POLITICAL THEORIES OF THE MIDDLE AGE

BY

OTTO GIERKE

TRANSLATED
WITH AN INTRODUCTION
BY

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ERRATA.

pp. 44, 46, 66, 67. For *Leopold of Babenberg* read *Leopold of Bebenburg.*

p. 67. The new section should be numbered VIII not VII.

p. 150, note 158. Add to what is said of the opinions of Baldus the following:—

'But in Rubr. C. 10, 1, nr. 12, he holds that the *camera imperii* may in a secondary sense be said to belong to the Roman people; quia princeps repraesentat illum populum et ille populus imperium etiam, mortuo principe.'

INTRODUCTION.

HAD what is here translated, namely, a brief account of the political theories of the Middle Ages, appeared as a whole book, it would hardly have stood in need of that distorting medium, an English translation. Englishmen who were approaching the study of medieval politics, either from the practical or from the theoretical side, would have known that there was a book which they would do well to master, and many who were not professed students or whose interests lay altogether in modern times would have heard of it and have found it profitable. The elaborate notes would have shewn that its writer had read widely and deeply; they would also have guided explorers into a region where sign-posts are too few. As to the text, the last charge which could be made against it would be that of insufficient courage in generalization, unless indeed it were that of aimless medievalism. The outlines are large, the strokes are firm, and medieval appears as an introduction to modern thought. The ideas that are to possess and divide mankind from the sixteenth until the nineteenth century—Sovereignty, the Sovereign Ruler, the Sovereign People, the Representation of the People, the Social Contract, the Natural Rights of Man, the Divine Rights of Kings, the Positive Law that stands below the State, the Natural Law that stands above the State—these are the ideas whose early history is to be detected, and they are set before us as thoughts which, under the influence of Classical Antiquity, necessarily shaped themselves in the course of medieval debate. And if the thoughts are interesting, so too are the thinkers. In Dr Gierke's list of medieval publicists, beside the divines and schoolmen, stand great popes, great lawyers, great reformers, men who were clothing concrete projects in abstract

vesture, men who fashioned the facts as well as the theories of their time.

Moreover, Englishmen should be especially grateful to a guide who is perhaps at his strongest just where they must needs be weak: that is, among the books of the legists and canonists. An educated Englishman may read and enjoy what Dante or Marsiglio has written. An English scholar may face Aquinas or Ockham or even the repellent Wyclif. But Baldus and Bartolus, Innocentius and Johannes Andreae, them he has never been taught to tackle, and they are not to be tackled by the untaught. And yet they are important people, for political philosophy in its youth is apt to look like a sublimated jurisprudence, and, even when it has grown in vigour and stature, is often compelled or content to work with tools—a social contract for example—which have been sharpened, if not forged, in the legal smithy. In that smithy Dr Gierke is at home. With perfect modesty he could say to a learned German public 'It is not probable that for some time to come anyone will tread exactly the same road that I have trodden in long years of fatiguing toil.'

But then what is here translated is only a small, a twentieth, part of a large and as yet unfinished book bearing a title which can hardly attract many readers in this country and for which an English equivalent cannot easily be found, namely *Das deutsche Genossenschaftsrecht*. Of that work the third volume contains a section entitled *Die publicistischen Lehren des Mittelalters*, and that is the section which is here done into English. Now though this section can be detached and still bear a high value, and though the author's permission for its detachment has been graciously given, still it would be untrue to say that this amputating process does no harm. The organism which is a whole with a life of its own, but is also a member of a larger and higher organism whose life it shares, this, so Dr Gierke will teach us, is an idea which we must keep before our minds when we are studying the political thought of the Middle Ages, and it is an idea which we may apply to his and to every good book. The section has a life of its own, but it also shares the life of the whole treatise. Nor only so; it is *membrum de membro*. It is a section in a chapter entitled 'The Medieval Doctrine of State and Corporation,' which stands in a volume entitled 'The Antique and Medieval Doctrine of State and

Corporation and its Reception in Germany'; and this again is part of *Das deutsche Genossenschaftsrecht*. Indeed our section is a member of a highly organized system, and in that section are sentences and paragraphs which will not yield their full meaning except to those who know something of the residue of the book and something also of the controversial atmosphere in which a certain *Genossenschaftstheorie* has been unfolding itself. This being so, the intervention of a translator who has read the whole book, who has read many parts of it many times, who deeply admires it, may be of service. In a short introduction, even if his own steps are none too sure, he may be able to conduct some of his fellow-countrymen towards a point of view which commands a wide prospect of history and human affairs.

Staats- und Korporationslehre—the Doctrine of State and Corporation. Such a title may be to some a stumbling-block set before the threshold. A theory of the State, so it might be said, may be very interesting to the philosophic few and fairly interesting to the intelligent many, but a doctrine of Corporations, which probably speaks of fictitious personality and similar artifices, can only concern some juristic speculators, of whom there are none or next to none in this country. On second thoughts, however, we may be persuaded to see here no rock of offence but rather a stepping-stone which our thoughts should sometimes traverse. For, when all is said, there seems to be a genus of which State and Corporation are species. They seem to be permanently organized groups of men; they seem to be group-units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units. Let it be allowed that the State is a highly peculiar group-unit; still it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an immeasurable gulf and ask ourselves no questions about the origin of species. Certain it is that our medieval history will go astray, our history of Italy and Germany will go far astray, unless we can suffer communities to acquire and lose the character of States somewhat easily, somewhat insensibly, or rather unless we both know and feel that we must not thrust our modern 'State-concept,' as a German would call it, upon the reluctant material.

Englishmen in particular should sometimes give themselves

this warning, and not only for the sake of the Middle Ages. Fortunate in littleness and insularity, England could soon exhibit as a difference in kind what elsewhere was a difference in degree, namely, to use medieval terms, the difference between a community or corporation (*universitas*) which does and one which does not 'recognize a superior.' There was no likelihood that the England which the Norman duke had subdued and surveyed would be either *Staatenbund* or *Bundesstaat*, and the aspiration of Londoners to have 'no king but the mayor' was fleeting. This, if it diminished our expenditure of blood and treasure—an expenditure that impoverishes—diminished also our expenditure of thought—an expenditure that enriches—and facilitated (might this not be said?) a certain thoughtlessness or poverty of ideas. The State that Englishmen knew was a singularly unicellular State, and at a critical time they were not too well equipped with tried and traditional thoughts which would meet the case of Ireland or of some communities, commonwealths, corporations in America which seemed to have wills—and hardly fictitious wills—of their own, and which became States and United States[1]. The medieval Empire laboured under the weight of an incongruously simple theory so soon as lawyers were teaching that the Kaiser was the Princeps of Justinian's law-books. The modern and multicellular British State—often and perhaps harmlessly called an Empire—may prosper without a theory, but does not suggest and, were we serious in our talk of sovereignty, would hardly tolerate, a theory that is simple enough and insular enough, and yet withal imperially Roman enough, to deny an essentially state-like character to those 'self-governing colonies,' communities, commonwealths, which are knit and welded into a larger sovereign whole. The adventures of an English joint-stock company which happed into a rulership of the Indies, the adventures of another English company which while its charter was still very new had become the puritan commonwealth of Massachusett's Bay should

[1] See the remarks of Sir C. Ilbert, The Government of India, p. 55: 'Both the theory and the experience were lacking which are requisite for adapting English institutions to new and foreign circumstances. For want of such experience England was destined to lose her colonies in the Western hemisphere. For want of it mistakes were committed which imperilled the empire she was building up in the East.' The want of a theory about Ireland which would have mediated between absolute dependence and absolute independence was the origin of many evils.

be enough to shew that our popular English *Staatslehre* if, instead of analyzing the contents of a speculative jurist's mind, it seriously grasped the facts of English history, would shew some inclination to become a *Korporationslehre* also.

Even as it is, such a tendency is plainly to be seen in many zones. Standing on the solid ground of positive law and legal orthodoxy we confess the king of this country to be a 'corporation sole,' and, if we have any curiosity, ought to wonder why in the sixteenth century the old idea that the king is the head of a 'corporation aggregate of many[1]' gave way before a thought which classed him along with the parish parson of decadent ecclesiastical law under one uncomfortable rubric. Deeply convinced though our lawyers may be that individual men are the only 'real' and 'natural' persons, they are compelled to find some phrase which places State and Man upon one level. 'The greatest of artificial persons, politically speaking, is the State': so we may read in an excellent First Book of Jurisprudence[2]. Ascending from the legal plain, we are in a middle region where a sociology emulous of the physical sciences discourses of organs and organisms and social tissue, and cannot sever by sharp lines the natural history of the state-group from the natural history of other groups. Finally, we are among the summits of philosophy and observe how a doctrine, which makes some way in England, ascribes to the State, or, more vaguely, the Community, not only a real will, but even 'the' real will, and it must occur to us to ask whether what is thus affirmed in the case of the State can be denied in the case of other organized groups: for example, that considerable group the Roman Catholic Church. It seems possible to one who can only guess, that even now-a-days a Jesuit may think that the will of the Company to which he belongs is no less real than the will of any State, and, if the reality of this will be granted by the philosopher, can he pause until even the so-called one-man-company has a real will really distinct from the several wills of the one man and his six humble associates? If we pursue that thought, not only will our philosophic *Staatslehre* be merging itself in a wider doctrine, but we shall already be deep in the *Genossenschaftstheorie*. In any case, however, the law's old habit of co-ordinating men and 'bodies

[1] A late instance of this old concept occurs in Plowden's Commentaries, 234.
[2] Pollock, First Book of Jurisprudence, 113.

politic' as two kinds of Persons seems to deserve the close attention of the modern philosopher, for, though it be an old habit, it has become vastly more important in these last years than it ever was before. In the second half of the nineteenth century corporate groups of the most various sorts have been multiplying all the world over at a rate that far outstrips the increase of 'natural persons,' and a large share of all our newest law is law concerning corporations[1]. Something not unworthy of philosophic discussion would seem to lie in this quarter: either some deep-set truth which is always bearing fresh fruit, or else a surprisingly stable product of mankind's propensity to feign.—Howbeit, this rare atmosphere we do not easily breathe and therefore will for a while follow a lower road.

I.

A large part in the volume that lies before the translator is played by 'the Reception.' When we speak of the Renaissance and the Reformation we need not be at pains to name what was reformed or what was born anew, and even so a German historian will speak of the Reception when he means the Reception of Roman law. Very often Renaissance, Reformation and Reception will be set before us as three intimately connected and almost equally important movements which sever modern from medieval history. Modern Germany has attained such a pre-eminence in the study of Roman law, that we in England may be pardoned for forgetting that of Roman law medieval Germany was innocent and ignorant, decidedly more innocent and more ignorant than was the England of the thirteenth century. It is true that in Germany the theoretical continuity of the Empire was providing a base for the argument that the law of Justinian's books was or ought to be the law of the land; it is also true that the Corpus Iuris was furnishing weapons useful to Emperors who were at strife with Popes; but those weapons were fashioned and wielded chiefly by Italian hands, and the practical law of Germany was as German as it well could be. Also—and here lay the possibility of

[1] In 1857 an American judge went the length of saying 'It is probably true that more corporations were created by the legislature of Illinois at its last session than existed in the whole civilized world at the commencement of the present century.' Dillon, Municipal Corporations, § 37 *a*.

a catastrophe—it was not learned law, it was not taught law, it was far from being *Juristenrecht*. Englishmen are wont to fancy that the law of Germany must needs savour of the school, the lecture room, the professor; but in truth it was just because German law savoured of nothing of the kind, but rather of the open air, oral tradition and thoroughly unacademic doomsmen that the law of Germany ceased to be German and that German law has had to be disinterred by modern professors. Of the geographical and historical causes of the difference we need not speak, but in England we see a very early concentration of justice and then the rapid growth of a legal profession. The Year Books follow and the Inns of Court and lectures on English law and scholastic exercises and that 'call to the bar' of the Inn which is in fact an academically earned degree. Also long before Germany had universities, Roman law was being taught at Oxford and Cambridge, so that it would not come hither with the glamour of the Renaissance. A certain modest place had been assigned to it in the English scheme of life; some knowledge of it was necessary to the students of the lucrative law of the Church, and a few civilians were required for what we should call the diplomatic service of the realm. But already in the fourteenth century Wyclif, the schoolman, had urged that if law was to be taught in the English universities it ought to be English law. In words which seem prophetic of modern 'Germanism' he protested that English was as just, as reasonable, as subtle, as was Roman jurisprudence[1].

Thus when the perilous time came, when the New Learning was in the air and the Modern State was emerging in the shape of the Tudor Monarchy, English law was and had long been lawyers' law, learned law, taught law, *Juristenrecht*. Disgracefully barbarous, so thought one enlightened apostle of the New Learning. Reginald Pole—and his advice was brought to his royal cousin—was for sweeping it away. In so many words he desired that England should 'receive' the civil law of the Romans: a law so civil that Nature's self might have dictated it and a law that was being received in all well governed lands[2]. We must not endeavour to tell

[1] Wyclif, De Officio Regis (ed. Pollard and Sayle, 1887), p. 193: 'Sed non credo quod plus viget in Romana civilitate subtilitas racionis sive iusticia quam in civilitate Anglicana.'

[2] Starkey's England (Early Eng. Text Soc. 1878), 192—5.

the story of the danger that beset English law when the future Cardinal Archbishop was speaking thus: a glance towards Scotland would shew us that the danger was serious enough and would have been far more serious but for the continuous existence of the Inns of Court, and that *indoctissimum genus doctissimorum hominum* which was bred therein. Then late in the sixteenth century began the wonderful resuscitation of medieval learning which attains its completion in the books and acts of Edward Coke. The political side of this movement is the best known. Antiquarian research appears for a while as the guardian and renovator of national liberties, and the men who lead the House of Commons are becoming always more deeply versed in long-forgotten records. However, be it noted that even in England a certain amount of foreign theory was received, and by far the most remarkable instance is the reception of that Italian Theory of the Corporation of which Dr Gierke is the historian, and which centres round the phrase *persona ficta*. It slowly stole from the ecclesiastical courts, which had much to say about the affairs of religious corporations, into our temporal courts, which, though they had long been dealing with English group-units, had no home-made theory to oppose to the subtle and polished invader. This instance may help us to understand what happened in Germany, where the native law had not reached the doctrinal stage of growth, but was still rather 'folk law' than lawyers' law and was dissipating itself in countless local customs.

Italian doctrine swept like a deluge over Germany. The learned doctors from the new universities whom the Princes called to their councils, could explain everything in a Roman or would-be Roman sense. Those Princes were consolidating their powers into a (by Englishmen untranslatable) *Landeshoheit*: something that was less than modern sovereignty, for it still would have the Empire above it, but more than feudal seignory since classical thoughts about 'the State' were coming to its aid. It is noticeable that, except in his hereditary dominions, the Emperor profited little by that dogma of continuity which served as an apology for the Reception. The disintegrating process was so far advanced that not the Kaiser but the Fürst appeared as 'the Prince' of political theory and the Princeps of the Corpus Iuris. The doctors could teach such a prince much that was to his

advantage. Beginning late in the fifteenth century the movement accomplished itself in the sixteenth. It is catastrophic when compared with the slow and silent process whereby the customary law of northern France was partially romanized. No legislator had said that Roman law had been or was to be received in Germany; the work was done not by lawgivers but by lawyers, and from age to age there remained some room for controversy as to the exact position that the Corpus Iuris occupied among the various sources of law actual and potential. Still the broad fact remains that Germany had bowed her neck to the Roman yoke.

In theory what was received was the law of Justinian's books. In practice what was received was the system which the Italian commentators had long been elaborating. Dr Gierke frequently insists that this is an important difference. In Italy the race of glossators who were sincerely endeavouring to discover the meaning of classical texts had given way to a race of commentators whose work was more or less controlled by a desire for practically acceptable results, and who therefore were disposed to accommodate Roman law to medieval life. Our author says that especially in their doctrine of corporations or communities there is much that is not Roman, and much that may be called Germanic. This facilitated the Reception: Roman law had gone half-way to meet the facts that it was to govern. Then again, at a later time the influence of what we may call the 'natural' school of jurists smoothed away some of the contrasts between Roman law and German habit. If in the eyes of an English lawyer systems of Natural Law are apt to look suspiciously Roman, the modern Romanist will complain that when and where such systems were being constructed concrete Rome was evaporating in abstract Reason, and some modern Germanists will teach us that 'Nature Right' often served as the protective disguise of repressible but ineradicable Germanic ideas.

With the decadence of Nature Right and the advent of 'the historical school' a new chapter began. Savigny's teaching had two sides. We are accustomed to think of him, and rightly, as the herald of evolution, the man who substitutes development for manufacture, organism for mechanism, natural laws for Natural Law, the man who is nervously afraid lest a code should impede the beautiful processes of gradual growth. But then he was also

the great Romanist, the great dogmatist, the expounder of classical texts according to their true—which must be their original—intent and meaning. There was no good, he seemed to say, in playing at being Roman. If the Common Law of Germany was Roman law, it ought to be the law of the Digest, not the law of glossators or commentators or 'natural' speculators. This teaching, so we are told, bore fruit in the practical work of German courts. They began to take the Corpus Iuris very seriously and to withdraw concessions that had been made—some will say to national life and modern fact, others will say to slovenly thought and slipshod practice.

But that famous historical school was not only a school of historically minded Romanists. It was also the cradle of Germanism. Eichhorn and Grimm stood by Savigny's side. Every scrap and fragment of old German law was to be lovingly and scientifically recovered and edited. Whatever was German was to be traced through all its fortunes to its fount. The motive force in this prolonged effort—one of the great efforts of the nineteenth century—was not antiquarian pedantry, nor was it a purely disinterested curiosity. If there was science there was also love. At this point we ought to remember, and yet have some difficulty in remembering, what Germany, burdened with the curse of the translated Imperium, had become in the six centuries of her agony. The last shadow of political unity had vanished and had left behind a 'geographical expression,' a mere collective name for some allied states. Many of them were rather estates than states; most of them were too small to live vigorous lives; all of them were too small to be the Fatherland. Much else besides blood, iron and song went to the remaking of Germany. The idea of a Common Law would not die. A common legislature there might not be, but a Common Law there was, and a hope that the law of Germany might someday be natively German was awakened. Then in historical retrospect the Reception began to look like disgrace and disaster, bound up as cause and effect with the forces that tore a nation into shreds. The people that defied the tyranny of living popes had fallen under the tyranny of dead emperors, unworthily reincarnate in petty princelings. The land that saw Luther burn one 'Welsh' Corpus Iuris had meekly accepted another. It seemed shameful that Germans, not unconscious of

their mastery of jurisprudence, should see, not only in England, but in France and even the France of Napoleon's Code the survival of principles that might certainly be called Germanic, but could not be called German without a sigh. Was not 'a daughter of the Salica,' or a grand-daughter, reigning over the breadth of North America? And then, as might be expected, all manner of causes and parties sought to suck advantage out of a patriotic aspiration. The socialist could denounce the stern and bitter individualism, the consecrated selfishness, of the alien slave-owners' law, and the Catholic zealot could contrast the Christiano-German law of Germany's great days with the Pagano-Roman law in which disruptive Protestantism had found an unholy ally.

In all soberness, however, it was asserted that old German law, blighted and stunted though it had been, might yet be nursed and tended into bearing the fruit of sound doctrine and reformed practice. The great men were neither dreamers nor purists. Jacob Grimm once said that to root out Roman ideas from German law would be as impossible as to banish Romance words from English speech. The technical merits of Roman law were admitted, admired and emulated. Besides Histories of German Law, Systems were produced and 'Institutes.' The Germanist claimed for his science a parity of doctrinal rank with the science of the Romanist. He too had his theory of possession; he too had his theory of corporations; and sometimes he could boast that, willingly or unwillingly, the courts were adopting his conclusions, though they might attain the Germanic result by the troublesome process of playing fast and loose with Ulpian and his fellows.

Happier days came. Germany was to have a Civil Code, or rather, for the title at least would be German, a Bürgerliches Gesetzbuch. Many years of keen debate now lie behind the most carefully considered statement of a nation's law that the world has ever seen. Enthusiastic Germanists are not content, but they have won something and may win more as the work of interpretation proceeds. What, however, concerns us here is that the appearance of 'Germanistic' doctrines led to controversies of a new and radical kind. It became always plainer that what was in the field was not merely a second set of rules but a second and a disparate set of ideas. Between Romanist and Germanist, and again within each school,

the debate took a turn towards what we might call an ideal morphology. The forms of legal thought, the 'concepts' with which the lawyer 'operates,' were to be described, delimited, compared. In this work there was sometimes shewn a delicacy of touch and a subtlety of historical perception, of which in this country we, having no pressing need for comparisons, can know little, especially if our notion of an analytical jurisprudence is gathered from Austin's very 'natural' exploits. Of special interest to Englishmen should be the manner in which out of the rude material of old German law the Germanists will sometimes reconstruct an idea which in England needs no reconstruction since it is in all our heads, but which bears a wholly new value for us when we have seen it laboriously composed and tested.

II.

At an early moment in the development of Germanism a Theory of the Corporation, which gave itself out to be the orthodox Roman Theory and which Savigny had lately defined in severe outline, was assailed by Georg Beseler who lived to be a father among Germanists[1]. You will never, he said in effect, force our German fellowships, our German *Genossenschaften*, into the Roman scheme: we Germans have had and still have other thoughts than yours. Since then the Roman Corporation (*universitas*) has been in the crucible. Romanists of high repute have forsaken the Savignian path; Ihering went one way, Brinz another, and now, though it might be untrue to say that there are as many doctrines as there are doctors, there seems to be no creed that is entitled to give itself the airs of orthodoxy. It is important to remember that the materials which stand at the Romanist's disposal are meagre. The number of texts in the Digest which, even by a stretch of language, could be said to express a theory of Corporations is extremely small, and as to implied theories it is easy for different expositors to hold different opinions, especially if they feel more or less concerned to deduce a result that will be tolerable in modern Germany. The admission must be made that there is no text which directly calls the *universitas* a *persona*, and still less any that calls it *persona ficta*[2].

[1] Beseler, Volksrecht und Juristenrecht, Leipzig, 1843, pp. 158—194.

[2] It does not seem to be proved that the Roman jurists went beyond the 'personae vice fungitur' of Dig. 46, 1, 22. Any modern text-book of Pandektenrecht will introduce its reader to the controversy, and give numerous references. Here it may be enough to name Ihering, Brinz, Windscheid, Pernice, Dernburg and Regelsberger as prominent expositors of various versions of the Roman theory. Among recent discussions may be mentioned, Kniep, Societas Publicanorum, 1896; Kuhlenbeck, Von den Pandekten zum bürgerlichen Gesetzbuch (1898), I. 169 ff.

According to Dr Gierke, the first man who used this famous phrase was Sinibald Fieschi, who in 1243 became Pope Innocent IV.[1] More than one generation of investigators had passed away, indeed the whole school of glossators was passing away, before the Roman texts would yield a theory to men who lived in a Germanic environment, and, when a theory was found, it was found by the canonists, who had before their eyes as the typical corporation, no medieval city, village or gild, but a collegiate or cathedral church. In Dr Gierke's view Innocent, the father of 'the Fiction Theory,' appears as a truly great lawyer. He really understood the texts; the head of an absolute monarchy, such as the catholic Church was tending to become, was the very man to understand them; he found the phrase, the thought, for which others had sought in vain. The corporation is a person; but it is a person by fiction and only by fiction. Thenceforward this was the doctrine professed alike by legists and canonists, but, so our author contends, it never completely subdued some inconsistent thoughts of Germanic origin which found utterance in practical conclusions. In particular, to mention one rule which is a good touchstone for theories, Innocent, being in earnest about the mere fictitiousness of the corporation's personality and having good warrant in the Digest[2], proclaimed that the corporation could commit neither sin nor delict. As pope he might settle the question of sin, and at all events could prohibit the excommunication of an *universitas*[3], but as lawyer he could not convince his fellow lawyers that corporations must never be charged with crime or tort.

Then Savigny is set before us as recalling courts and lawyers from unprincipled aberrations to the straight but narrow Roman road. Let us bring to mind a few of the main traits of his renowned doctrine.

[1] Gierke, Genossenschaftsrecht, III. 279.

[2] Dig. 4, 3, 15 § 1.

[3] Gierke, Genossenschaftsrecht, III. 280.

Realm, since the one was instituted by divine ordinance and the other (1 Reg. viii.) 'extortum ad petitionem humanam.' Compare August. Triumph. II. q. 33, a. 1. Also Alvar. Pelag. I. a. 59 G (regnum terrenum, sicut ipsa terrena creatura sibi constituit tanquam ultimum finem,...est malum et diabolicum et opponitur regno coelesti) and 64 D—E (sordida regni temporalis initia).—Gerson, Op. IV. 648: the efficient cause of *dominatio* and of *coercitivum dominium* was sin.—Petr. Andl. I. c. 1: 'fuit itaque solum natura corrupta regimen necessarium regale'; but for the Deluge, instead of ownership and lordship, there would have continued to be, as there will be in another world, liberty, equality and community of goods under the direct government of God. See also Frederick II. in Petr. de Vin. ep. v. c. 1. [In an earlier part of his book, D. G. R. III. 125, 126, Dr Gierke has stated the doctrine of the sinful origin of the State that is found in Augustine's De civitate Dei.]

Ordination of State by Church.

17. Already Honorius Augustodunus, Summa gloria, c. 4, in Migne, vol. 172, pp. 1263—5, declares that, since soul is worthier than body, and priesthood than realm, the realm *iure ordinatur* by the priesthood; as the soul vivifies the body, so the priesthood *constituens ordinat* the realm: 'igitur quia sacerdotium iure regnum constituet, iure regnum sacerdotio subiacebit.'—So again, Hugo a S. Victore, De sacram. lib. II. pars 2, c. 4: the spiritual power is worthier than the temporal, 'nam spiritualis potestas terrenam potestatem et instituere habet, ut sit, et iudicare habet, si bona non fuerit; ipsa vero a Deo primum instituta est, et cum deviat, a solo Deo iudicari potest, sicut scriptum est: Spiritualis diiudicat omnia et ipse a nemine iudicatur': the spiritual is prior in time as well as in worth: thus in the Old Dispensation the priesthood was first instituted by God, and afterwards the royal power was ordained by the priesthood at God's command; so now in the Church the sacerdotal dignity consecrates the royal power, both sanctifying it by blessing and forming it by institution.—So in the same words Alexander Halensis, Summa Theolog., P. IV. q. X., memb. 5, art. 2. Then Aegid. Rom. De pot. eccl. I. c. 4, and Boniface VIII. in Unam Sanctam: 'nam veritate testante spiritualis potestas terrenam potestatem instituere habet et iudicare, si bona non fuerit.' Compare also Joh. Saresb., above Note 14, nd Thomas of Canterbury, who, in the passage cited in Note 10, proceeds to say: 'et quia certum est reges potestatem suam accipere ab Ecclesia, non ipsam ab illis, sed a Christo.' Vincent. Bellovac. lib. VII. c. 32.—A thorough statement by Alvar. Pelag. I. a. 36. 37 (regalis potestas est per sacerdotalem ordinata), 56 B, 59 —G (the spiritual is efficient and final cause of the temporal

power, and only in this way has the, in itself sinful, terrene realm a share in the sanctity of the celestial). August. Triumph. I. q. 1, a. 1 and 3, q. 2, a. 7, II. q. 33, a. 1 and 2 (the *imperium tyrannicum* is older than the priesthood, but the *imp. politicum, rectum et iustum* is established by the Popes for the defence and service of the Church). —Hostiensis, upon c. 8, X. 3, 34, nr. 26, 27.—Panormitanus, upon c. 13, X. 2, 1.—Konrad v. Megenberg, in Höfler, Aus Avignon, p. 24 ff.—A relationship of this sort between the two powers is already implied in the allegorical use of Sun and Moon (e.g. in Gerhoh v. Reichersberg, praef. c. 3), which becomes official from the time of Innocent III. onwards: c. 6, X. 1, 33, also lib. 1, ep. 104, vol. 214, p. 377, and Reg. s. neg. Imp. ep. 2, 32 and 179; for the moon borrows her light from the sun (ep. 104 cit.). The yet commoner comparison with Soul and Body effects the same purpose, for the soul was regarded as the formative principle of the body. See Honorius Augustod. as above, and Ptol. Luc. De reg. princ. III. c. 10 (sicut ergo corpus per animam habet esse, virtutem et operationem...ita et temp. iurisdict. principum per spiritualem Petri et eius successorum).

The State an Ecclesiastical Institution.

18. The thought that in the last resort the State is an Ecclesiastical Institution is already being expressed when, on the one hand, the two powers have assigned to them respectively the ghostly domain and the corporeal, and, on the other hand, corporeal purposes are declared to be mere means for ghostly purposes. See Gregor. VII., lib. 8, ep. 21; Innoc. III., Respons. in consist. in Reg. sup. neg. Imp. ep. 18, p. 1012 ff.; c. 6, X. 1, 33. Thom. Aquin., De reg. princ. I. c. 14—5: the priests have the care of the ultimate end; temporal kings have merely the care of antecedent ends: 'ei ad quem finis ultimi cura pertinet, subdi debent illi ad quos pertinet antecedentium finium, et eius imperio dirigi.' See also Thom. Aq. in libr. II. Sent. dist. 44 in fine, and Summa Theol. II. 2, q. 60, a. 6 ad. 3. Vincent. Bellov. lib. VII. 3 and 32. Aegid. Rom., De pot. eccl. II. c. 5: 'potestas regia est per pot. eccl. et a pot. eccl. constituta et ordinata in opus et obsequium ecclesiasticae potestatis.' Aug. Triumph. I. q. 1, a. 8: 'temporalia et corporalia...ad spiritualia ordinantur tanquam instrumenta et organa.' Alv. Pel. I. a. 37 P and R, a. 40 and 56. Durandus a S. Porciano, De origine iurisdictionis, qu. 3: 'temporalia quae ordinantur ad spiritualia tanquam ad finem.' Panorm. c. 13, X. 2, 1.

The sphere of Temporal is defined by

19. To this effect already Deusdedit, Contra invasores, lib. III. sect. 5 et 6 § 13, p. 108. Petri Exceptiones, I. c. 2, in Savigny, Gesch. des r. R., II. 322. Dictum Gratiani upon c. 6, Dist. 10.

Part of the Church.

ences as to the active participation of the laity in the constitution of the Church. Comp. Randuf, c. 3.

The Laity and the Election of Popes.

209. Ockham, Dial. III. tr. 2, l. 3, c. 4—15: refuting opinions which would attribute this right only to the Canons, or the Clergy, or the Emperor.

The Emperor's part in Papal Elections.

210. Ockham, l. c., c. 5, 7, 12 (vice omnium eligeret): not as Emperor (c. 2, 3, 13), nor by the authority of the Pope (c. 5, 7). Comp. Octo q. IV. c. 6; also III. c. 8, and I. c. 17.

The Temporal Magistrate as Representative of the Laity.

211. See e.g. Ockham, Octo q. III. c. 8, Dial. I. 6, c. 85, 91—100.—So too Wyclif and Hus, rejecting the severance of Clergy and Laity, end by placing the ecclesiastical power in the hands of the State. See Lechner, Johan v. Wiclif, I. p. 566 ff. and 597 ff.

The Objectification of Office or Dignity.

212. [Dr Gierke here refers to other parts of his work in which he has given copious illustrations of this matter. The office or dignity can be 'objectified,' i.e. conceived as a 'thing' in which rights exist, and which remains the same while men successively hold it; and then again it can be 'subjectified' and conceived as a person (or substitute for a person) capable of owning things. In the present note he cites from Baldus 'dignitas...vice personae fungitur,' and refers to a legal opinion touching a mitre which the deposed John XXIII. was detaining from Martin V. and which was said to belong to the (subjectified) Apostolic See.]

The Prelate as Representative of his Church.

213. [Our author here refers to his treatment of this subject in other parts of his book. It was generally agreed that, although the Prelate was very often entitled solely to exercise those rights which legal texts ascribed to his *ecclesia*, still he was not the *ecclesia*. Divers analogies were sought. He acts 'sicut maritus in causa uxoris'; or again, he is the *tutor* and the *ecclesia* is his *pupillus*. They all imply that, beside the Prelate, there is some other person concerned. Then practical inferences were drawn: e.g., a Prelate may not be judge *in causa propria*; but it is otherwise *in causa ecclesiae suae*.]

Is the Pope the Church?

214. Only in this sense 'papa ipse ecclesia' (e.g. Huguccio, l. c., p. 263), 'papa est sedes apostolica' (Dur. Spec. I. 1 de leg. § 5, nr. 1), 'ecclesia intelligitur facere quod facit papa' (Joh. And. Nov. s. c. 1 in S xto, 2, 12, nr. 1). Comp. Domin. Gem. Cons. 93, nr. 12; Cardin. Alex. in summa D. 15 (what the head does, the body does); Jacobat., De conc. IV. a. 7, nr. 29—31, VI. a. 3, nr. 41 and 58 ff.: the present Pope alone represents the whole church and is thus *ecclesia corporalis*: such also is the case of a Bishop in those matters in which the counsel, but not the consent, of the Chapter is requisite.

215. Ockham, Dial. I. 5, c. 25: only within certain limits is

Is the Pope's Representation of the Church unlimited

the Pope 'persona publica totius communitatis gerens vicem et curam.' Zabar. c. 6, X. 1, 6, nr. 16: non solus sed tanquam caput universitatis. Gerson, De aufer. c. 8—20, De pot. eccl. c. 7. Nic. Cus. I. c. 14—17, II. c. 27 ff. Ant. Ros. II. c. 20—24, III. c. 16—17.

Representation of the Empire by the Emperor.

216. Baldus, Rubr. C. 10, 1, nr. 12, 13, 18: princeps repraesentat illum populum et ille populus imperium etiam mortuo principe; but 'princeps *est* imperium, *est* fiscus,' because only in him does the Empire live, will and act. Cons. III. c. 159, nr. 5: 'ipsa respublica repraesentata' can be bound by the acts of the Emperor. Also Ockham, in Note 210 above, and Zabarella in Note 192.

Representative Character of Kingship.

217. Already Joh. Saresb. IV. c. 3: the king 'gerit fideliter ministerium,' if he 'suae conditionis memor, universitatis subiectorum se personam gerere recordatur'; compare c. 5. Thom. Aquin. Summa Theol. II. 1, q. 90, ad 3: Ordinare autem aliquid in bonum commune est vel totius multitudinis vel alicuius gerentis vicem totius multitudinis: et ideo condere legem vel pertinet ad totam multitudinem vel pertinet ad personam publicam quae totius multitudinis curam habet. So again ib. 97, a. 3. Mars. Pat. Def. pac. I. 15: when the rulers (*principantes*) act within the sphere constitutionally assigned to them (secundum communitatis determinationem legalem), their act is that of the whole community (hoc facientibus his, id facit communitas universa). Baldus, Consil. 159, nr. 5 and especially 1 Feud. 14, pr. nr. 1: 'The city of Bologna belongs to the Church!' exclaims Baldus, 'Much rather to the Bolognese! For the Church has no authority there, save as (*tanquam*) the Republic, of which Republic it bears the name and image. Even so the city of Siena belongs to the Kaiser, but more to the Sienese: for republic, fisc, and prince are all one; the *respublica est sicut vivacitas sensuum*; the fisc is the stomach, purse and fastness of the republic; therefore the Emperor would be *quasi tyrannus* if he did not behave himself as the Republic, and such are many other kings who seek their own profit: for he is a robber, a *praedo*, who seeks his own profit and not the profit of the owner.' [Dr Gierke gives this interesting passage in Latin.] See also nr. 2: the office of ruler (*dignitas*) is inalienable, being 'totius universitatis decus.' Barth. Salic. l. 4, C. 2, 54: the *civitas* as such can demand a *restitutio in integrum*, even if the Ruler who acted in its name profited by the transaction: and, despite the *translatio*, this holds good of the *respublica imperii*. Jason, l. c., nr. 8. Nic. Cus., above in Note 171.

The Monarch's Double Personality.

218. Baldus, Cons. III. c. 159, nr. 5: loco duarum personarum rex fungitur; I. c. 271, nr. 4: bona propria...non tanquam rex, sed tanquam homo et animal rationabile. Alex. Tart. l. 25 § 1, Dig. 29,