vaile sunt bona. Ergo et tamen potestas bona quoddam est, tamen non nebulas mah. Est enim taraas ad Deo concessus homini potestatis abusus. In hoc tamen male multus et magna est honorum usus. Patet ergo non in solis principibis esse taramnem, sed omnes esse taramnem qui concessas desuper potestate in substantiis abutantur."1

1 1d. id., vm. 20. "Hoc tanem cavendum docet historia, ne quis illius molatur intertum cui fidei aut sacra- ments religione tenetur eunctu . . . Nam et Sedeobus ob neglectam fidei religione legitur captivatus, et quod in alio regnum Judae non memini, erat uti et etsi eius, eum Deum, eum sustinere, etiam cum ex iusta causa cæverunt tiranno, lapsus in perfidiam non pro- posuit anti spectum suum . . . (The example of David and Saul ). Et lue quem modum defensus tarnen usus sumus est, qui primum ad patrocinum divinam Dei humiliati confugians et puras manus levantes ad Dominum devotis precibus flagellum quo affliguntur avertat."
authority subjects the law to his will. It is therefore right that the laws should take arms against him who disarms them. There are many forms of treason, but there is none graver than that which attacks the whole system of justice. If in the case of treason any one may act as a prosecutor, how much more in the case of that crime which attacks the laws which should control even the emperor. Assuredly no one will avenge the public enemy, and he who does not attack him is guilty of a crime against himself and the whole body of the Commonwealth.¹

These principles are constantly maintained by him. We have already seen how, in that passage in which he describes the character of the tyrant, he says that while the prince, who bears the divine image, is to be loved and venerated, the tyrant, who has the image of wickedness, often ought to be slain. Again, in the same chapter, where he has urged that there may be ecclesiastical as well as secular tyrants, he says that if the secular tyrant may properly, according to divine and human law, be slain, we cannot think that the tyrant who bears the priesthood is to be loved and cherished. And again, in a later chapter, he says that it is clear from history that it is just to slay public tyrants, and to set free the people for the service of God; the priests of the Lord reckon their slaughter to be an act of piety.²

¹ John of Salisbury, 'Policraticus,' iii. 15: "Prorro tyrannum occidere non modo licetum est sed equum et iustum. Qui enim gladium accipit, gladio dignus est interire. Sed accipere intelligitur qui eum propria temeritate usurpat, non qui utendi eo accipit a Domino potestatem. Utique qui a Deo potestatem accipit, legibus servit et iustitiae, et iuris famulos est. Qui vero eum usurpat, iura deprehendit et voluntati sui leges summittit. In eum ergo morito armatur iura qui leges examinat, et publica potestas servit in eum qui evacuare nitetur publicum manum. Et, cum multa sint crimina maiestatis, nullum gravius est co, quod adversus ipsum corpus iustitiae exercetur. Tyrannus ergo non modo publicum criminis sed, si fieri posset, plus quam publicum est. Si enim crimen maiestatis omnes persecutores admittit, quantum magis illud quod leges promit, quae ipsa debent imperatoribus imperare? Certe hostem publicum nemo obsecutur, et quisquis eum non persecutur, in seipsum et in totum rei publicae mundane corpus delinquit."²

John of Salisbury sums up, no doubt in extreme and somewhat harsh terms, the normal doctrine of these centuries, that there can be no legitimate government which does not represent dolio diligendum censeat aut celen dum?"¹

¹ Id. id., viii. 20: "Ut autem et ab alia consetet historia iustum esse publicum occidit tyrannos et populum ad Dei obsequium liberari, ipsi quoque auctoritas Domini necem suam re- putant pietatem et, si quid doli videtur habere imaginem, religioni misterii dicunt Dominum consequatur."²

² John of Salisbury, 'Policraticus,' iii. 15: "Ex quibus facile liquet quis semper tyranno licuit adulari, licuit eum decipere et honestum fuit occidere, si tamem alter cohaerere non poterat. Non enim de privatis tyrannis agitur sed de his qui rem publicam premunt."³

³ Id. id. id. 20: "Sed nec ven ens, licet vidam ab infidelibus aliquaude usurpatam, ullo quam iure indulgam lego licentiam. Non quod tyranno de medio tollendum esse non credam sed sine religioni honestitateque dispendor."
the principle of justice, and that this justice is embodied in the law. The ruler who is unjust, and who violates the laws and customs of his country, has ceased to have any claim to the obedience of his subjects, and may justly be resisted, and if necessary deposed and killed. It is probable that the somewhat harsh terms of his doctrine of tyrannicide are due to the influence of his study of classical literature and history, and it is interesting to observe the first effects of the direct study of the ancient world. But though the form of his principle of the right of resistance to unjust and illegal authority is probably literary in its origin, and might not have met with general approbation, yet the essential principle which he maintains is the normal view of the Middle Ages.

CHAPTER VI.

CONSTITUTIONAL THEORY AND CONTRACT.

We have so far endeavoured to trace the development of the conception that political authority is controlled and limited by the principle of justice, and by the law as the embodiment of this. There is no doubt that in this conception we have one of the most important apprehensions of political theory in the Middle Ages. In modern times it may seem that the principle does not take us very far, for we always tend to ask what is justice, and whether the law is just, and this is the natural tendency of a time when men are conscious of movement and change. In the Middle Ages the conditions of civilisation were actually changing probably as rapidly as they are today, but men were hardly conscious of change, and the appeal to precedent, to tradition, was probably almost wholly sincere.

While, however, the belief in the supremacy of law and justice is of the first importance, yet it is also true that a society which is civilized and moving towards greater civilisation must not only be possessed of some ideal or ethical principles, but must also develop some method or form for securing the effective authority of its principles. In the Middle Ages this was represented by the development of the conception that the ruler received his authority, sometimes by the principle of hereditary succession in some one family, but never without the election or recognition of the great men, or the community as a whole—and these two cannot be separated in the mediaval apprehension. And the authority which the mediaval ruler thus held by the authority of the community, he exercised and
could only exercise normally with the counsel of the great men of the community.

We have considered the earlier stages in the development of these principles in our first volume, and they were too firmly rooted in the structure of medieval society to die out even in the chaos of the tenth century; but it is no doubt true that in this respect, as with regard to the other principles of political authority, it was the great civil and religious conflicts of the eleventh and twelfth centuries which made men clearly conscious of ideas and convictions which had always been implicit, but had only occasionally been expressed. It is, however, important to observe that, even before these violent conflicts compelled men to make real to themselves their political principles, we can find occasional but very clear expressions of what we may call the constitutional conception of authority.

Here is, for instance, a very characteristic expression of the principle that the king governs only with the counsel of his faithful men. This is contained in a letter written by Gerbert (afterwards Pope Sylvester II.) in the name of Hugh, King of France, to the Archbishop of Sens. The king was evidently somewhat doubtful of the loyalty of the archbishop, who had probably not been present at his consecration in Rheims in July 987, and admonishes him with some asperity to make his allegiance before November, and, evidently in order to reassure him, declares that he has no intention of abusing the royal power, but intends to administer the state with the advice and judgment of his faithful men, among whom he reckons the archbishop as one of the most honourable.

We find the same principle expressed in a contemporary

work of Abbo, the Abbot of Fleury. How can the king, he says, deal with the affairs of the kingdom and drive out injustice except with the advice of the bishops and chief men of the kingdom? how can he discharge his functions if they do not by their help and counsel show him that honour and reverence which is due?—the king alone is not equal to all that the needs of the kingdom require. And he appeals to the obligations which they had taken upon themselves in electing him to the kingdom, for it were better not to have assented to his election than to contend with whom they had elected. There are three important elections, he says—that of the king or emperor, which is made by the agreement of the whole kingdom; that of the bishop, which represents the unanimous agreement of the clergy and people; and that of the abbots, which is made by the wiser judgment of the community.

This conception corresponds precisely with the contemporary forms of legislative or quasi-legislative action. The Capitula issued by the Emperor Otto I. at Verona in 967 are said to be established by the emperor and his son Otto the king, with the chief princes—that is, the king, bishops, abbots, and judges, along with the whole people. And again, the Emperor Henry II.

1 Abbo, Abbas Floracensis, 'Collecto Canonum,' iv. "Cum regis munterior ac totus regni penis negotia discutiere, ne quid in cas lateat multis, quandoque ad tanta potest substetere, non nece sit usque episcopos et primarios regn?" Et cum apostolus dicit: 'Deum timete, regem honorificate,' quae ratione suis manifestae esse exercerent in contumaciwm possidem, ea quidem regi auxilio et consulio non exihibit debatum honorem cum omni reverentia Ipsam em Sun solus non sufficit ad omni regni utilia. Idemque partitio in alia one, quos dignos credit honores, honorandus est et ipsa unum devoturcum, ne quos in contraduct quomodovocque, quia quod potestas residi, Dei ordinatim residi. Siquecum ut melius est non vovere quum post votum non reddere, ut melius est electum principem non subscribere quam post subscriptionem electum comminere vel prescribere, quandoquidem in alto libertas amor laudatur, in alto servitutus contumacia proba datur. Tres naucnum electores genera normus, quem una est regis vel imperatoris, altera pontificis, tertia abbatum. Et primam quedam facit concordia totus regni, secundam vero una/amita omnim et cler, tertiae sicnum cemum communibus congregations Et teneacius non profectorum amenat gratis vel pretio, sed ad saum professionem pro saumita vel vitae mento. Foro ordinatus rex ab omnibus surrexit fidebus salva sacra mento exigat, ne in aliquidus regnus sus finibus discutia generari possit."

issued in 1022 the Constitution confirming and approving certain synodical legislation of Pope Benedict VIII., along with the senators, the officers of the palace, and the friends of the commonwealth.1

It is not within the scope of our work to deal with the development of the constitutions of the European states, but it is impossible to separate the history of political theory from the history of the growth of institutions. This is always true, but especially in the earlier Middle Ages, when there was very little merely abstract political speculation. In the thirteenth and fourteenth centuries this was somewhat different, but we hope to deal with this later. In the eleventh and twelfth centuries it is obvious that political theory arises very largely out of the conflicts of the time, and reflects in the main the constitutional principles of the European societies, as men conceived them. While therefore we must keep clear of any attempt to give an account of the constitutional organisation of Western Europe, we must endeavour by means of a few illustrations to indicate what seem to us to be some of its most important principles.

There is no doubt that in the Middle Ages the authority of the ruler was conceived of as normally depending upon the election, or at least the recognition, of the community. The conception of a strictly hereditary right to monarchy is not a medieaval conception. In France and England no doubt the principle of succession within one family established itself early. But students of English history do not need to be reminded that some form of election or recognition was always necessary to confirm the sanctity of the royal grant of the throne. And in France it was not really otherwise, though the strictly hereditary principle may be thought of as having established itself there more rapidly. In the Empire the succession was elective, and if at any time during the eleventh century it might have tended to become hereditary, this tendency was abruptly checked in the great civil wars of Henry IV.'s reign, and in the troubles of the thirteenth century.

It is worth while to notice some of the phrases in which this is expressed. Hermann of Reichenau relates how the Emperor Henry III. procured the election of his infant son as king at Tribur in 1053, but mentions that the election was made subject to the condition that he should prove a just ruler.1 Bruno relates how at the council of Forchheim, in 1077, it was determined by the common consent, and approved by the authority of the Roman pontiff, that no one should receive the royal authority by hereditary succession as had been the custom, but that the son of the king, even though he were wholly worthy, should succeed to the kingdom by free election rather than by hereditary right; while if he were not worthy, or if the people did not desire him, they should have it in their power to make him king whom they would.2

This principle is again expressed, and something more of its significance indicated, in the circular letter issued by the Archbishop of Cologne and Mainz and other bishops and princes on the occasion of the death of Henry V. in 1125. They announce the Emperor's death, and say that they have celebrated his funeral, and that they now propose to hold an assembly to consider the condition of the kingdom and to arrange for a

1 Herimannus Augiensis, 'Chronicon,' A.D. 1053: "Imperator Henricus magnus apud Triburiam conventu habito, filium quidem regem a concilia eligit, eique post obitum suum, si recter iustus futurus esset, sublectionem promissi facit."  
2 Bruno, 'De Belo Saxonicus,' 91: "Hoc etiam tibi consenti communi comprobatum, Romani pontificis auctore et corroboratione, ut regia potestas nulli per hæreditatem, sed a publica consensu, cederet, sed filius regis, etiam si validum esset, potius per electionem spontaneam quam per successionem lineam rex provenierit; si vero non esset dignus regis filius, vel si nollet eum populus, quem regem fuisse vellet habere in potestate populi."
successor. They disclaim all intention of prejudicing the decision of those to whom they write, but they express the hope that they will be mindful of the oppression of the Church and kingdom, and will invoke the help of God that He would so guide the election of a successor that the Church and kingdom might be free from the slavery in which they had been held, and might live under their own laws, and that the princes and the people might have peace. The writers of the letter not only claim the right of determining the succession, but also clearly consider that this right should be used to provide security for good government and the due observance of the laws.

We can find another illustration of the recognition of the elective principle, and of the conception that it involved definite obligations on the part of the chosen ruler, in the letter sent to Pope Eugenius III. in the name of Frederick I. (Barbarossa) on his election to the kingdom in 1152. He speaks of himself as having been clothed with the royal dignity, partly by the homage of the lay princes, partly by the benediction of the bishops, and as having put on the royal mind, and that therefore he purposes, according to the terms of that promise which he made when he was enthroned and consecrated, that in the election or succession of the ruler that the authority of the community was recognised, but that in some sense or another the legislative action of the ruler was limited and conditioned by the counsel and assent of the great men of the community. This is clear in the first place from the formula which are used in all legislative or quasi-legislative actions. We may take a few examples from the twelfth century.

The great settlement of Worms in 1122 was embodied in the Privilegium Imperatoris,' in which Henry V. agreed to resign the imperial claim to the right of investiture of bishops with the ring and staff. This is expressly said to be done with the counsel and consent of the princes whose names are subscribed. 1 Romanes ecclesie et omnibus ecclesiasticis personis promptum et dubiam justitiam ac defendendum exhibeamus, viduis ac pupulis et universo populo nobis commissa legem et pacem faciamus et conservemus.' 2

We have already dealt with the treatment of this question in the feudal law books, but it is worth while to notice again the emphatic terms in which the principle of election is set out in the Sachsenspiegel.' The Germans, according to the law, are to elect the king; when the king is elected he is to swear that he will maintain the law, and put down all that is against it. 3 And in another place the author lays down the principle of election in the broadest terms when he says that all authority is founded upon election. 4 What the exact significance of the latter phrase may be is difficult to say, but at least it seems to illustrate the breadth and importance of the elective principle.

The fact that in medieval theory the authority of the king is founded upon the election or at least the recognition of the community does not in truth require any serious demonstration. It is very important, however, to notice that it is not only in the election or succession of the ruler that the authority of the community was recognised, but that in some sense or another the legislative action of the ruler was limited and conditioned by the counsel and assent of the great men of the community. This is clear in the 1st place from the formula which are used in all legislative or quasi-legislative actions. We may take a few examples from the twelfth century.

1 M. G. H., Legum, Sect. IV., Constitutiones, vol. i. 112: "Nullum tamen preclaustrum deliberationi et voluntati vestrae facientes, nihili nobis singulari ac privatim in haec re usurpamur. Quin pocui discretioni vestrae hoc adnime intuitum esse cupimus, quidem minor oppressiosis, qua ecclesia cum universo regno usque modo laboravit, dispositiones divines providentiam invocet, ut in substitutione alterius personae sic ecclesia sua et regno providet, quod tanto servitutis in quo amodo cararet et suis legibus uti licet, nescie omnes cum subiecta plebe temporali perfruamur tranquillitate."

5 M. G. H., Legum, Sect. IV., Constitutiones, vol. i. 137: "Nos vero in multiplicitatis regiae dignitatis ornamentis, quiusque partem per laicorum principum obsequio, partem per reverendas pontificum beneficencias vestiti sumus, regium animum induimus, tota mente virtute intendentes, ut inixa professiones nostrae formulam, quam ab orthodoxiis praesulibus in ipso regni throno etunctione sacra accepimus, honore nobis et dispositionem, et asseramur nostrum maxim illum.

Romanas ecclesiae et omnibus ecclesiasticis personis promptum et dubiam justitiam ac defendendum exhibeamus, viduis ac pupulis et universo populo nobis commissa legem et pacem faciamus et conservemus.'

'Sachsenspiegel, 'ii. 52. 1: "Die discheschen solen durch recht den koning kiesen."

iii. 54. 2: "Als man den koning kuset, so sal he dem rike hulde done, unde aven den hat he recht sterkhe unde unrecht krenke unde it rike vorecta an sine rechte, als he kenne und moge.'

2 Ed., i. L. 1: "Al welik gerichte heret begin von kore; dar umme ne man den na man richtere sin noch neman, he ni se gekorender belant richtere.'

Cf. i. 56 and 58. 'Sachsenspiegel, '71. 1.

3 M. G. H., Legum, Sect. IV., Constitutiones, vol. i. 107: "Hec omnia nota sunt consensu et cognitio principium quorum nomine subscripta sunt."
Lothar III.'s Constitution, 'De Feudorum Distractione,' of 1136, was made on the exhortation and counsel of the archbishops, bishops, dukes, and other nobles and judges. Frederick I. issued the feudal constitutions of Roncaglia after taking counsel with the bishops, dukes, marquesses, counts, judges of the palace, and other chief persons. It is not, however, only in the formal preambles of legislation that we find this principle recognised. It was expressly asserted as a principle of government by so great and masterful an emperor as Frederick Barbarossa. In replying to certain demands of Pope Hadrian IV. in relation to the papal and imperial position in the city of Rome, and to certain claims of the imperial authority on ecclesiastical persons in Italy, Frederick, while giving a provisional answer, says that he cannot give a complete answer until he has consulted the princes.

There is really no doubt whatever that in the normal tradition of the Middle Ages the position of the ruler was conceived of as that of one who ruled with the advice and consent of the chief persons of the community. The relation of this to the feudal conceptions, as we have endeavoured to set them out, is obvious, but the tradition was older than the feudal system. The authority of the medieval ruler rested upon the election or consent of the community, and was exercised normally and constitutionally with the advice of persons who were not merely his dependents or creatures, but were in some sense, however vague and undetermined, the representatives of the community.

It was the great civil conflicts of the eleventh century which compelled men in the Empire to consider how far the conditions and assumptions of constitutional order gave the community or its chief men the right to take such action as might secure the purposes for which the ruler had been elected or recognised. It is from this standpoint that we must again consider the principles of government which are presented by the historians of the great revolt against Henry IV. We have already dealt with some passages from their writings in considering the theory of the relation of authority to justice, but we must look again at some of these, and consider them from the standpoint of their constitutional theory.

According to the account of Lambert of Hersfeld, the demands of the Saxons and Thuringians in 1073 were, first, that Henry IV. should do justice to the Saxon princes, whose possessions, as they said, he had seized without judicial process, in accordance with the judgment of the princes of the kingdom; secondly, that he should dismiss from his court the low-born persons by whose advice he had been governing; and should entrust the administration of the affairs of the kingdom to the princes of the kingdom, to whom the charge properly belonged; and thirdly, that he should put away his concubines and abandon the vicious habits which had disgraced the royal dignity. If he would do these things they were prepared to serve him, but only as became free men in a free empire.
As we have already said, we are not discussing the question of the real nature of the causes which lay behind the revolt of the Saxons, and we think that the sentiments or motives attributed by Lambert and the other historians to the revolters must often be taken rather as those of the writers than of those into whose mouths they are put. We are concerned with the theory which the great conflicts brought out rather than with the conflicts themselves, and the passage just cited represents two constitutional principles of great importance. First, that the king has no arbitrary power, but that there is a legal authority in the State to which he and all others must submit; and secondly, that the great affairs of the State are not to be administered by him at his capricious pleasure, but only through those who have a constitutional right to be consulted.

The principles which are thus expressed in relation to the beginning of the great revolt are constantly repeated during the conflicts which followed. Lambert represents even those in the State to which he and all others must submit, reverence which is due to the royal majesty, and urges that their validity. In the speech which he attributes to Berthold, formerly Duke of Carinthia, Berthold admits the justice of the complaints of the revolters, but begs them to consider the reverence which is due to the royal majesty, and urges that they should lay aside their arms and agree upon a meeting to which the king should summon the princes of the whole kingdom, at which he might clear himself, before the common judgment, of the charges made against him, and might set right whatever should need correction.1

It was indeed this constitutional conception, that the king was in the end responsible to the judgment of the princes of the kingdom, which was maintained throughout the long struggle between Henry IV. and those who revolted against his authority. They maintained steadily that it was for the council of the princes of the kingdom to decide upon the justice or injustice of the charges brought against Henry, and that it was in their power, for sufficient reasons, to declare the throne vacant. Lambert represents Rudolf of Suaubia as refusing in 1073, at the meeting between the Saxon princes and those of the royal party at Gersengen, to be made king, until the matter had been considered by a council of all the princes, and it had been decided that this could be done without involving them in the guilt of perjury.2

It is true that when once the great dispute between Henry IV. and Gregory VII. had developed, and when in 1076 Gregory had formally excommunicated Henry, the revolters, as reported by Lambert, eagerly seized upon this new circumstance, and proposed to refer the charges against Henry to the Pope, who was to be invited to attend a council of all the princes at Augsburg, and, when all parties had been heard, to pronounce judgment upon them. They also decided that if Henry was not released from his excommunication within a year, they would no longer recognise him as king.2


2 Lambert of Hersfeld, ‘Annales,’ 1076 (p. 254). "Se tamen rem integram Romini pontificis cognitione reserva, actore se cum eo, ut in purificazione sanctie Marie Augustam occurret, aequum celebrarem convenio habito principem tocmus regum, discussum utirarumque partium alienationibus, ipse suo minus vel addidit vel absoluta accusat."

Saxons, hoops enatem cuta inviolateque fusset, pondre remissu armorum strepitu, pueritiam arma, superis simultantibus, tempus locumque constituerint, quia regem regum principes excavarent, et mixta comunitas sententiam et objecta purlacet et correctiones egere viderentur cernere."

1 Lambert of Hersfeld, ‘Annales,’ 1073 (p. 197). "Tutam comum esse causam, quos summis se per maximas regum inveniendas ad hoc extra divinitudia congrat, honor dominus suis magis consulendum quam macundia, et denierum reges manet, quia inpulso religione non tener, sed quasi cum barbaro hoste et christianis non opprimente nistum sequentes bellum gesturos, et quod ultima vita, sed etiam etiam dansentia superesse, pro eclese Dei, pro fide christianis, pro libertate etiam eum ducem usus."

2 Lambert of Hersfeld, ‘Annales,’ 1076 (p. 254). "Se tamen rem integram Romini pontificis cognitione reserva, actore se cum eo, ut in purificazione sanctie Marie Augustam occurret, aequum celebrarem convenio habito principem tocmus regum, discussum utirarumque partium alienationibus, ipse suo minus vel addidit vel absoluta accusat, quod si autio ilium annullaverint exciting boni, suo precibus vero, excommunicatione non absolutur, abique retractatione in
In our next volume we shall have to examine the whole question of the principles of the papal intervention, here we need only observe that it greatly strengthened the hands of those who were already in revolt against Henry. The revolters would evidently have been glad to put the whole responsibility of Henry’s deposition upon the Pope, and indeed at the council of Forchheim in 1077, as Berthold of Constance reports it, they at first assumed that the Pope had finally deposed him, but the Pope’s legates seem to have made it clear that this was not so—presumably on account of Henry’s absolution at Canossa early in the same year—and intimated that it was for the council to judge and to determine upon their action. It was the princes therefore who declared him to be deposed, and elected Rudolf of Swabia.1 It soon, however, became clear that there was still a strong party which supported Henry, and Berthold represents the chief men of both parties as agreeing later in the same year that the principal men of the kingdom should meet, and along with the legates of the Pope should consider what should be done, and as determining that they would by common consent repudiate whichever of the kings should refuse to accept their judgment, and would acknowledge and obey the other.2

1 Berthold of Constance, ‘Annales,’ 1077 (p. 291). “Denque in Idibus pedetatis, ut deliberatum est, ex magnis parte optimatis regni convenuerunt illaque habato colloquio, per quam multis monsitarum et murorum calamitosissimam prolationem et quernimus, quas ibi et totius regni primatibus et accessus multis habebat, regem accusabant, et quas papa, ne ut regis obernent aut servirent, ipsam tam intoleraret, regni dignitate prevalebat, neque regum saltem nomine dignum ob iudicia ipsum millesimis flagitias adiuvi cabant, set alium ibi pro illo eligere et constitueris unanymiter destinabat Legati autem sedis apostolicae audito ille tam sacriego homine, non parum quadem mutati sunt, quod tamid illum super se sustinuerat Verum tamen id quod inunctum erat, non retebeant, quem potius in audientia munctorum propalabant sui legationes communitionum, ut sit quodlibet sua cautum artierum possi ier, uto adhibe aliquamud quaelisqueus sustentato, alium ibi regem nequa quam constituerent, aliquan ipsi, quass multo minus quae necessitates expertum non ignoraet pereulum, quod quacunque ibi optimi praetoribus indicarent, apostolico non contradicente penugerent.”

2 Berthold of Constance, ‘Annales,’ 1077 (p. 306). “Cujusquam maioribus totius regni omnis post paululum prater albores reges ad colloquium iusta Renaun convenirent, et ibidem cum legatis annul apostolicus nutus-
under any advice or influence should take hostile measures against any one on account of this, the princes, acting under his own authority and consent, determine that they will act together and admonish him not to do this, and, if he should neglect their advice, the princes will abide by the faith which they have pledged to each other.  

It is no doubt difficult to measure precisely the reality and value of principles which are put forward in periods of violent controversy and civil war. But in this case we can recognize with confidence that the principle that the ruler is not an arbitrary or irresponsible master of the State, but must govern in accordance with the counsel and judgment of others whose duty it is to see that justice is done to the whole community, was firmly held apart from the mere passion of revolt, and that the stress and pressure of civil conflict only brought out into controversy and civil war. But in this case we can recognize the value of principles which are put forward in periods of violent struggle and pressure, and that duty it is to see that justice is done to the whole community.

It is then from this standpoint that we can profitably examine the political theory of Manegold of Lautenbach, by whom the conception of the limitations and conditions of the royal authority was most clearly and sharply set out. In order to deal adequately with his position we must not consider only a few isolated phrases, but must endeavour to make clear to ourselves the logical structure of his theory.

1 M. G. H., Log., Sest. IV., Const., vol. i. 100: "Hoc est consilium in quo convenerunt principes de controversa inter dominum imperatorum et regnum. Domus impositor apostolica sedi obidat. Et de calumnia quam adversa eam habet ecclesia, ex consilio et auxilio principum inter se et dominorum papam compositor, et sit firma et stabile papas, sit quod dominus imperator que suum et quod regnum habeat, ecclesia et unusquisque sua quod et pacifice posse possit . . . Hoc etiam, quod ecclesiae adversus imperatorum et regnum de investiture causatur, principes esse dolo et esse simulatim elaborare intendunt, ut in hoc regnum honorem suam retinat . . . Et si in posteriorum dominorum imperatorum consilii vel suggestione aequus sit in quem videntem pro hac momenta exspectaverint, consensu et licentia regni hoc inter se principes confirmant ut ipsi munus permanent et eum omnium curate et reverentia, ne aliquod horum facere velit, eum commodatam. Si autem dominus imperator hoc consilium preterret, principes acut ad invicem fidem deederunt, eam observat."  

2 See p. 103, 111.  

3 Manegold, "Ad Gebehardum," xxx. "Regalis ergo dignas et potestas autem omnes mundanas excellent potestates, ne ad eam ministrandum non flagitantissimus quoque vel tyrannus est constituendus, sed qui acut loqu ut dignates, ut necholomnus ceteros sapientis, iustitia superet et justitiae. Necessae est ergo, quia omnium curare, omnes debet gubernare, masore gratiasutrum super ceteros debet splendere, traditam sui potestatem summo equitatis liberae studiis administrare."  

4 Id., xxxix: "Unde martyre sanctissimus et egregius pontific Cyprianus in nono abusione gradu inter multa disturbance et discipline ministeria suscipere non tam exigere, sed etiam errores, parvidae et penitentias non anere vivere. . . .  

5 Id., xxxix: "Unde sanctissimus papa Innocentius in decreto sua cap.

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CHAP. VI.) CONSTITUTIONAL THEORY AND CONTRACT.

It would be to fall into a complete and deplorable confusion if we were to think that Manegold denied or doubted the sanctity and the divine authority of secular government. On the contrary, as we have already pointed out, if he attacks its abuse, it is in the name of the greatness and the august nature of the office of the king. The royal office, he says, excels all other earthly authorities, and therefore the man who is to administer it should excel all other men in wisdom, justice, and piety, for he who is to have the care of all, should be adorned with greater virtue than others, that he may be able to exercise the powers entrusted to him with the highest equity. 2 Again, in defending the right of the opponents of Henry IV. to use violence in resisting him, he urges with great force that the authority of the State in punishing transgressors is a part of the divine order. 2 He does not doubt the truth of the words of St. Peter, "Be subject to the king as supreme," and "Fear God, and honour the king," but only argues that they have been missapplied, for the title of king is a description not of a personal quality, but of an office, and obedience is due to the office, not to a man who has been deposed from it. 4 Wenrich
of Trier had urged against Hildebrand that Ebbo the Archbishop of Rheims had been deprived of his see for taking part in the deposition of Louis the Pious, in the ninth century, and Manegold admits that this was just, because it was done without due process and for unjust reasons. 1

Manegold, that is, recognizes fully and explicitly the Augustan and sacred nature of political authority and its function in maintaining justice and equity. But, on the other hand, he refuses to admit that this means that the authority of the ruler is absolute, or that he is irresponsible and irremovable, and with characteristic boldness he attacks the tradition of the absolute divine right of the ruler in its most august source. Wenrich of Trier had, as we have already seen, 2 urged the words and the example of Gregory the Great as showing that even the popes, and even in matters which concerned religion, had felt themselves bound to obey the commands of the emperor even when they thought them wrong. Manegold meets this first by suggesting that the words of Gregory are susceptible of another interpretation; but he does not hesitate to maintain that if indeed Gregory meant what was thought, and acted as he was understood to have done, his words and actions were wrong and must be repudiated. 3 Manegold was clearly prepared to refuse to accept any authority however august which would impose the yoke of an unlimited obedience upon the subject.

It is with the same courage that he deals with the question of the binding nature of the oath of allegiance. Wenrich had made a vigorous attack upon the action of Hildebrand in absolving the subjects of Henry IV. from their oath of allegiance. 1 Manegold answers him not so much by urging the papal authority in this matter as by examining the nature of such an oath and the conditions of its obligation. This, he says, is the superiority of human nature to that of the animal, that in virtue of the power of reason it examines the causes of things, and considers not merely what should be done, but why it should be done. No man can make himself king or emperor, and the people elect a man to this position in order that he may protect the good and destroy the wicked, and administer justice to every man. If he

1 Wenrich, Epistola, 6.

2 See pp. 119, 120
3 Id., xlv "Non enim negamus Ebbonem toto deponentem, qui contra imperatorem catholicum conspexitunque nullo judicio convenit discursum, nulla vocazione expectatam, non confessum, non convictum premissa corruptas decesit et Lutharum illum in regno subsilire contentum."

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violates the agreement under which he was elected, and disturbs and confounds that which he was to set in order, the people is justly and reasonably absolved from its obedience, since he has broken that faith which bound him and them together. The people never binds itself by an oath to obey a ruler who is possessed by fury and madness.¹

There are, Manegold points out, two cases which have to be considered, that of the man who takes a just and reasonable oath to the king, and that of him who takes an unjust and unreasonable oath, and he examines the two cases separately. He who takes a just and reasonable oath to the king swears that he will be his companion and helper in maintaining the government of the kingdom, in preserving justice and establishing peace, and this oath is binding so long as the king demands his help in doing those things which he has sworn to do. But if the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from this allegiance rashly when Henry VI. was too young to understand the nature of an oath, but they had striven to keep their oath, is what the German princes had done; and the nature of the authority which was exercised, when a man was absolved from the obligation of an oath, was not in any way peculiar or eccentric, but represents what was probably the usual.²

The discussion of the second case, that of the man who has sworn to do something in itself evil and unjust, does not demand any detailed consideration. Manegold urges, and supports his contention with a number of patristic quotations, that such oaths are obviously from the outset null and void.²

It should be observed that Manegold's treatment of the real nature of the authority which was exercised, when a man was absolved from the obligation of an oath, was not in any way peculiar or eccentric, but represents what was probably the usual.

¹ Id., xliii: "Aut enim quaque justa et qua fide debet ratione regibus et principibus natura aut munere et qua fide debet ratione Sequamur utraque et quam servanda sunt ratione, videamus.

² Id., xlvii: "In hoc namque natura humana cetera prescat amantibus, quod capax rationum ab agenda sequente non fortuna carbus prorsu, causas rerum judicio rationem inquirit ac tantum, quod agat, sed cur aliquod agat intendat. Cum enim nullos se imperiorem vel regem creare posset, ad hoc unum alaquam super se populos exsulat, ut muti ratione imperti se gubernet et regat, cuquire sua distribuat, pos foveat, ipsae permitem, omnibus videlicet rusticum impendat. At vero si quando pactum, quo cligitur, infrangit, ad ea disturbans et confundens, quo correpare constitutas est, erumpent, rustique rationes considerandas populum subsectio debito absolvt, quae cum fidelis prorsus desertur, quod alterum altero fideltate colligat. Huc accedit, quod populus nequaquam in uram ad hoc se cuquam obligat, ut ad quosquefanes noantes absque inpetus obediat, aut, quo illae fuerunt et insuper praecipit, illum necessitudo subsectio consequent sequa compellat."
normal conception of the canonists. We are not here dealing
with the claim of the ecclesiastical or papal authority to have
the power of deposing kings; with that we propose to deal
in the next volume, and we shall then have to consider the
treatment of this subject by Manegold. In the meanwhile we
must observe that his contention that the oath of allegiance
is not binding to the king who abuses his authority is really
independent of this. In his opinion the Pope merely declares
that obligation annulled which is already null and void.

We can now approach the consideration of that well-known
passage in which Manegold sets out his theory of the nature of
political authority and obligation in the sharpest and clearest
terms. We have already indeed cited the first words of the
passage, the words in which he expresses his judgment of the
greatness and dignity of the royal office, and of its high moral
function in maintaining justice. 2 The royal dignity excels all
earthly authority, and he who is to hold it, who is to have the
care and government of all, should be superior to all in virtue,
that he may exercise this power with the highest equity.
So far we have already followed Manegold’s argument, but sud-
denly he turns to the other side of the principle. The people
does not exalt him in order that he should act as a tyrant
towards them, but in order that he should defend them from
the wickedness and tyranny of others. If he, who has been
elected to put down the wicked and to defend the good,
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them, he will refuse to pay the wage, and will dismiss him from
his service. If this is just in such humble matters, how much
more is it clear and just that the man to whom the rule of men
has been committed, and who uses his power not for the true
government of men, but to lead them into error, should be
deprived of all power and dignity. This principle is surely
right in Christian times, for even the Romans drove out Tarquin
for the outrage which his son had committed against Lucretia.
It is one thing to reign, it is another to act like a tyrant, and,
while men should render faith and reverence to kings and
emperors in order to maintain the true government of the
kingdom, yet, if they play the tyrant, then they deserve neither
faith nor reverence. 1

1 Manegold, ‘Ad Gebhardum,’ xxx.

'Reglsa erga digntas et
potestas seuit omnes mundanae excellit
potestates, es ad eam munstrandum
non flagitiosumus quosque vel tur-
passum est constituentes, sed qui
seuit loco et digntate, ita nicholomnum
cestos sapentias, rusticet superet et
petatet Necesse est ergo, qui omnem
corum gerere, omnes debet guberare,
maior gratis virtutum super ceteros
debeat splendere, tradatam abu postes-
tatem summum equitntum libranme
student administrare. Nefug enem
pelusus idem cum super se exaltaet,
it libram in se exercendae tyrannidns
facultatem concedat, sed ut a tyrannndo
cestorum et improbatet defondat.
At quin aule, qui pro coerderendae pravas,
probet defendendos digntatim, pravatet
in se favere, bonos coterere, tyrannum,
dem, quam debeat propulsure, in
sectebe segregi ipso crurelissumne ecorere,
onnem clarum ost, mento illum a con-
cessa digntate caderet, populum ab eis
domino et subsecuenta literam existente,
cum pactum, pro quo constitutum est,
constit illum prius usurpasse! Nec illos
quesquam poterit nunc ac raonabiliter
perilum aedgere, cum nicholomnum
cestos illum fidem prius decesserat.'
We have in this passage not only the summary of the political conceptions of Manegold himself, but the crystallisation of a movement of political thought and principle into a great phrase. For when Manegold represents the relation between the king and the people as embodied in an agreement or "pactum," a contract binding equally upon each party, he is not only giving the first definite expression to the conception which came in later times to be known as the theory of the "social contract," but he is summing up in one phrase the main principle of mediaeval political society. This conception is the same as that which finds its classical expression in the phrase of the "Declaration of Rights" that James II. had broken the original contract between the king and the people, and it is also the expression of the mediaeval principle of the relation of the king to the law and the administration of justice. It is, indeed, of the first importance to observe that Manegold's conception is not constructed upon some quasi-historical conception of the beginnings of political society, but rather represents in concrete form the constitutional principle of the mediaeval state as embodied in the traditional methods of election or recognition, and of the reciprocal oaths of the coronation ceremonies. The people have indeed sworn obedience, but their oath is related to and conditioned by the oath which the king has at the same time taken to administer justice and to maintain the law. It is in virtue of this that he has been elected or recognised, and it is these reciprocal oaths which constitute the contract. The oath of the people is indeed "ipso facto" null and void if the king does not on his part faithfully observe the obligations which he has taken. Men do not undertake so great an obedience except for reasonable causes, and it is not reason to think that they are bound to obey one who refuses to recognise the principles and conditions in virtue of which they promised obedience.

regni gubernacula fide et reverentia est adhibenda, sic certo, sic firma ratione, si tyrannidem exercere eruperint, absque omni fidei lesion vel petatis iactura nulla fidelitas est
vel reverentia impendenda. 'In maximo enim imperio' act hystoricus, 'minima est licentia.' "

Cf. id. xlvii., p. 164, note.
CHAPTER VII.

THE CONCEPTION OF A UNIVERSAL EMPIRE.

We have endeavoured to set out the main aspects of the theory of political authority in the eleventh and twelfth centuries, and we have so far made no distinction between the theory as it may have been related to the empire and the other Western states. We do not indeed find any reason to think there was any substantial distinction; on the contrary, the principles of political organisation appear to us to have been substantially the same in all the European communities.

There is, however, one conception which has been thought to have been important in the theory of the structure of medieval society with which we have not dealt, and this is the conception of the political unity of the world. It has been sometimes thought that as the Middle Ages present us with a unified ecclesiastical system under the headship of the Pope, so, at least in principle, they represent a unified political system under the headship of the emperor. There is, indeed, no doubt that at least in the fourteenth century, when abstract political theory was very highly developed, many writers, of whom Dante was the most illustrious, were much occupied with this conception, and it might well be supposed that this represents the natural survival of the impression of the great attempt of Charlemagne to gather together into one the divided members of the ancient Roman empire.

It is indeed clear that the conception of the one empire embracing and including all lesser states, and claiming some indeterminate superiority over them, was from the first frequently held among the people of the empire which the Ottos built up in the tenth century, and that they conceived of the position of the Roman emperor as being something different from that of a German king. The expeditions to Italy represented the claim not merely to political authority in Italy, but to the succession of Charles the Great and of the ancient empire.

This is the conception which is represented in the Annals of Quedlinburg. They speak of the consecration and coronation of Otto III. in 996 as being done with the acclamation not only of the Roman people, but of the people of almost all Europe." And they enlarge these phrases, and make them even more emphatic in describing the position of Conrad II. (the Salic). They speak of the chief men of all Europe and the envoys of many peoples as hastening to his court, and of the emperor as one to whom all parts of the world bow the neck. The author of the life of St Adalbert, writing probably about the end of the tenth century, uses a phrase which serves well to illustrate the conception of the emperor as supreme lord of the world. He speaks of Rome as the head of the world, and says that Rome alone can transform kings into emperors. It is Rome that keeps the body of the Prince of saints, and it is right therefore that the lord of the world should be appointed by Rome. Berno, the Abbot of Reichenau, in a letter to the Emperor Henry II., addresses him as his lord, the propagator of the Christian religion, Emperor and Augustus,
of the world as being subject to his empire. Again, we may notice, in a treatise ascribed to Cardinal Beno, in the last years of the eleventh century, Hildebrand is vehemently censured for applying certain words of St. Gregory the Great to the emperor, as though there were no difference between him and any "provincial" king.

It is thus that when the empire reached its highest point under Frederick I. (Barbarossa), we find a frequent recurrence of phrases indicating the notion that the Empire was superior to all other States, and even in some sense supreme over them. Thus Frederick uses of himself a phrase which might seem to be a claim to universal authority. In the introduction to a document of 1157 he styles himself "Frederick, by the grace of God emperor and always Augustus," and says that he holds by the Divine providence "Urbi et Orbi gubernacula." Again, in a document relating to the enfeoffment of the Count of Provence, he speaks of the dignity of the Roman empire as having a more excellent glory and greatness than all other kingdoms, authorities, or dignities, as it is adorned by the greater number and merit of its illustrious princes and wise men.

It is, however, in one of the documents relating to the Council of Pavia (1159-1160) that the imperial claims are most forcibly expressed. On the death of Hadrian IV, there had been a double election to the papacy, and both Alexander III. and Victor


Fredericus divina favente clementia Romanorum imperator Augustus. Cum Romana umeri dignitatis, scut nulli mortalium in dubium venit, per se principaler ac singulariter nullo non divino munere posito, totum honestatum omniumque virtutum et adonata fulgurum, tantae comparatione solis, quam habet ad alia sydera, excelsitione gloria et magnitudine omnium regum et reliquis potestatibus vel dignitatis nobis persuadente, quanto ille illustres principum ac sapientum varorum, qui portant orbes, amplior numero et merito decoratur."
claimed to have been duly elected. Frederick maintained that in such a circumstance the emperor had the responsibility of taking the proper steps to prevent a schism, and he therefore called together a council at Pavia to inquire into the matter and to decide which of the two claimants had a just title. It is in the letter of invitation to the German bishops that he uses the strongest phrases about the position and dignity of the empire. When Christ, he says, was content with the two swords, this pointed to the Roman Church and the Roman Empire, for it is by these two that the whole world is ordered in sacred and human things. For as there is one God, one pope, one emperor, there must be one Church. And thus it is the Roman emperor who must take measures to provide a remedy for this great mischief. He has therefore called together an assembly of the bishops of the empire, and of the other kingdoms, France, England, Spain, and Hungary, in order that they should in his presence decide which of the claimants should lawfully rule over the universal Church.¹

We are not here concerned with the question of the relation between the secular and the ecclesiastical authorities which was raised by this attempt to deal with the disputed succession to the papacy, we deal with Frederick's letter here only as illustrating his assertion of a special and unique position of the

¹ M. G. H., Legum, Sect. IV., Constitutiones, vol. i. 182, 'Enchyla Inviatona ad Episcopos Teutonicos':

"Quod in passione sua Christus diutius gladius contendit, hoc in Romana academia et in imperio Romano eruditis mirabili providentia declarasse, sum per hoc duo rerum capita, et principa totius mundi tam in divina quam in humana ordinatur. Quoniam unus Deus, unus populus, unus imperator sufficit, et una academie Dei esse debet, quod una dolore corda duces non posse, duos apostolos in Romana academia habere videmus. . . .

Ne in tanta discordia universalis academia persiddat possit, Romanum imperium quod ad remedium tam perennis mai divinae elementi providit, universale salutis debet sollicita providere et, ne tanta mala in academia Dei praeeminentia futuris casibus soliter observare. . . .

cursam sollemnem et generalen convventum omnium ecclesiasticiorum virorum in octava epiphanias Pappae celebrandam inductam, ad quam ambos qui se ducent Romanc pontifices vocavimus omnem episcoporum imperii nostri et aliorum regiorum, Franciae velbus, Anglorum, Hispanicum atque Ungarum, ut eorum in presentia nostra justo declarare examine, quos illorum regnum universalem academiam de novo debet obtineo."

empire. If we were to take the encyclical letter to the German bishops alone, we might well think that Frederick definitely claimed that the empire stood above all other political authorities. When, however, we take account of the other documents relating to the Council of Pavia, we observe that his tone is somewhat different. His letter to Henry II. of England has been preserved, and it is noticeable that in this the more pretentious phrases about the position of the empire are omitted, and that he confines himself to the invitation to send as many of his bishops and abbots as possible to the meeting at Pavia, that they may assist in restoring the peace of the Church.¹

And in another of these documents, a letter addressed to the Archbishop of Salzburg asking him to postpone his recognition of either of the claimants to the papacy, he tells him that he has entered into communication with the Kings of France and England, and asked them also not to accept either of the claimants unless he had been recognised by them all.²

There is, however, a passage in a letter of Henry II. to Frederick I. cited by Rahewin, which seems to recognise the superior authority of the emperor in a very large sense; he speaks of the emperor as having the right to command, and assures him that he will not fail in obedience.³ And Roger of Hoveden relates that Richard I. of England being a prisoner in Germany, and in order to procure his release from captivity, handed over his kingdom of England to the Emperor Henry VI.

¹ M. G. H., Legum, Sect. IV., Constitutiones, vol. i. 183: "Set quan hoc insan du desiderabile votum nostrum necessare curo precludunt, dictationem tuam modis quibus possumus euror: tum esse cupimus, qualesque de venter: et ad collegium episcoporum regnum tuum et abbatiam ahorumque orthodoxorum, quorum sapientia et religione Anglorum prefugit ecclesia, quotquot potes, nobis transmittas et predicto sacro conventii interesse facias, ut eorum ceterorumque ecclesiae sacerdotum virorum salutis desiderantes sed tantae commune unitas Romanae ecclesiae, eo mediante qui facta utraque unum, reformator et status ecclesiaenulla densa disseruntur turbine collibus, nostras temporum incolam in summa tranquilitate posset permanere."

There has survived a very significant letter written in 988 by Gerbert (afterwards Pope Sylvester II), in the name of Hugh, King of France, to the Emperor of Byzantium, which indicates very clearly the attitude of the newly established kingdom of the Western Franks. It is possible, indeed, as M. Havet has suggested, that the letter was never actually sent, but it is hardly the less significant. It expresses the desire for close and friendly relations, and, in order that these may be secured, proposes a marriage between Robert, the son of the French king, and the daughter of one of the emperors, and assures them that the French king will resist any attempt on the part either of the "Gauls" or the "Germans" to attack the Roman Empire. It is no doubt very probable that the project of a matrimonial alliance with Byzantium was suggested by the marriage of Otto II. with Theophano, and that the letter may represent the opinion or feelings of those who were emperors, or members of the empire. When we turn to the consideration of the question how far the sentiments of men in other western countries corresponded with them, we find ourselves in a somewhat different atmosphere.


2 Id. id., vol. iv. p. 37.

3 Id. id., vol. iii. p. 226.

CHAP. VII.] CONCEPTION OF A UNIVERSAL EMPIRE.

1 Gerbert, Epistolae, 111: "Basilio et C. imperatoribus orthodoxos, Hugo gratia Dei rex Francorum.


bons fiant perpetus, quoniam est nobis unicus filius, et ipsa rem, nec eit parem in matrimonio alicus esse possit, ait in unum, sanctae subvrinorum regum, filiam sanet imperii praecepto affectu quernurm."
to Pope John XIX. (1024-1033), he asserts that the Roman Empire, which once ruled over the whole world, is now broken up, and is ruled by many kings, and that the power of binding and loosing in heaven and earth belongs to the jurisdiction of St Peter. We are not now concerned with the ecclesiastical question, but the emphatic assertion of the contrast between the unity of the ecclesiastical authority and the fragmentary and divided nature of political authority is very noteworthy. And again, while as we have seen St Peter Damian in some places speak as though the world was united under the rule of the one emperor and the one Pope, in another work he expresses himself very differently, and contrasts the one Pope who rules over the world with the many kings whose authority is limited to their particular territories, and explains that this is the reason why the death of the Pope is notified throughout the world, while there is no reason why the death of a king should be thus announced.

There is then some evidence that the idea of the unity of the world continued to influence men's thoughts and expressions, that the tradition of the universal empire of Rome, and the great unity of the Carolingian empire was never wholly lost, and that from time to time it was asserted by emperors, or those who were under the imperial rule. On the other hand, we find occasional statements which seem to repudiate the conception of a unity of political control, and we can find no examples of any attempt seriously and practically to assert this. This does not mean that there was no conception of a unity of the Christian world as a single political entity, but that the idea of a single sovereign ruler over all Christendom as a whole was not generally accepted.
was in the main that of independent states, recognising no authority over them but that of God. We are therefore driven to the conclusion that while the tradition of a universal empire was not dead in these centuries, and while in those parts of Europe which were closely connected with the Empire the conception was always more or less present to men's minds, it is yet impossible to recognise that during the eleventh and twelfth centuries the conception had any living part in determining either men's ideals, or the principles and theory of the structure of society.\footnote{For a further discussion of this question, see vol. v. Part I. chap. 10.}

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CHAPTER VIII.
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SUMMARY.
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\footnotetext{There are three great conceptions expressed in the political literature of the Middle Ages, so far as we have yet examined it. The first is the principle that the purpose or function of the political organisation of society is ethical or moral, that is, the maintenance of justice and righteousness. We have seen in an earlier volume that this was continually and emphatically maintained in the political literature of the ninth century, and our examination of the general literature of the eleventh and twelfth centuries, and of the feudal law books to the thirteenth, has been sufficient to show that no one ever seriously questioned it. If there has been any doubt among modern scholars it has arisen from a misunderstanding as to the influence of St Augustine on the mediæval theory of the state, and from a hasty interpretation of some phrases of Hildebrand.

No doubt there lay behind St Augustine's treatment of the state a real difficulty which had its origin in the fact that, as we can see in the later philosophical systems of the ancient world and in the Christian theory of life, men had become more clearly aware of the existence of characteristics of human nature and personality which cannot be adequately expressed in the terms of the political organisation of society. It is this new apprehension of the nature of human life which is struggling for expression in St Augustine's 'De Civitate Dei.' His apprehension is often profound, but the expression of it is sometimes crude and ill-considered. As we have seen in the first volume, St Augustine at times seems to deny to the
State as such the character of justice, though at other times he speaks in different terms. But the difficulty is not to be measured by these hasty phrases of St Augustine. The difficulty lay in the fact that men had begun to apprehend that there are aspects of the moral and spiritual life which the coercive machinery of the state cannot adequately represent. This is no doubt the principle which lay behind the development of the conception of the independence of the spiritual power. It was conceived of as the embodiment of moral and spiritual ideals which could not be adequately represented by the temporal power. When the distinction was crudely conceived, the former was spoken of as being concerned with "divine" things and the latter with "secular." We cannot here discuss these questions adequately, we shall have to return to them when in our next volume we deal with the relations of the ecclesiastical and political powers in the Middle Ages. We can, however, recognise at once that behind the formal aspects of this question there lay great and profound difficulties, difficulties for which we have not yet found any complete solution.

It is necessary to recognise the existence of real perplexities for the medieval political thinkers. But, having done this, we must also recognise that the broad common-sense of these men refused to allow itself to be entangled in these perplexities to such an extent as to admit any doubt whether the State had a moral character and purpose. It is clear that no medieval thinker seriously doubted the moral function of the State, and that this moral function was the securing and maintaining of justice. Even when Hildebrand urged that the State had its origin in sin, he did not mean that the State was sinful. It may have been sin which made it necessary, but also it was the remedy for sin, the divinely appointed remedy for the confusion which sin produced, the means of curbing and restraining the sinful passions and actions of men.

This is the real meaning of the doctrine of the New Testament, and the Fathers, and of the Middle Ages, that the authority of the king is a divine authority. He is God's minister for the punishment of the wicked and the reward of the good. It is true that here again a certain confusion had crept in, owing mainly to some rash phrases of St Gregory the Great, and, as we have seen, there were some even in the Middle Ages who were carried away by this tradition into the impossible theory that the authority of the king was in such a sense divine, that he was responsible only to God, and that it was always unlawful to resist him even when his conduct was unjust and illegal. But again the robust good sense of the medieval political thinkers and the force of circumstances counteracted this influence. They believed firmly in the divine nature of the state, they looked upon the ruler as God's representative and servant, but only so far as he really and in fact carried out the divine purpose of righteousness and justice.

This, then, was the first principle of the political theory which we have been considering. And the second is closely related to the first, for it is the principle of the supremacy of law as the concrete embodiment of justice. Medieval thinkers upon politics were not disturbed by some of our modern perplexities, they were satisfied to regard the law of any society as the expression of the principle of justice for that society. It is very difficult for us to put ourselves back into the mood and temper of these times; we look upon all legal regulations as being at the best reasonable applications of general principles which make for the wellbeing of human life, we look upon laws as the expression of the judgment of the legislative authority, representing more or less adequately the judgment of the community, and normally we recognise the laws as reasonable, though not necessarily the best possible; we take them to be rules laid down by men yesterday or to-day, and perhaps to be changed to-morrow. Our difficulty is to make it clear that there ought to be, and to feel certain that there is, a real moral sanction behind them, and that they justly interpret the actual needs of society. To the men of the Middle Ages the law was a part of the local or national life; it had not been made, but had grown with the life of the community, and when men began to reflect or theorise on the
nature of law, they assumed that these customary regulations represented the principles of justice.

To the medi eval political theorist then the supremacy of justice meant the supremacy of law, and though the expression of this conception by John of Salisbury is stronger and more systematic than that of most writers of the period which we have been considering, yet it does not really go beyond their principles. To them the conception of an arbitrary authority was simply unthinkable, the distinction between the king who governs according to law and the tyrant who violates it, was not a rhetorical phrase, but the natural and normal expression of their whole mode of thought.

And if we now compare the conceptions which are embodied in the general political literature with those of the feudal lawyers, we find that they are substantially identical. Indeed Bracton and the authors of the Assizes of the Court of Burgesses of Jerusalem speak as sharply and definitely as John of Salisbury. "There is no king where will rules and not law," "The king is under God and the law," "La dame ne le sire n'en est seignor se non dou dreit," these phrases are as unequivocal as those of John of Salisbury, and their doctrine is the doctrine of all feudal lawyers.

The third great principle of medieval political theory is again related to the others, and it is the principle that the relation between the king and the people is founded and depends upon the mutual obligation and agreement to maintain justice and law. We have considered the clear and somewhat harsh terms in which this is expressed by Manegold of Lautenbech. It may be urged that he represents an extreme position which was not generally approved, but we must not allow ourselves to be misled into the judgment that the principles which he expressed were strange or unfamiliar. On the contrary, it is clear that he was only putting into definite if hard form a principle which was generally assumed as that which determined the relations between subject and ruler. This is, we think, the conclusion which must be drawn from the literature which we have just been examining, and our judgment is only confirmed when we turn to the strictly feudal literature. The feudal obligation may have once been conceived of as one of unconditional personal loyalty, but, as we find it in the feudal law books of the twelfth and thirteenth centuries, it is clear that this loyalty was limited and conditioned by the principle of the necessary fidelity of lord as well as of vassal to the mutual and legal obligations which each had undertaken.

Manegold may express the principle in one way, John of Salisbury in another, and the authors of the Assizes of Jerusalem in a third, but their meaning is the same. Manegold speaks of deposing the ruler who has broken his contract, John of Salisbury of the lawfulness of slaying the tyrant, the authors of the Assizes of refusing to discharge any of their feudal obligations to the lord who refuses to do justice to his vassal according to the law and the judgment of the court; the forms of expression are different but the principle is the same. The medi eval conception of contract is not a speculation of a pseudo-historical kind, related to some original agreement upon which political society was founded, but rather a natural and legitimate conclusion from the principle of the election or recognition of the ruler by the community, and the mutual oaths of the ceremony of coronation; it is an agreement to observe the law and to administer and maintain justice.
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