# 1

# Medieval Political Ideas and Medieval Society



The public triumph of Christianity in the fourth century (discussed in volume 1), established the context for the future development of that Latin, Western European political theorizing that we now call medieval political thought. In order to treat the centuries from the fifth to, say, the fifteenth as the *Middle* Ages, we are already complying with a later, retrospective, even pejorative perspective on this period. 'What is *middle* about the Middle Ages?' we might ask.

This view stems from the eighteenth century at least, at a time when history began to be seen as a story of humanity's progressive improvement and ultimate release from the illusions of religion and myth. The period from the fifth to the fifteenth centuries – a thousand years of European cultural and political development – was considered open to characterization as a monolithic hiatus, a decline from ancient philosophical reason, the dark ages, the 'age of faith', a period 'in the middle' between the particular reason of the ancients and that universal reason of the 'moderns' that putatively began in what is known as the sixteenth-century Italian Renaissance and reached its apex in the eighteenth-century Enlightenment. It was judged that medieval people wrote in a barbarized Latin and were oppressed by two forms of arbitrary rule: of feudal lords and institutionalized religious prejudices. It is the purpose of this volume to show that this long period in the Latin West was anything but monolithic, that there was no such thing as 'the medieval mind', that there are more difficulties than are usually acknowledged in distinguishing the end of the Middle Ages and the beginning of the Renaissance, and clearly, no one living at any time *between* the age of Augustine and the age of Machiavelli thought of themselves as a dweller 'in-between ages', which is what 'medieval' means.

These strange locutions, 'Middle Ages' and 'medieval', have none the less passed into our accepted academic periodization of the past. And there is a lively temptation to drop the 'middle' from examination and leap from the ancients to the moderns in university courses treating the history of political thought, following the misguided assumption that European political discourses and practices owe the Middle Ages very little. In fact, however, we owe the Middle Ages almost everything, and not only their very distinctive ways of reconstructing and passing on the ancient philosophical legacy of political theorizing. The Middle Ages established its own agenda and a collection of different political discourses which would either be absorbed, transformed or argued against until the early-modern period. But most importantly, Western Europe is overwhelmingly indebted to the medieval creation of institutions and practices which could never have developed either in ancient Greece or Rome.

Today the political *theory* of the ancients has survived for us, reinterpreted and reconstructed often as philosophically coherent discourses that have little to do with the cultures from within which they were generated, but the *practices* of the ancient Athenians (for instance, direct democracy where the *polis* was its men and not the modern state and its governing bureaucracy) were forgotten or rejected.[1] The Greek notion – found in Aristotle – that man is a political animal would be revived in the Middle Ages but rejected by many of Europe's early-moderns who thought that politics was the consequence of man's fear of death and aversion to pain rather than man's capacity for public deliberation and co-operative agency. If early-moderns sought an ancient society to emulate, they often chose Sparta and almost never Athens.

Rome, however, would play a larger role in the self-conscious construction of Europe's future. Not only did the Middle Ages emerge out of a late and declining Roman imperial reality; early medieval institutions and practices would be selectively saturated with the law of imperial Rome. But when the self-conscious, comprehensive revival of Roman law was undertaken in the twelfth century, it would be to the sixth-century Christian Emperor Justinian's codification of Roman law that they would turn. Very little of Cicero's Rome survives there and they did not possess the text of his *De re publica*. Therefore, even when during the Middle Ages and thereafter Europeans thought themselves to be the heirs of Rome, we will find them to have pieced together from disparate and fragmentary sources what they thought the Roman republic to have been, and then they reconstructed the Romans' republicanism in order to open up in practice something that might be seen as akin to a representative commercial democracy, where the people,[2] when gathered together, constituted the sovereign and made law by voluntarily and explicitly consenting to it. Medieval political theorists and practitioners were to take literally and then transform the maxim of late Roman law that 'what touches all should be approved by all' (*quod omnes tangit ab omnibus tractari et approbari debet*), wrenching it out of the context in Justinian's *Codex* where they found it, and thereby emphasizing a deliberative participation by the 'people' in consenting to the laws. Furthermore, the people would be declared capable of electing removable public officials as the executive government. Medieval governors would come to be described as directive functionaries, public administrators of a collective good which some interpreted as a peaceful, law-governed and self-sufficient life of which all men were equally aware, including those not considered experts in law and who had few possessions.[3] This was something of which the ancient Romans whom we have examined would never have approved because 'the people' for them were never to be considered a deliberative body.

Let us recall that citizenship in ancient republican Rome did not give every citizen the right to engage in government, but rather to be governed by those who were more than mere administrators. As Gruen has observed, 'a resplendent elite governed the Roman Republic'.[4] For ancient Romans, those who were most engaged in administer-

1 For a distinctive perspective see P. Rahe, *Republics, Ancient and Modern: classical republicanism and the American Revolution* (Chapel Hill, NC, 1992).

2 Or what they thought of as their representative: 'the weightier part', or the 'greater and sounder part', the *valentior pars*, or the *maior et sanior pars*.

3 See chapter 4 on Marsilius of Padua's *Defensor pacis (Defender of peace)*.

4 E. Gruen, 'The Exercise of Power in the Roman Republic', in A. Molho, K. Raaflaub and J. Emlen, eds, *City-states in Classical Antiquity and Medieval Italy* (Ann Arbor, MI, 1991), pp. 251–67: 'To be sure, the populace could make its needs felt – and not just as clients of individuals or factions. And Roman leaders had to take those needs

ing the *respublica* were also owners with a special *dignitas*, inherited or merited, indicating an acknowledged differential in what was due them: they differentially possessed more of the property that *was* the *respublica* and were likewise differentially obliged to engage in the maintenance of the state's law. Ancient Roman citizenship was a matter of degree.[5]

We recall that Cicero had made plain in his *On Duties* that social utility was the highest good and there were certain natural governors who recognize their duties of public service as an aspect of their own individual interest. And he argued that private property derived from custom but that the *rights* to private property were the creations of Roman civil law. The 'state' came into being through men's construction of an agreed means to preserve and stabilize customary agreements to what is differentially mine and thine, creating civic rights, enforceable in law. Where Cicero distinguished between all men as natural appropriators on the one hand, and on the other, men as legally entitled, unequal possessors under civil law, certain medieval theorists[6] would use these Roman arguments but transform them. By integrating Christian theological views concerning the nature of man and his duty to labour, theorists like John of Paris would alter Cicero's customary private property into a universally applicable labour theory of *natural rights* to ownership *prior* to the 'state'. John of Paris would argue that it was these prior rights which the 'state' was entrusted to serve and stabilize by fair administration and adjudication in property disputes. This medieval argument, significantly revising Cicero's, would be revived in the seventeenth century by Locke in his *Second Treatise of Government*.

As we saw in volume 1, ancient Roman magistrates consulted the aristocratic Senate on important issues and before introducing a bill to one of the popular assemblies magistrates were meant to set it before the Senate. This meant that the Senate was the only deliberative body and it had not only a firm grip on legislation but also defined the sphere of activity of the magistrates. When Cicero described his ideal republican mixture, he went even further than what appears to have been practice in order to eliminate any popular balance to his aristocratic republic: the people should maintain their sense of *libertas* while the *boni* retain their authoritative influence. But as we shall see, the practice of citizens collected together with a freedom of discussion and with the power to initiate business from the floor of the debating chamber would be a medieval institution based on *their* developed practices, especially in city communes. During the Middle Ages there would also develop a notion of rights that were other than acquired civic rights. The influence of Christian theology would be felt in discussions of a Christian liberty that

into account, at least on occasion. But the postulate that *nobiles* framed policies and actions to cater to that constituency misses the mark. It will be more fruitful to adopt a different mode of analysis: the exploitation of popular discourse to entrench the authority of the establishment' (p. 254). The aim of the Roman nobility 'was not to secure legitimation from the *populus* but to employ popular rhetoric to check challenges from *novi homines* or curb the ambitions of individual *nobiles*. Pressure by the populace played little part' (p. 267). See also W. Eder, 'Who Rules? Power and Participation in Athens and Rome', in Molho, Raaflaub and Emlen, *City-states*, pp. 169–96.

5 See W. W. Buckland, *A Text-book of Roman Law from Augustus to Justinian*, revd P. Stein, 3rd edn (Cambridge, 1975), pp.86–7 on privileged classes of citizens in relation to citizens with more restricted rights. Also T. J. Cornell, 'Rome: the history of an anachronism', in Molho, Raaflaub and Emlen, *City-states*, pp. 53–70, on both the artificial construct of the early Roman ideal of the integrated political community, the city-state, and the increasing separation of the aristocracy from the rest of the population.

6 John of Paris, *De potestate regia et papale* (*On royal and papal power*); see chapter 3, below.

could not be alienated or contravened, whatever freedoms were conventionally established by civil law.

One of the attitudes medievals did absorb from Romans rather than from Greeks was the notion of the city as open to outsiders who could be freely admitted and assimilated without the requirement of having been born a citizen. Citizenship could be acquired by service to the 'state'. How this was applied during the Middle Ages, however, and how the legal concept of citizenship was further defined beyond received Roman law came about through the medieval use of Roman law texts as little more than authoritative reference points for their own original solutions, and these emerged from the constant pressure on medieval civil lawyers to administer the law in practice, *de facto*, rather than simply to apply the rules *de jure*. As Quaglioni has demonstrated, medieval jurists gave preference to the substance of citizenship rather than simply to the abstract principles of Roman legal rules, and in so focusing developed new vocabularies as well as institutions to suit lived practice.[7] We shall see that it was the peculiar contractual genesis of medieval city communes, where the citizen was an active rather than passive member of the city (this activity resulting from *his individual will actually to contract with the commune)*, that highlighted an un-Roman fusing of socio-economic principles and assumptions regarding authority and power that were typical both of feudal society and city communes, with forms of the Roman patrimonial system. There would be a spectrum along which the feudal *fideles* (the free vassal bound by oath to his overlord)[8] and the Roman *civis* (citizen) met. From medieval jurisprudence would develop the legacy to the early-modern and contemporary European world of the notion of acquired or naturalized *and* native citizenship as a *fictio iuris* (a legal fiction).[9] It was from the medieval jurists, responding to medieval practice, that our notion of citizenship as signifying merely the *juridical* status of those who are part of a state was to come.

In place of ancient Greek and Roman practices then, there emerged organized ways of life during the Middle Ages which came to serve, however unconsciously, as the foundations of some of the dominant attitudes that characterized the government of early-modern and modern cities and states. Indeed, Christianity as put into practice in monasteries from the sixth century onwards would emphasize a very unclassical attitude to work, favouring an ethic of toil in which labour was a form of prayer suitable both to fallen man as well as to God's only son, who on earth was a carpenter's son and his disciples workmen. Unlike ancient attitudes to economics, the medievals would give economy a central place in what they came to call 'practical moral philosophy' as well as in the constitutional organization of cities. Furthermore, medieval culture would reverse the ancient Greek journey from sacral kingship to politics by re-establishing a king–priest along a late Roman imperial model, who was at the head of a corporate endeavour, there to maintain peace, order and economic wealth. And the ancient philosopher, a theorist in the ancient city's midst, would with the help of a reinterpreted Cicero and Aristotle become the university-trained bureaucrat, actively engaged in policy-

7 D. Quaglioni, 'The Legal Definition of Citizenship in the late Middle Ages', in Molho, Raaflaub and Emlen, *City-states*, pp. 155–67.

8 See below, pp. 13ff.

9 E. Cortese, 'Cittadinanza (Diritto intermedio)', in *Enciclopedia del Diritto*, VII (Milan, 1960), pp.132–40. These were notions that went beyond a mere repeat of the Roman patterns. See Quaglioni, 'The Legal Definition', p. 165.

formation and dissemination in royal and ecclesiastical courts. While these developments occurred 'on the ground' as it were, we shall also see that during the Middle Ages educated men continued to use the discourses of the ancient traditions with which we became familiar in volume 1, applying both ancient philosophical and biblical insights to their own distinctive conditions and experiences. Aristotle's *polis* would be reconfigured as the medieval *civitas*, and Cicero's *respublica* would be applied to *any* well-governed regime, be it a monarchy, a republic or the church itself, where the common, public good was said to be served.

There is no doubt that in general 'medieval persons' would have thought of themselves as Christians and would have been aware to some degree that spiritual considerations played a role in helping to establish the aims and spheres of influence of temporal power. Medieval political discourses would be forged out of the shifting relationships between the thought and institutions which came to structure both the church and the 'state', giving substance and structure to the spiritual and the temporal spheres of life, indeed to the very assumption that there *were* two such spheres where the church and the state had separate but interlocking jurisdictions.[10]

## Medieval Sources

Our sources for medieval political thought are very varied: they are the productions of Christian theologians with teaching posts in universities or in the schools associated with different religious orders, Christian philosophers who taught in the arts faculties of medieval universities, Christian historians, often attached to monastic centres, Christian bureaucrats in the service of temporal or spiritual institutions, and Christian jurists, specializing in Roman and customary, or in church (canon) law. Indeed, we could add poets, dramatists, local chroniclers, merchants, religious men and women, anyone who acquired a sufficient degree of literacy and the standard genres of current, learned discourse to write about the ordered processes and ideals of their lives as they saw them.

But there are virtually no professionals whom we could call with any historical accuracy 'political theorists' during the Middle Ages. What is currently considered the autonomous discourse of politics is a development of the emergence of the early-modern state in Europe. In an important and perhaps surprising sense, the autonomy of early-modern political discourse developed outside the university and in opposition to what the university milieu had become in the early-modern period. Hobbes's scorn for the seventeenth-century university's slavish attitude to Aristotle and other 'authorities' led him to develop a 'science' of politics, based on human experience, that was meant to be autonomous in the sense that it drew eclectically on past thinking and yet owed nothing to the university as an institution of learning with its settled categories of discourse. But prior to the seventeenth century, politics was not a distinctive discipline with its own subject matter and methodology. It had not yet disengaged itself either from the dominance of practical moral philosophy and theology as studied in medieval universities, or from ancient rhetorical and ethical discourse as studied in Renaissance humanist schools.

10 See A. Black, 'Individuals, Groups and States: a comparative overview', in J. Coleman, ed., *The Individual in Political Theory and Practice* (Oxford, 1996), pp. 329–40.

As we shall see, in the Renaissance humanist schools as in medieval universities, the discussion of the organization of human communities and of behaviour considered appropriate within communities of men, alongside analyses of moral right, of virtue and of personal responsibility for one's acts, be they the acts of ruler or ruled, were still tied to ancient authoritative discourses. In the early stages of a medieval or Renaissance student's education these discourses were first confronted in the process of learning to read and write a foreign language, Latin. Students across Europe were taught to read ancient Latin texts of holy scripture, Roman history, the Roman moralists and the Latin church Fathers. Using the texts of ancient Roman grammarians and rhetoricians (themselves translations and commentaries on ancient Greek theories of grammar and rhetoric), and supplementing these with Latin translations of Aristotle's rhetorical and logical treatises, medieval and Renaissance students absorbed theories about the relation between human thinking and language. They absorbed explicit and sometimes conflicting theories concerning the relation between reason and emotion and between persuasive speech and collective action. They learned how to distinguish between virtuous and vicious behaviour and between legitimate governance and its opposite. Medieval and Renaissance students were being prepared for professions in the non-academic world of 'state' and church bureaucracies in much the same ways. Education was vocational and for this reason we can regard Renaissance humanist schools as providing a very similar education, but in truncated form, to that provided by medieval university arts course programmes. Both were the heirs of ways of speaking about what we would call 'the ethical' and 'the political' that were inherited from the ancient Roman and Greek worlds, filtered through Christian perspectives. How they respectively reinterpreted and used these ancient masters and their 'classical' agenda is, in part, our concern here.

It will be seen that the specific historical milieux in which those men lived who wrote what *we* recognize as 'political theory' exercised an enormous influence on what they said about 'the political'. And they did not all say the same things, not least because the respective agendas of theologians, philosophers, bureaucrats and jurists were not the same. Furthermore, we shall see that when they wore different professional 'hats' they 'spoke' different languages: the language of the Latin Bible, the language of the theology of the church Fathers, of Christianized Platonism, of Roman civil law, of canon (church) law, of feudal and customary law, of Ciceronian rhetoric, and of Aristotelian ethical and political philosophy.[11] Latin remained the language of most political theorizing during the Middle Ages, broadly construed, and when the vernaculars came into their own, many of the earlier scholarly Latin terms and expressions would be 'translated' and put to new use. But during the medieval and Renaissance periods there was never a wholesale and self-conscious attempt, as there would be in the seventeenth century, to reformulate the ethical and political world 'from the beginning' and as though men were naturally non-social isolates who had to create politics as convention. Medieval and Renaissance Latin and vernacular texts always related back to the already formulated 'languages' of moral discourse that were found in a wide range of authoritative ancient texts which insisted that men were naturally embedded in the social. We shall see that Machiavelli, the so-called first modern, the so-called 'father' of what *we* mean by political science, was no exception to this. In short, when modern historians of political ideas approach the texts of the Middle Ages, they tend to study a range of discourses that collectively are

11 See A. Black, *Political Thought in Europe 1250–1450* (Cambridge, 1992), pp. 1–13.

called by them 'political thought'. But it is our aim here to show how, for the Middle Ages, 'political thought' is a rather messy and unstable category, not least because it is everywhere and it invaded all genres.

If the political thought of the Middle Ages begins in late antiquity with its particular reinterpretation of the legacy of ancient philosophy, it arguably extends to the middle of the seventeenth century, even beyond. The beginnings are clearer than the end. The beginnings of medieval political thinking are to be found in the rich mixture of Greco-Roman and biblical concepts which we have already seen to have been integrated into Augustine's *City of God*. But it is in the long period of transition from the world of Constantine's Roman Empire to a very different Western Europe in the eighth and ninth centuries that the context for the development of distinctively medieval political ideas was established.[12]

## The Historical Context of Early Medieval Political Thought

Barbarian kingdoms emerged in the fifth and sixth centuries, peopled by heirs of those Germanic tribes who had settled within Roman borders and who eventually triumphed as the survivors of the collapse of the Roman administration. Barbarian kingdoms, with their own regional customs, gradually absorbed diluted remnants of Roman civilization, but their territorial rule would became the paradigm of medieval rule: *territorial kingship*. The slow decline and fall of the Roman Empire, from the later fifth until the eighth centuries, can be seen as the gradual replacement of a centralized Roman administration that had developed during the imperial period, with barbarian leadership in those Western European provinces previously captured and dominated by Rome.

The period from the end of the fifth to the eighth centuries has a character of its own. It saw the development of a strong ecclesiastical network of governance throughout Europe to replace the secular administration of old Rome. It saw the development of monasteries as alternative ways of living to those established in secular society and its social groupings. It saw the collection and final codification of Roman law by the Eastern Emperor Justinian in the sixth century which provided Europe with the *Institutes*, the *Digest*, the *Codex* and the *Novellae* of imperial Roman law, all collected into several texts for study. These collected texts are what are referred to as civil law, the law of the Roman civilian lawyers. This Roman law, originally based on precedent, then codified and to be appealed to by anyone interested in a *centralized* theory and practice of imperial Rome, would at first live in libraries and fall into relative disuse as barbarian kingdoms came to replace with their own laws – themselves influenced by Roman categories – the once centralized jurisdiction of the Roman Empire. Justinian's Roman law as a corpus would only be revived when in the eleventh century kings were made aware of this body of law that pre-dated the institution and law of the church and they saw it as a means to bolster temporal autonomy against the claims of the church.

With the flooding into Western Europe of peoples, some of whom were not converted to Christianity and who had their own customary laws suitable to warring,

12 The essential background text is J. H. Burns, ed., *The Cambridge History of Medieval Political Thought c. 350–c.1450* (Cambridge, 1988) (henceforth *CHMPT* (1988)), with its extensive bibliography. Also see the excellent J. Canning, *A History of Medieval Political Thought 300–1450* (London, 1996).

wandering and illiterate people, and with their infiltration of the Roman army and their partial Romanization, a once Mediterranean-led culture, dominated by antiquity, became a tribal, regionalized Europe, gradually left to its own resources. The kingdoms of Visigothic Spain, Frankish Gaul, the Lombards in Italy, and the Anglo-Saxon and Celtic kingdoms of the British isles emerged. The story of the sixth to eighth centuries is in part a story of the evangelization and conversion to Catholic Christianity of these barbarian successor kingdoms. This was spearheaded by missionaries sent by the Roman church and its first bishop, the pope of Rome. Western Europe during these centuries not only saw the conversion to Catholic Christianity of barbarian kingdoms within the limits of the Western empire, but also their progressive withdrawal from the sphere of imperial influence in Byzantine Constantinople. In the Byzantine East, a different history unfolded where this Greek-speaking part of the Roman Empire of antiquity more or less endured and the Eastern church never adopted the kind of independent ecclesiastical claims that would emerge in the West.

During the seventh century Palestine and North Africa had already been conquered by the armies of the new religion of Islam and by the eighth century Islam had conquered Spain, parts of southern France, and was only stopped in its advance northwards by the leader of the Franks, Charles Martel, at the battle of Poitiers. With the Mediterranean no longer the focus of what remained of Latin Europe, Gaul, parts of western Germany, Italy and the British isles became the theatre for the triumph of the Carolingian Franks who became masters of all of Western Christendom, excluding the British isles. But the influence of Islam, not least in having preserved much of the ancient Greek tradition of philosophy and science, would come to reassert itself on Northern Europe and, from the twelfth century onwards, would enable Western Europeans to reconnect with ancient traditions of speaking about the political.

In the year 800 the Carolingian Frankish king Charles the Great (Charlemagne) was crowned at Rome by the pope, a coronation of a king of the Franks as the heir to the Roman emperor. Charles the Great's empire left an enduring memory to later generations, although its own unity did not last long. During the ninth century the lands of the once united empire were divided among the different members of the Carolingian dynasty, with one of the family carrying the imperial title until the tenth century. During the ninth century Europe was invaded by pagan Vikings and central Europe by the Magyars. The collapse of the Carolingian empire made way for regional, territorial principalities whose rulers attempted to exercise the functions nominally belonging to the Carolingian king. Although after the disintegration of the Carolingian empire we begin to see Europe emerging as a congeries of territories ruled by individual feudal lords and princes, the legacy of a centralized rulership as established by Charles the Great served as a theoretical ideal which would be invoked in centuries afterwards as the model for organized government by a Christian king and emperor of a Christian people. From what is called the Carolingian Renaissance under Charles the Great, typically medieval concepts of rulership would remain fundamental to discussions of politics throughout the Middle Ages and beyond.

Beginning with the Carolingians, a variety of medieval ideas and attitudes – to custom and law, to institutional structure and purpose, to rule and subjection, to legitimate public power, to consent and mutual contracts of faithful agreement, to the sphere of religion and its relationship to the world of organized, secular institutions of collective protection and justice, to the relationship between the individual and the numerous

collective agencies of which he was an incorporated member – would survive to be reinterpreted but not essentially obliterated well into what is now called the early-modern period. This is true despite the growing diversity of cultural and institutional structures that came to typify sixteenth- and seventeenth-century responses to local and more widespread public dilemmas. As we shall see, perhaps most fundamental was the notion of Christian kingship and a Christian people, laying the foundation for theories of monarchy which have survived into modern times.

## Carolingian Christian Kingship and Feudal Society

Our aim here is to get some idea of the theory and practice of Carolingian kingship and sovereignty because these served as models for future emergent medieval 'states'. We also need to try to understand something about the economic and status organization of a society governed by Carolingian kings. Is it appropriate to call the Carolingian period one in which there was a feudal society requiring feudal government? Or was it the case that only by the late eleventh century were there truly feudal rulers who adapted a Carolingian legacy of political power and practice over defined European territories? These are not simply historical questions. They are questions the answers to which have guided the ideological construction of different European national states' histories into the twentieth century. There is a British tradition of historiography, for instance, which insists that feudalism was a foreign import, imposed on Anglo-Saxon society by the Norman Conquest in 1066.

Indeed, the first reference in English to 'the feudal system' occurs in Adam Smith's *Wealth of Nations* (1776). During the eighteenth century feudal*ism,* a word coined well after the supposed disappearance of the phenomenon it sought to describe, was taken to be a result of Roman decadence, Germanic arrogance or medieval brutality. Feudalism came to be used as a pejorative term. A distinction was then drawn between feudalism as describing a particular system of economic production on the one hand, and a legal system of governing the military organization of earlier society on the other. But scholars from the nineteenth century until today have investigated aspects of early feudal society and have discovered that its legacy was one that actually prevented absolutism and tyrannical rule, by passing on the notion of government as a kind of contract, and where there was a legitimate right of resistance to unjust or inefficient rule. Contract theory, rights of resistance, consensus politics, government as co-operative, were found to be central to the governance of a feudal society, especially when, as would later happen, feudal practices would be reframed in Roman law categories. A feudally saturated landscape could and did make use of certain key aspects of Roman law theory, especially from the twelfth century onwards.

None the less, there is a long-enduring scholarly debate about the general structure and significance of a feudal society and the period to which the term 'feudal' ought to be applied. Marc Bloch in his classic work *La Société féodale* (1939) distinguished two feudal ages. The characteristics of the first age were the personal bond between one man and another, often known as *vassalage*; a property bond was created by the granting of what later were called *fiefs* or land in return for military service; there was a distribution of governmental powers among numerous petty lords which led to a multiplication of jurisdictions. In time this led to immunities or exemptions from centralized law, and

these immunities were granted by superior rulers or kings to lesser lords who then established their own systems of local justice, local tax collecting and military recruitment. The institutions of this first feudal age were held to be rooted in the folk practices of the early medieval West.

What has come to be called the second feudal age dates from the later eleventh century, a period in which the previous insecurities and the disruptive tribulations caused by Viking invasions had come to an end. Forest and wasteland clearances were undertaken to absorb the increase in population, extensions towards the east and south occurred, trade and an exchange economy developed with the use of money. With the re-establishment and growth of towns there were legal and intellectual attempts to improve and centralize authority. Older feudal practices and institutions were extended so that the lines of dependency formed networks across Europe.

Once feudal relations lost their original military characteristics they became stable contractual relationships between lords and vassals, where both parties to the contract were seen as free individuals, albeit of unequal status. The vassal was not seen as a mere subject of his lord and he had, by virtue of his consent to the contract, a certain individual standing which was enhanced by the grant of a certain local autonomy. The vassal could economically exploit the land he held in grant and he was further conceded immunities or exemptions from certain fiscal, military and judicial powers that were normally exercised by the superior lord over the said territory. In certain parts of Europe, and notably during the ninth and tenth centuries, the superior lord's ruling activities had become decentralized by the vassal's immunities and the latter took over as an economically self-sufficient exerciser of rights and duties within his own space. His amalgam of economic and political power was more potent than the old benefice in the days of the Carolingian empire. His public powers came to be known as *consuetudines*, customs, and he exercised them as the landlord with private jurisdiction and independent local power.

The population beneath the feudal relation was subjected: they were objects (or beneficiaries) of rule and not party to the feudal contract. Hence, a fief came to be equated with lucrative seignorial rights and this could shift effective power in a unified territory downwards, establishing private, local courts with autonomous systems of their own rules. This came to be further complicated not only by the different terms of grants by an overlord to individual vassals, but also by a system of subinfeudation in which a vassal of a higher lord was himself a superior lord to his own vassals.

Whether or not a strong monarch with a centralizing strategy was in place to manipulate feudal organization determined the different histories of European countries on the road to medieval 'state' formation. If a king were unable to claim to be considered sovereign and obeyed as the overlord of all other lords and vassals, then a regional fragmentation of authority ensued, with fiefs coming to be considered the divisible, inheritable and even alienable patrimony of a vassal's lineage. The initial, early feudal grant of public prerogatives, as immunities, over feudal land would become private and particularized. Such immunities came to be increasingly for sale, so that by the fourteenth century the European nobility had emerged from the feudalized landscape as an estate with a range of privileges, prerogatives, claims to honour and precedence along with responsibilities, all of which originated in the initial grants and liberties of a superior. The feudal language of 'rights' is, then, a language of privileges as concessions to individuals. We shall later see how it conflicted with another emergent language of rights as claims.

The fief and the vassalic relationship can be seen as having led to the rebuilding of a

distinctive kind of monarchic 'state', when judicial reflection on feudal matters became prominent, especially by the thirteenth century. Some kings and territorial princes then began to attempt to regain control of what had become the hereditary transmission of fiefs in order to recapture for themselves various revenues and military service. Some kings and territorial princes were to be more successful than others in restructuring thirteenth-century feudalism in accord with the three emergent orders or estates of political society: clergy, nobility and labouring free men. What was to be left of feudalism when stripped of its original military and institutional significance was a form of land possession as a money fief, where the fief would normally be reserved for noble tenure. This proceeded hand in hand with a revitalization of the military nobility that was to be so prominent a characteristic of the end of the Middle Ages. We shall see that medieval 'state' formation by the later Middle Ages was, especially on the European continent, the consequence of emergent, centralized governments *checking* the resistance of individual feudal lords. They achieved this most notably by acknowledging freely governed and autonomous cities as the 'state's' new clients. From these new clients would arise some of the essential characteristics of the modern state: the universality and individuality of citizen allegiance to *it*.[13]

Across Europe, then, it would be concrete historical situations which determined whether a king or prince could minimize his feudal obligations and act 'absolutely' as an unopposed sovereign.[14] Some sovereigns were no longer to be considered the supreme lord (*seigneur*) but became, instead, overarching manipulators of feudality beneath their own public persons.[15] Hence, it has been argued that feudal institutions and practices ought not to be seen as *obstacles* to state formation. Rather, feudal practices should be seen as having been differentially deployed in order to enhance the centralizing strategies of kings and princes to provide them with a recovered monopoly over financial means and royal justice to support a hierarchical construction of power that would eventually characterize the modern state.

13 The literature on feudalism is enormous. For our purposes, the discussion by R. van Caenegem, 'Government, Law and Society', in *CHMPT* (1988), pp. 174–210 is a sufficient introduction. Also see J. R. Strayer, *Feudalism* (New York, 1965) and J. R. Strayer 'The Two Levels of Feudalism', in J. R. Strayer, *Medieval Statecraft and the Perspectives of History* (Princeton, NJ, 1971), pp. 63–76; D. Herlihy, ed., *The History of Feudalism* (New York, 1970); A. Black, *Political Thought* (see index under feudal ideas). A symposium on feudalism was published in *Past And Present* 73 (1978); W. Ullmann, *Law and Politics in the Middle Ages: an introduction to the sources of medieval political ideas* (Cambridge, 1975); C. Lis and H. Soly, *Poverty and Capitalism in Pre–industrial Europe* (Brighton, 1979), ch. 1; M. Bloch, *Feudal Society*, 2 vols (Paris, 1939/40) and English trans. 1961. See P. Anderson, *Passages from Antiquity to Feudalism* (London, 1974), pp. 150–1, 193–5 on communes in England contrasted with Continental urban autonomy and the oath of reciprocal loyalty between equals in communes, an early social contract, as opposed to feudal contracts between unequals. Also J. Coleman, 'The Individual and the Medieval State', ch. 1, and G. Dilcher, 'The City Community as an Instance in the European Process of Individualization', in Coleman ed, *The Individual in Political Theory and Practice*, the latter on the relation between feudalism and 'estates', the cities, citizens and subjects in Prussia until the eighteenth century. For an overview see M. Mann, *The Sources of Social Power: a history of power from the beginning to AD 1760*, vol. 1 (Cambridge,1986).

14 J. C. Holt, *Magna Carta*, 2nd edn (Cambridge, 1992), p. 29 discusses the demands for liberties on the Continent, aimed either at municipal independence (e.g. Lombardy in 1183) or at aristocratic immunity (German concessions 1220 and 1231 or French charters 1315), whereas in England demands for liberties were aimed at the control and subjection of the administrative functions of the Crown. By King John's reign in the early thirteenth century the sale of privileges became a final and permanent alienation of the rights of the Crown to the Barons; ibid., p. 57.

15 For an important reinterpretation see J. Giordanengo, 'Etat et droit féodal en France, xii–xiv's', in N. Coulet and J.–P. Genet, eds, *L'Etat moderne: le droit, l'éspace et les forms de l'état* (Paris, 1990), pp. 61–90.

Because feudalism is thought to have had such an overwhelming influence (whatever its contested interpretations) on the development of institutions and practices that are acknowledged aspects of the early-modern state, we can risk some oversimplification in order to grasp some of the characteristics of early medieval feudal society which endured and were transformed in the later period. We can point to the existence of a subject peasantry; the widespread use, by the ninth century, of what is called the 'service tenement or fief' instead of salary for military service – where the grant of seignorial rights included both the land and the dependent population dwelling thereon; the supremacy of a class of specialized warriors who constituted an aristocracy; the contractual ties of obedience and protection which bound one man to another; and the fragmentation of authority. It is thought that the Carolingian period provides evidence of at least the beginning of feudal relationships and most characteristic was the existence of a personal bond of sworn fidelity between the ruler and the free men or vassals who were ruled (*commendatio*). The *commendatio* established a degree of equality between an inferior vassal and the superior lord to whose protection he entrusted himself, and the vassal assumed duties of submission and personal aid. The vassal, not being considered a subject of his lord, had by virtue of his consent to the contract certain individual standing which was enhanced by the grant of a certain local autonomy (*beneficium*). Each party, however, acknowledged mutual companionship through a contract, each preserving the power to consent and to withdraw consent (*diffidatio*). This sworn fidelity consolidated the kingdom.

Charles the Great demanded a sworn oath from all free men in his dominions and placed special emphasis on the fidelity of lay and ecclesiastical nobles. It is this personal bond of mutual loyalty and affection between a free warrior and his hand-picked retinue of free close associates which came to be institutionalized by the Carolingians. The personal bond of fidelity presupposed some form of consent of the aristocratic faithful. Hence, early feudal government is defined as the exercise of power by kings or lords with the support of a military class, bound to their overlords by oaths of fidelity, where these *fideles* had the duty to give counsel to their king. A vassal was tied to his lord so that a mutual and life-long relationship was established between a lord and his man. In the Carolingian period, vassals constituted a large army of warriors, tied by contract to their overlord through personal loyalty, and the vassal was rewarded for his fealty by a grant, a benefice, of lands in return for the performance of his mainly military service.

The central importance of the feudal relationship, then, has been seen to be its contractual nature.[16] A general picture of early feudal society is a hierarchy in which Europe was divided geographically by means of spheres of influence and loyalty, based on land grants and military service. A contract of life-long mutual consent between a lord and vassal established normative limitations on ruler and ruled. This meant that the superior overlord could not require unconditional subservience from his *fideles*. Because the contract was mutual, any reneging on either side had consequences, and hence resistance was legitimate if fidelity on either side was breached.

> If any vassal should wish to abandon his lord, he may do so only if he can prove that the lord has committed one of these crimes: first, if the lord should have unjustly sought to

16 Bloch thought the clearest legacy of feudalism to modern societies was its emphasis on the notion of political contract, where the contract presupposes individual contractees who are capable of individual consent. M. Bloch, *La Société fëodale*, vol. 2 (Paris, 1940), pp. 258–60.

> enslave him; second, if the lord plotted against his life; third, if the lord committed adultery with the wife of his vassal; fourth, if the lord willingly attacked him with drawn sword in order to kill him; fifth, if after the vassal commended his hands into his, the lord failed to provide defence which he could have done. . . . We wish that every free man in our kingdom select the lord whom he prefers, us or one of our faithful subjects; we also command that no man abandon his lord without just cause, nor should anyone receive him, unless according to the customs of our ancestors.[17]

Anyone worthy of entering into faithful vassalage was a free man and not an unfree serf who was tied to the land like chattel. A faithful vassal was a noble, however insignificant his degree of nobility. What constituted nobility is hotly disputed but it appears to have had something to do with family origins, blood lines, distinguished ancestors going back to eponymous heroes of barbarian legend. German scholars have highlighted the associationist tendencies in this kind of society based on kinship bonding, blood lineage, unifying 'national' myths and oral customary codes. But there has been resistance to this interpretation on the part of other scholars because there is no secure evidence to demonstrate the link between the uniquely Germanic band of the king's warrior–companions mentioned by the first century AD Roman historian Tacitus in his *Germania* and the much later Carolingian *fideles*. What is clear is that early medieval societies rested on a diffused network of contractual agreements between relatively privileged individuals within larger groups, agreements which provided mutual aid and protection in relatively unsettled conditions, and that the oaths of allegiance which survive for these Christianized barbarian groupings were based on being made in the sight of God. The partnership between the king and his magnates who shared in his ministry as agents of the royal office was contractual, requiring some form of consensus. And it is notable that where Roman law ignored oaths, Carolingian professions of loyalty and mutuality of protection and order became the basis of virtually all kinds of bondings, and here it is thought that Charles the Great's ecclesiastical advisers played a foundational role.[18]

If feudal kingship rested on the consent of the king's free subjects, then in theory no succession could be allowed without some recognition of a king's fitness to rule. Consultation, at least among the more important of the magnates, both lay and ecclesiastical, was somehow required. Together such men determined in particular cases the extent to which a king was subject to the authority of law and custom in a contractual and collective community. A king who acted tyrannically or by whim, or who was negligent, was called *inutilis* or ineffective and his authority questioned and sometimes overridden.[19] The king's responsibility was to provide laws and perhaps more importantly to maintain the received laws and customs of the peoples within his domain. Under Carolingian kings documents known as *capitularies* represented both a theoretical and practical aspect by which royal reforms could be circulated and made known universally throughout the territory. Many Carolingian capitularies mention that they are the record of the deliberations and decisions on the part of an assembly. The capitulary of Herstal (779), for instance, states that its contents were agreed by the bishops, abbots and counts gathered

17 Carolingian kings' laws: *Capitularia regum francorum,* Monumenta Germaniae Historica [MGH] Legum II, no. 77, dated 802–3 and no. 104, dated 801–13.

18 See J. Nelson, 'Kingship and Empire', in *CHMPT* (1988), pp. 211–51.

19 E. Peters, *The Shadow King*: *rex inutilis in medieval law and literature, 751–1327* (New Haven, CN, 1970).

together with the king in one special council.[20] Decisions about secular and ecclesiastical organization that were recorded in the capitulary were subsequently made known to the people in the regions administered by the delegates.

The concern of kings in legislating and writing down laws seems to have been to fix custom rather than to bring in ostensibly new laws to change customary behaviour. Furthermore, Charles the Great showed himself concerned to surround himself at his court with learned clergy who could help him confirm custom with appeals to ancient texts and especially those of the Bible which spoke of kingship. Such councillors/counsellors were educated in monastic centres where theology and to some extent Roman law were studied. Most of Charles's advisers came from monastic centres in England or Ireland. And it was said that Alcuin of York not only taught Charles to read and write but he acted as his chief adviser.

Charles's royal enactments therefore have a strongly religious flavour where the idea of kingship as practised is rephrased in biblical terminology. Charles is described as the new King David and his ultimate authority comes from God. Carolingian kingship mixes early feudal seignorial along with theocratic notions of governance. The central idea behind theocratic monarchy was the divine origin of royal power and hence the king's relationship between those he ruled was based on *fides* in the sense of religious faith. But as a feudal, seignorial ruler this same king had with his *fideles* a contractual relationship of mutual fidelity. As Canning has noted,[21] such fidelity was not the source of his royal title but it might consolidate his actual power.

The dual theocratic–seignorial model of kingship was to become the distinctive form of monarchical secular government in Western Europe in the Middle Ages. But it would be the peculiarly constitutional solutions to the tensions between the two notions of ruling, theocratic and seignorial/feudal, that would help to set the boundaries of future European debates on the nature and practice of good government. It is important to realize that this dual theory and practice is thought to be particular to the Western European experience. Where we can find analogous feudal practices and institutions in other parts of the world, notably Japan, the tensions between central and local authorities have usually been resolved historically by a sacral monarchy as the *only* form of effective centralized government. As we shall see, however, the mixed inheritance of feudalism with the influences of Rome, Christian theological doctrine and the development of canon and civil laws to suit the evolving conditions of the medieval West's church and 'states', would produce a *constitutional* theory of the 'state' as a deliberate product of human reason and will. This would be the peculiarly European answer to the more universal problem of a tension between central and local authorities which was more usually solved by centralizing absolutisms.[22]

### *Translatio Imperii*

With the help of learned advisers Carolingian emperors were able to claim to wield legitimate imperial authority since they saw themselves, after Charles the Great's coro-

20 MGH Cap. 1, no. 20, prologue, p. 47.

21 Canning, *A History,* p. 64.

22 B. Tierney, *Religion, Law and the Growth of Constitutional Thought 1150–1650* (Cambridge, 1982), p. 9.

nation as emperor in 800, to be the legitimate heirs of Byzantium. The 'translation of imperium' from East to West with imperium now lodged in the Carolingian line was pronounced along with an ideology that proclaimed a renewal and restoration of the idea of the Christian Roman Empire of Constantine. From Charles the Great onwards, the ideology of a Roman imperial restoration and renovation would continue to find champions. Indeed, poets at Charles's court proclaimed: 'Golden Rome renewed is once more reborn to the world', now geographically located in Northern Europe. And the bishops of Rome who sought independence from the Greek East increasingly looked to the Latin-speaking West for protection with the aim of consolidating a Western Latin Christendom that was divorced from a Greek-speaking Byzantine East, which the popes of Rome could not control. During the tenth century, when the centre of historical focus moves from Gaul to Germany and its Saxon kings, the Ottonian dynasty would once again seek to unite Germany and Italy under the rule of one Caesar. They too would be dominated by the notion of imperial re*novatio*, a Christian Rome renewed, with a reformed and purified church in the care of a German monarch and emperor. *Renovatio imperii Romanorum* would appear on Ottonian seals.

## Theocratic Kingship

The Carolingian theory of kingship was effectively the work of Latin-speaking clergy, both at Rome and at the Carolingian court, hand in hand with the Carolingian aristocracy. With the Frankish appeal for the support of the pope in the election of their king over one they deemed *inutilis* – and this had established the Carolingian line in the first place – came the replacement of a Germanic kin-right with Christian principles. This has been seen as a conscious ideology on the part of Frankish clerical and lay aristocratic powers. Catholic Christianity was therefore a compulsory aspect of membership in the 'state'. Using the notion of the Roman imperial sacred kingship,[23] the Carolingians developed the religious element further. The Carolingian king and emperor was not only a convener of church councils, but he played a role in nominating bishops to ecclesiastical offices, and he was ultimately responsible for maintaining both clerical discipline and public morality. The Carolingian king ultimately pronounced on sound religious doctrine as it was to be taught in 'his' churches. Carolingian monarchy was theocratic not only in exercising legitimate intervention in church affairs but also in that the monarch himself was seen as sanctified, ruling as a surrogate of God on earth. Churches became literally the properties of the king's vassals and they were serviced by royal and lordly nominees. For the monarch to possess such powers he relied on the recognition of his royal and imperial titles by the pope in Rome. Furthermore, Carolingian rule depended extensively on the practical support received from bishops and abbots of monasteries within the domain, not least because bishops and abbots had been given vast tracts of land and they received, as feudal lords, payments in kind from serfs and lower vassals. Hence, the notion of Carolingian royalty was not only religiously sanctioned but it was also patrimonial. The king was patriarch, exercising authority over his household

23 Although it has been argued that in the Byzantine context the emperor had not been a priest nor had he been head of the church as an ecclesiastical body; see D. M. Nicol, 'Byzantine Political Thought', *CHMPT* (1988), p. 67.

and children, and in so far as the church was part of the realm, it no less than 'his people' were taken to have been committed to the king's care.

There was a spiritual and ceremonial aspect of Carolingian lordship where the king was viewed as a surrogate Christ. The clerical and monastic scholars at the Carolingian court developed a concept of kingship in the language of the Old Testament with David, Solomon and Melchisedek taken as both kings and priests of their people. The imperial crown, a combination of a royal crown and a bishop's mitre, publicly displayed the emperor's authority as both king and high priest. The ceremony of installing a king closely resembled an episcopal ceremony, and the king was more often viewed as a cleric than as a layman. Indeed, whatever the nature of 'original' barbarian kingship, once the tribes entered the Roman Empire they were directly influenced by and were assimilated to aspects of imperial government. And they understood that God was the source of royal authority, appealing directly to certain key texts both in the New Testament (1 Corinthians 15:10; John 3:27) and in the Old. Their formulation of a ruler as king by the grace of God (*rex dei gratia*) was widespread and by the end of the eighth century it became part of Charles the Great's royal title. This formulation was the distant ancestor of early modern divine right monarchy.[24] Furthermore, the Frankish people were identified with Israel under a theocratic kingship, an image of a 'chosen people' that would survive well into the seventeenth century in England and elsewhere on the Continent. In deriving his authority directly from God, the Carolingians said the king was God's vice-regent on earth, God's vicar, to whom the people were entrusted. In turn, the king by divine grace conceded governing offices and powers to those he governed, and hence his people were his subjects, subject to his superiority. On this theory, they seemed to lack any right of resistance to him.

But the office of kingship, being divinely instituted, had as its purpose the furthering of the divine will; hence the monarch was not to rule by absolute whim. His office, a duty, was that of Christian service for the common good of his people. In serving their good he was serving God. His office was a Christian ministry, exercised in his justice, mercy, humility, and in his serving, protecting and preserving the Christian religion. In Roman terms his was a tutorial role to his people, which in itself limited his freedom of action, as it required that he protect certain of their rights which were not necessarily derived as concessions from him. It is thought that 'the people' were conceived of as a separate entity, perhaps with certain inherent rights, separate from their ruler, even if in reality what was meant by ' the people' was the great men of the realm. 'The people', therefore, proved central even to this theocratic notion of monarchy. Crucially, theocratic kingship was not arbitrary absolute rule. And yet if the king was in theory limited both by his ministry and by customs, there were no means to enforce these limitations and no legal right of resistance: according to theocratic theory, his rule was not absolute but he was not controlled.

There is, however, a tradition of argument which goes back to nineteenth-century German scholarship that sees the limits on arbitrary rule having been inherent in the practices of Germanic tribes themselves. It has been asserted that Germanic peoples preserved a kind of popular kingship by election, thereby limiting a king's power by his need to answer to a popular assembly. But many scholars now think that there is too

24 Canning, *A History*, p. 17.

little evidence to demonstrate characteristics of Germanic practices *before* they were Romanized and Christianized.[25] There is no doubt, however, that practices of Romanized and Christianized Germanic kingdoms gave a place to popular involvement in the making of a king and part of the process of his legitimation was their recognition of the divine source of his authority. Furthermore, there was a popular aspect to the creation of customary law and royal law was meant to coexist with it, rather than replace it. The ruler caused to be written down the customary law which was given legitimacy and authority by his will. Since the different barbarian kingdoms were composed of different peoples with different oral customs, written codes which were often a mixture of Roman and Germanic elements came to be written down in Latin to apply to members of respective peoples (*gentes*). The most important and long-enduring barbarian code was the *Lex Romana Visigothorum,* a simplified Roman law code. Indeed, there survive other collections of 'national' laws of the different peoples in the regions under Carolingian rule, comprising the *Lex Salica, Lex Ribuaria, Lex Alamannorum, Lex Burgundionum* and the *Lex Baivvariorum*. Carolingian rulers were enjoined to judge wisely according to the written law, implying that judges as well as counts and royal agents were to know the different barbarian laws and have copies of them in their different regions to guide them in their day-to-day administration. There are documents which describe how Charles the Great assembled the dukes, counts and the rest of the Christian people, together with men skilled in the laws, and he had all the laws of his realm read out; each man's law was expounded to him and emended where necessary, and the emended law written down. Charles declared that the judges should judge in accordance with what was written and should not accept gifts; all men, poor or rich, should enjoy justice in Charles's realm.[26]

Theocratic Carolingian kings therefore worked within a legal tradition that was largely based on custom. Both the traditions of Roman law and Germanic law insisted that rulers governed within the legal structure of human laws rather than arbitrarily. And when law did not exist in written form, law was what experienced men declared it to be. Hence, despite the subjection of his people to his rule as God's vicar in theocratic theory, no monarch could rely solely on his theocratic claims for his legitimacy. The feudal, contractual partnership between the king and his aristocratic lay and ecclesiastical vassals underwrote his power. While the spiritual authority of his ecclesiastical magnates formally created him as quasi-divine monarch, once installed these ecclesiastics were subordinated in temporal matters to him. As a consequence, many scholars have argued that the contractual aspects of this kind of monarchy, based on bonds of sworn fidelity, in fact and practice superceded in importance the theocratic conception of his royal personality. Out of this bond of mutual faith would evolve not only notions of rights and duties of both ruler and ruled but even more abstract notions of rule over the corporate body of society, conceived as the *duties* of a public office.

The very notion of kingship as ministry emphasized a mixture of spiritual and secular power and capacities united in one person. But a distinction was also observed between 'the king's two bodies', his individual person by nature and his person by grace which raised him above natural men into a public, impersonal, official personality: a God-

25 See Canning, *A History,* pp. 16–17 for a summary view of the debate.

26 R. McKitterick, *The Carolingians and the Written Word* (Cambridge, 1989), p. 60.

man.[27] He governed a *regnum* or a *populus* comprised of Christian men, with a Christian liberty that acknowledged their freedom as sons of God but without otherwise destroying social ranks in a hierarchical *respublica*. Both Roman and feudal law equalized in a legal rather than a social sense. Society was governed by the person of the particular ruler and yet simultaneously was understood impersonally as a public realm, founded and structured by law in which *regnum* and *ecclesia* together comprised the commonwealth, the *respublica*, without implying a specific constitutional form of government. A monarchy could therefore be called a *respublica*. This way of speaking would continue well into the sixteenth century, so that any reader of medieval and Renaissance political theory texts must be careful not to confuse a specific reference to a republican constitutional form with the more general notion of a *respublica* as simply a law-governed community with the common good as its purpose.

The dual personality of the king, by nature an individual man and by grace and through ecclesiastical consecration a God-man, would also survive into the future. From the Carolingian period would also survive both the theory and practice of governance by consensus, whereby a realm is ruled with the counsel and consent of the faithful vassals in mutual contracts with their overlord, the king. In practice, 'consent' meant both an implicit general consensus and an explicit consent of a relative minority of important men, a notion that would later lead to the use of the term *maior et sanior pars*, 'the great and the good'. The language of much of this theory is Roman and legal. Its reality was often simply the rule of many Germanic peoples under one organizing principle. When linked with papal Rome, the language would be invested with ancient reverberations of empire and therefore continue a link with antiquity. The Carolingian period is important because it allows us to observe a period in European culture where sovereignty was construed as a faithful, religiously sanctioned sharing of power between a monarch, an aristocracy and the church, and where policies were based on the consultation and consent of these elite parties to policy.

## The Origins of Papal Authority and the Gelasian Doctrine

It has often been observed that anyone wishing to throw light on the models that have influenced the formation of the European modern state cannot ignore the medieval Western church. The Latin church evolved a model of concentrated decision-making power and a pyramidal structure of institutional organization, what English-language historians often call 'papal monarchy', well before European states came into existence.[28] Hence, another language of legitimate authority was developed within ecclesiastical circles. Papal authority, the authority of the bishop of Rome, was understood to be founded in Christ's commission to St Peter as related in the Gospel of Matthew 16:18–19:

> And I say also unto thee, That thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it. And I will give unto thee the keys of the

27 E. Kantorowicz, *The King's Two Bodies: a study in medieval political theology* (Princeton, NJ, 1957).

28 A. Padoa–Schioppa, 'Hierarchy and Jurisdiction: models in medieval canon law', in A. Padoa–Schioppa, ed., *Legislation and Justice* (Oxford, 1996), pp.1–15; K. Pennington, *Pope and Bishops: the papal monarchy in the twelfth and thirteenth centuries* (Philadelphia, 1984).

> kingdom of heaven; and whatsoever thou shalt bind on earth shall be bound in heaven: and whatsoever thou shalt loose on earth shall be loosed in heaven.

This, along with Christ's command to Peter (John 21:15–17) to 'Feed my sheep', served as the scriptural foundations of papal legal claims to jurisdiction over European Christians throughout the Middle Ages.

Christ was to be understood as having built his church and he passed on governing jurisdiction to his apostle Peter and to Peter's successors. This is known as the claim to apostolic Petrine succession of the papacy. Each successive pope, many years after the age of the apostles, was to be seen as the 'unworthy heir of St Peter', as Peter's vicar, rather than as the heir of the previous incumbent. Each pope succeeded directly to the same legal powers of St Peter but not to his personal merits. A distinction had therefore been drawn between the office of pope on the one hand and the incumbent on the other, which enabled the papacy throughout the Middle Ages to claim that no matter how unsuitable a particular incumbent might be, he retained the full legal authority of pope 'in place of' St Peter. This notion of the duration of office, its impersonal indestructibility and its separation from the personal idiosyncrasies of an incumbent, was to remain fundamental to European political discourse on government in church and state.

Furthermore, by the mid fifth century the bishop of Rome was spoken of as head (*principatus*) of the church which was the Body of Christ. The church was seen as structured organically as a public corporation, a body (*corpus*) comprising a head (*caput*) and members. The head, the pope, was to be judged by no one and hence the pope was declared constitutional sovereign with a jurisdictional function as the final court of appeal in ecclesiastical cases. This was the culmination of the evolving hierarchical structure adopted by the church from the second century onwards where a system of functions and duties differentiated bishops, priests and deacons. There was also established a hierarchy between different episcopal sees, ranging from suffragan bishops to metropolitans and, the highest, patriarch. The empire's own institutional model, centralized and hierarchical, offered the church an example, but from the fourth century the church in the West began to evolve along its own road to claim Roman primacy. Thereafter, to the organic image of the church as the Body of Christ would be added a notion of hierarchy inherited from a sixth-century anonymous Christian neoplatonist who was erroneously thought to be St Paul's disciple Dionysius the Areopagite. This Pseudo-Dionysius wrote two works, *On the Celestial Hierarchy* and *On the Ecclesiastical Hierarchy,* whose core principle was that all powers emanate from above, from the principle of unity, God, in a succession of graded ranks and estates. The superior transmits capabilities to the inferior. By comparing a body politic with the human body, the hierarchy implicit in the organic analogy established that each part of the corporate, public unity was like a limb in a body and each had been assigned a specific task from which it must not default. Hierarchy expressed itself through a notion of differential participation in the origin and source of power, the one God, and it reinforced the view that each part must be content with its status. Appealing to this neoplatonist theory of infusion of differentials of power from an original, complete, divine source, led to the view that God transmitted the faculty of governing a whole body to its head. Both popes and kings would see advantages in this formulation throughout the Middle Ages, taking the institution of the graded hierarchy of lesser estates and their instruction in their respective tasks to be within their primary powers.

This hierarchical, organic theory, when applied to the pope as final, undisputed court of appeal in ecclesiastical cases, would not go unchallenged within the church itself. There was to be a major and enduring debate over the relationship of the pope's powers and those of his bishops throughout the Middle Ages, a debate which centred on biblical justifications for the scope of episcopal local autonomy and for the scope of the pope's centralizing authority. The passage in Matthew 16:18 which was read as expressly attributing to Peter and his successors the power to bind and loose on earth and in heaven was countered with Matthew 18:18 and John 20:23, where this power was accorded to all the disciples without distinction. Did bishops derive their local jurisdictional powers from the pope as St Peter's vicar or by being the successors to the other apostles, where Peter was simply to be seen as first among equals? Was the church organically structured as a governing, directing head over members or was it in origin a corporate collective, with local sites of episcopal autonomy, the pope being no more than an overarching, elected public administrator of the whole?

If there were these difficulties in interpreting the nature and limits of papal authority *within* the church, there would also emerge difficulties in determining the relationship *between* the functional scope and authority of temporal government and the functional scope and authority of spiritual government. The Carolingian relationship between temporal and spiritual authority, embodied in the exercise by one man, Charles the Great, of his imperial office as king *and* divinely appointed God-man, would gradually find competition from other theories and practices of public office in the Middle Ages.[29]

As early as the fourth century there was a view that clergy were superior to the laity, and we saw this already expressed by St Ambrose and others who contributed to the 'ascetic takeover' in the Latin West. By the end of the fifth century, Pope Gelasius attempted to define more precisely the relationship between the respective power and authority of empire and priesthood. He argued that the world was governed in two ways, one priestly and the other secular. Both spiritual and temporal rulers derived their authority and function from Christ's decree that they exist in parallel and observe their respective limits. Priests control religious matters and hence the emperor is the son, and neither teacher nor director, of the church where religion is concerned. The clergy is itself to recognize the primacy of the pope. However, in secular affairs, clergy obey and use imperial laws, the imperial power having been instituted by God. But in a hierarchy of authoritative power, the clerical was said to supersede the temporal. The priesthood was seen as bearing the heavier burden since clergy render an account before God for the kings of men.

Gelasian doctrine was read thereafter as – in theory at least – denying the Roman imperial possibility of uniting in one person headship of church and 'state'. Perhaps most significant and enduring was Gelasius's view that there was an ultimate duality of jurisdiction in the authorities over men. But in the Carolingian period it clearly was not maintained that a king was incapable of being both temporal ruler and in charge of his people's spiritual well-being. However, there would come to be developed a theory that sought to maintain in practice the authority of emperorship and kingship as exercised, but only through papal favour. Charles the Great did not himself appear to accept

29 But the Carolingian idea would survive, transformed, in the later fully blown doctrines of divine right monarchy that would enable post–Reformation rulers like England's Henry VIII to argue that in being heads of state they were also heads of the state's church.

this papal interpretation of his power. But out of this would later emerge an elaborate theory of papal supremacy over church and state with the temporal authority being graciously conceded to kings, without which kings could not legitimately function. It would lead to the possibility and eventuality of popes being able to depose kings.

Furthermore, the document known as the Donation of Constantine, a ninth-century monastic forgery, would be included in collections of church law and popes came explicitly to exploit it. It purported to be a constitution of the fourth-century Emperor Constantine in favour of the papacy, which said that Constantine had donated the imperial palace, the crown, and the very government of all of the Western Roman Empire to Pope Sylvester and his successors, in gratitude for his having been baptized and cured of leprosy. To the papacy was thereby accorded imperial power in the West; and the pope was recognized as higher than, and first of all, priests in the world.

By the eleventh century, during his conflict with the emperor Henry IV of Germany,[30] Pope Gregory VII would pronounce that kings and emperors were no more than lay members of the church and their first duty was to help the church provide for the spiritual well-being of their subjects. Bishops and the pope in particular were therefore the only ones in a position to judge of the spiritual suitability of such men. To the clergy alone had been given the powers to bind and loose in heaven *and* on earth (Matthew 16:18). Hence, an unsuitable lay governor could be both excommunicated from the church and his subjects freed from their oaths of loyalty to him. On this view, the king in the hierarchy of world governance was placed beneath the lowest of the orders of the clergy and well beneath the pope. The pope alone, then, not only can free a secular ruler's subjects from their oaths of allegiance, but he alone may judge and depose emperors. In line with the Donation of Constantine's assurance that Constantine had donated the governance of the Roman Empire to Pope Sylvester, the pope alone had the rightful use of the imperial insignia.[31] The church was now to be understood as autonomous and immune from all and any secular governance.[32]

These views had already begun to emerge during the tenth century, when there had been a call from enclosed monastic centres, notably in Burgundy and Lorraine, for a *renovatio* within the church itself.[33] Powerful men of noble feudal families had become abbots of monasteries that nominally adhered to the sixth-century monastic Rule of St Benedict. Now came a call from such enclosed 'cities of God' for a renewal of the Benedictine Rule, a more ascetic and rigorous application of its structure, and from within these centres emerged the radical reforming voices of a group of well-born and intensely spiritual men. At Cluny, a massive Benedictine monastery in Burgundy, came the demand that her foundations be established under the protection, not of neighbouring feudal lords, but of Rome itself. Cluny sought *libertas*, an immunity from feudalism's burdens and security for the church of God. The movement to purge the church of

30 This is traditionally known as the Investiture Contest. K. Leyser, 'The Polemics of the Papal Revolution', in B. Smalley, ed., *Trends in Medieval Political Thought* (Oxford, 1965) is still useful.

31 *Dictatus papae*, esp. 27, 12, 8.

32 See I. S. Robinson, *The Papacy 1073–1198: continuity and innovation* (Cambridge, 1990).

33 See P. J. Geary, *Phantoms of Remembrance: memory and oblivion at the end of the first millennium* (Princeton, NJ, 1994) on the extraordinary, selective use of earlier documents and traditions to suit the present perspectives of eleventh-century publicists and archivists engaging local conditions, as well as their wholesale destruction of inherited past documents and their importance in leaving a legacy from which twelfth-century views of the past would be constructed.

those clergy who had bought their offices, or who were dominated by feudal princes or local counts, or who lived with concubines and inherited their posts, had begun. Cluny, with the support of spiritually minded and Rome-centred German emperors who fostered the religious reform, would become the vanguard of the papal reform movement that, by the time of Pope Gregory VII, would come to argue against the reforming role of the empire itself.

By the mid-eleventh century it was argued that spiritual benefices and positions of power with land could not be conferred by a layman, a king, no matter how spiritual and concerned for the security of the church he may be. It was proposed that the church, as an ecclesiastical body, had a freedom from lay control and subjection, a *libertas ecclesiae*. This reveals a peculiarly feudal notion of negative liberty: the concession of an autonomous space of action and value, immune from the general rules and observances otherwise imposed by a superior lord on those ruled by him. But the claim was that this ecclesiastical immunity was not a grant or concession from secular governors but from Christ in the Petrine commission. The church was to be understood as autonomously structured as a hierarchy, with the pope as its monarch, indeed as emperor. And the liberty of the church consisted, in the first instance, in its own establishing of a *more than* feudal, hierarchical subjection of the clergy to the overlord pope. Not only was the pope the final court of appeal, but through his will alone could new legislation be produced. In the twenty-seven propositions expressed in his *Dictatus papae* and in his other letters, Pope Gregory VII attempted to establish a papal theocracy, curtailing the powers of bishops, and based on Roman primacy. He believed the Roman church (not specifically the pope) to be infallible and those not in agreement with this Rome-centred church were to be excluded from Catholicism. What was being attempted was a higher unification of Christendom over the particularism of organized feudalism throughout Europe.[34]

By only citing a part of the Gelasian doctrine, Pope Gregory VII gave the impression that royal power was not simply subjected to the priesthood in religious matters but in all matters. The powers of binding and loosing included the power 'to remove from as well as to concede to anyone, according to his merits, earthly empires, kingdoms, principalities . . . and the possessions of all men'. Augustine's understanding of a post-historical 'city of God' was being transformed into a realized community in this world, the institutional church, whose jurisdiction covered not only ecclesiastics but all of Christendom, since all men were the pope's sheep and Christ had commanded that Peter feed them all. On this view, monarchs were to function within structures evaluated by the clergy. In serving the 'state' they were serving the higher purposes of the Christian common good as defined and sanctioned by the church. And the church itself was to increase the numbers of its own *fideles* by increasing the number of kings and lords who were faithful to St Peter's vicar.

Pope Gregory VII's pontificate spawned the first pamphlet exchange of publicists engaged in what we recognize as perhaps *the* debate in medieval political theory over the relation between temporal and spiritual power. This set in motion the ongoing disputes that helped to define both in theory and practice the relative scopes of political and ecclesiological jurisdictions throughout the Middle Ages. But even among pious churchmen of the day there were many who refused Gregory's initiative and his programme,

34 For the *Dictatus papae*, 'Dictates of the Pope', in translation see B. Tierney, *The Crisis of Church and State 1050–1300 with selected documents* (Englewood Cliffs, NJ, 1964 and reprints), pp.49–50.

since they held that the church's task was moral regeneration and not a reordering of the fundamental laws and principles of society. They were unwilling to forego the help that kings and emperors had already been giving to the reforming party within the church. Hence, Gregory set in train a scholarly movement that would lead to the establishment of a body of church law, the canon law which from the twelfth century onwards would establish the church as an autonomous, legal and governing institution, notably dominated by experts in canon law. Gregory had called upon monastic reformers who were familiar with the early councils of the church and the laws there promulgated to ransack the archives and bring together all decretals of former popes, the canons of church councils and passages from historians which set forth the power of the Holy See.

The German church, through the interest and power of German emperors, had actually been the most organized and reformed of Europe's churches, but as Gregory saw it the monarchy now had to be attacked at its theocratic heart in order for the papacy to liberate itself from the imperial system. To Gregory, a kingship with priestly powers along Carolingian lines, what he took to be a ruler who was both *rex et sacerdos* (king and priest), had to be destroyed, despite Charles never having claimed to be a priest in the sense of celebrating the eucharist. According to Gregory, Christ alone could give or take away *dominium* and this Christ-originated authority had passed directly to Gregory as Peter's successor. Either you are a king and layman, or you are a priest (*aut rex est laicus aut clericus*), not both. Gregory sought a real separation of church and 'state' with his interpretation of the king's so-called priestly character severely challenged. The king should instead be seen as a removable official. If he did not perform his official function, as determined by the pope, then he was to be regarded as a tyrant to whom obedience was not owed.

It has been generally observed that in establishing 'suitability' to rule as the test of lay kings, Pope Gregory VII further encouraged lesser lay princes to select and propose a candidate for papal approval. Kings should be chosen from below as a nominee, and this effectively favoured a theory of elective monarchy to an office that could then be filled by the elected nominee only upon papal approval of suitability. This implied to German princes that the authority in the realm was theirs to elect one of their number, and it served their particularist interests against the centralizing tendencies of German monarchs. Gregory's reading of church decrees led him to this theory of elective monarchy in order to destroy the sacred element in the king's person. But it was received as an appeal to that other structuring set of principles of feudal society: that legitimate government was based on a contract, consent to which was fundamental.[35]

During the fourteenth century papal publicists would take Gregory's theory even further, seeking to remove all autonomy from secular authorities. On their view, the pope was responsible before God for the whole Christian community, and was thereby taken to have the right to judge, depose and concede power to secular rulers, while being himself judged by none. As in Gregory's own time, such 'papal hierocratic' publicists would constitute only one side of the argument, and by the fourteenth century they would already be on the road to becoming a vociferous minority position in the medieval church itself. Their view would, however, continue to be sustained during the sixteenth century by canon lawyers and even adopted in reverse, by later monarchs with absolutist pretensions in their own realms.

35 H. Fuhrmann, *Germany in the High Middle Ages c. 1050–1200* (Cambridge, 1986), chs 3 and 4; A. Haverkamp, *Medieval Germany 1056–1273* (Oxford, 1988). part II, ch. 1.

Needless to say, in the medieval monarchical resistance to this doctrine of papal monarchy[36] alternative ideologies of legitimate temporal rule emerged.[37] Some would continue to maintain that the king was Christ's vicar and not merely a layman. They would retain the Rome-centred focus on imperial kingship and either reaffirm a duality, but of separate *and* equal co-operative spheres of power and jurisdiction; or they would reverse the Gelasian and Gregorian hierarchy of church over 'state' altogether, and insist instead on an overlapping duality where the church was a necessary but subordinate, non-coercive, functional part of the 'state'.

## Two Swords Theory

In Luke's Gospel, chapter 22, Christ, at the passover supper, distributes the bread and wine to his disciples and warns that his betrayer is sitting at the table. After acknowledging those of his disciples who had continued with him in his temptations he says:

> And I appoint unto you a kingdom as my Father hath appointed unto me: That ye may eat and drink at my table in my kingdom, and sit on thrones judging the twelve tribes of Israel. (Luke 22:28–30)
>
> And he said unto them, When I sent you without purse and scrip and shoes, lacked ye any thing? And they said, Nothing. Then said he unto them, But now, he that hath a purse let him take it, and likewise his scrip: and he that hath no sword, let him sell his garment and buy one. For I say unto you, that this that is written must yet be accomplished in me. . . . And they said, Lord, behold, here are two swords. And he said unto them, It is enough. (Luke 22:35–8)
>
> Lord, shall we smite with our swords? One of them struck at the high priest's servant and cut off his right ear, but Christ said Suffer ye thus far. And he touched his ear and healed him. (Luke 22: 49–51).

In John's Gospel (18:11), after Peter has severed the servant's ear, Christ says to him: 'Put up thy sword into the sheath'.

We have two swords, they are 'enough' and they are used. We have Christ, appointed by his Father to a kingdom, and who appoints his disciples to the same kingdom, seated on thrones, to judge the people of Israel. Publicists elaborately interpreted possible meanings. The monarchical resistance to the Gregorian case read Luke 22:38 as referring to the church as possessing a spiritual sword, and the *regnum* or 'state' a carnal sword. Some interpreted the priestly sword as encouraging obedience to the king as God's vicar, since it was forbidden to clergy to shed blood, whereas the royal sword was meant to enforce obedience. The two swords were to work co-operatively in bringing about peace and unity in the Christian community. Pro-monarchists increasingly examined Roman law to provide material that would allow them to establish precedents for secular rulers exercising jurisdiction in ecclesiastical as well as temporal matters. They

36 J. A. Watt, *The Theory of Papal Monarchy in the Thirteenth Century: the contribution of the canonists* (London, 1965) provides a good analysis of 'papal monarchy'.

37 For the arguments against 'papal monarchy' from within the church, see B. Tierney, *Foundations of the Conciliar Theory: the contribution of the medieval canonists from Gratian to the Great Schism* (Cambridge, 1955).

found that the Roman emperor had been the unifier of the church, and that imperial consent had been required to install a pope who had been chosen by clergy and people. It was argued that the king, standing in for Christ, was the head of the Christian community (*caput ecclesiae*). The pope was, after all, only Peter's vicar. Implicitly, the power of both swords was the king's.

French and English writers entered the debate either to argue that the two swords, spiritual and material, are the pope's 'to be drawn, perhaps at your command, if not by your hand'; that 'the pope has the plenitude of power [*plenitudo potestatis*] while others have been called only to a limited part of power and care';[38] or to argue that temporal power and jurisdiction is superior to sacramental power and jurisdiction, because Christ was king by virtue of his divine nature (as was indicated in Luke 22) and priest only by virtue of his human nature. The priesthood was therefore subject to the king as to Christ.[39] The authors on one or another side of the debate increasingly plundered 'authorities' to make their ideological cases by means of a selective use of the Bible, of Roman, customary and early church law, of history, and of the writings of the church Fathers. An investigation of the past, massively supported by institutions with a stake in the answers uncovered, was undertaken to justify the present.

If, in the earlier Middle Ages, government and its underlying principles were considered to be integral parts of applied Christian doctrine, then Carolingian theories of sovereignty and law-making were in many ways, as Ullmann observed, applied ecclesiology.[40] Biblical sources were interpreted and applied to Christian society as a whole. But in the twelfth century we begin to see an extension of medieval jurisprudence to the whole of society on the part of those who studied Roman and canon law. The governmental principles that were conceived, elaborated, applied and modified by medieval governments themselves were frequently first expressed by lawyers who, through legal practice, came to theorize about their own profession. An attempt to embrace the rules of social living of Christians *across* geographical boundaries was enhanced by an increasingly literate, bureaucratic group of men who uncovered ancient Roman and ecclesiastical documents. These revealed how, for instance, the Roman Empire was rationally governed despite its pluralistic differences across vast territories. Spurred on by the ambitions of monarchs and popes to collect into coherent systematic wholes the doctrines that would govern men in a centralized fashion, literate men sought to harmonize what looked like contradictions in the statements about society and the faith made by different church Fathers, earlier church councils, and ancient Roman authors like Cicero, all of whom wrote about a society that was in many ways unlike its medieval successors.

## The Twelfth-century 'Renaissance': Canon Lawyers and their Heirs

The twelfth century was one in which practical and intellectual achievements in the arts and sciences across Europe combined to produce what has been called a 'rebirth and

38 St Bernard, *De consideratione*, 4.3.7.

39 Norman Anonymous.

40 W. Ullmann, *The Carolingian Renaissance and the Idea of Kingship* (London, 1969).

renewal', a renaissance.[41] New religious orders were established; new urban communes with increased numbers of organized merchants and artisans developed features of autonomous government. New ways of speaking about the different functional and professional orders or states of life were elaborated to take into account the proliferation of different roles and obligations in a society that was developing more complex institutions. The expansion of urban schools, soon to develop into the earliest universities, and a multiplication of monastic foundations, increased the scope for discussion of the themes of the goal of human life and the government of society that had been found in the authoritative writings of the Bible, the church Fathers and the ancient philosophers. More men were acquiring literate skills. New approaches were found to the old texts of grammar, logic, poetry, philosophy and theology which had been the mainstay of monastic education for centuries, inspired by the rediscovery of further ancient texts. New texts of authority were discovered, traditional texts were reorganized, and modes of interpretation were more sharply defined. Everywhere, there appears to have been a need to organize knowledge in a comprehensive, rational manner. Everywhere, there were quests to understand the universal order that was thought to exist behind the often fragmentary remains of the past. One such quest resulted in a new jurisprudence, 'reborn and renewed' with the rediscovery of Justinian's *Digest c.* 1070 which supplemented the relics of Rome's laws that existed in barbarian adaptations.

The claim in the twelfth century for a *renovatio imperii* was far from new. But we must be aware that both the German monarchy and even the city commune of Rome took as their principal model the period of late antiquity and the empire of the Christian emperors from Constantine to Justinian, but not the empire of Augustus and certainly not the republic of Cicero.[42] What was being 'reborn and renewed' from the twelfth-century renaissance and its aftermath comprised an appropriation of selected forms of antiquity which were then grafted on to contemporary institutions, the form of Roman law in particular, being imposed on the substance of life . Thus began the attempts at creating an intellectually coherent, rational discipline to guide legal thinking. Conflicting authorities had to be harmonized to provide guidance to present agents, and a literary methodology, developed first among theologians, was adapted to reduce contrary arguments to agreement (*solutio contrariorum*). This is what is called the scholastic method of debate that would endure for centuries in learned circles, and in the twelfth century it was in the process of emergence.[43]

It is thought that the so-called Gregorian Reform movement began the revival of Roman law categories and added to civil law the pronouncements of several centuries of church councils and various popes, enshrining these in a body of church law. Church lawyers had to create their authoritative book first since, unlike Roman lawyers, they had not inherited a closed corpus. During the twelfth century, canon law was collected into one textbook by the monk Gratian and it was known as the *Concordance of Discord-*

41 See R. Benson, G. Constable, C. Lanham, eds, *Renaissance and Renewal in the Twelfth Century* (Oxford, 1982) for excellent discussions and important bibliographies; for a very useful overview see D. E. Luscombe and G. R. Evans, 'The Twelfth–century Renaissance', in *CHMPT (*1988), pp. 306–40; and J. Canning 'Development: *c.* 1150–*c.* 1450, politics, institutions and ideas', in *CHMPT* (1988), pp. 341–66.

42 R. Benson, 'Political *Renovatio*: two models', in Benson, Constable and Lanham, *Renaissance and Renewal,* pp. 339–86.

43 See below, chapter 2 on Aquinas's method.

*ant Canons*, or simply as the *Decretum* (1139/40). The *Decretum* comprises one authority set against another, one text against another, side by side with technical juristic materials from all the periods of the church's past. A not always successful attempt is then made to reconcile apparently opposing positions. Commentaries on the *Decretum* by jurists known as decretists[44] and further compilations of papal decretals, themselves commented upon by jurists known as decretalists,[45] proliferated.

By the end of the twelfth century, papal centralization had already extended beyond the field of judicial decisions and gradually engaged the field of legislation; papal decisions in certain specific cases that reflected the conditions of medieval life came to exert influence as authoritative precedents for similar cases. Many of the popes of the twelfth and thirteenth centuries had trained as lawyers and they became increasingly aware of their role as legislators and creators of new laws for the church. Because the creation of new law in the church was an ongoing process, popes provided answers to specific problems within their judicial authority and sent them as decretal letters (not unlike late imperial rescripts) to bishops in order to answer enquiries on difficult points of law. Or they had made decisions on cases that had been directly submitted to the apostolic see by appellants or aggrieved parties. By the thirteenth century unsolicited papal rulings established new law. Consequently, there was an expansion in the roles of professional decretists and decretalists in interpreting juridical doctrines. But it is not simply that they were fascinated by earlier authorities that could confirm papal sovereignty; they also examined early Christian texts which focused on community and collective organization, the life of the early church, the activities of early councils. Consequently, Huguccio, the greatest decretist wrote that the church is the aggregate of the faithful and exists wherever the faithful are.[46] Canonists, always looking for reconciliations, did not necessarily see this as opposed to papal sovereign headship. Some came to teach that the papal sovereign will was expressed in its highest form when the pope acted in and with the gathered church or its representative council. They went further and simultaneously drew on the Roman law of sovereignty to defend a doctrine of papal headship of the church as well as defending the structure of the church in terms of Roman corporation law.

Hence, much of what we call political theory, because it discussed the inviolable, fundamental law framework in which sovereign rulers and legitimate communities operated, emerged from the interpretations of these learned canon law commentators and interpreters. Most notably it was in their recognition of a need to find solutions to two competing problems, the overriding right of a sovereign to rule and the overriding claim of a community to defend itself against the abuse of power, that they made their mark and developed a range of original and influential perspectives on constitutional thinking. As a consequence, it has rightly been claimed that the canonists probably had a greater impact over a wider spectrum of what we regard as important issues in political theory than did the civilian lawyers, who at least initially were more tied to the authoritative Roman law texts of Justinian.[47]

From 1150 to 1250 a series of clashes between the papacy and the Hohenstaufen

44 The most distinguished was Huguccio, *d.* 1210.

45 The most distinguished were Pope Innocent IV, *d.* 1254, Hostiensis, *d.*1271 and Bernard of Parma, *d.* 1266.

46 *Summa* ad C. 24 q. 1 c. 9.

47 Canning, *A History*, p. 117. Tierney, *Foundations of the Conciliar Theory* is the classic text.

dynasty of German emperors, most notably Frederick Barbarossa and Frederick II, was marked by theoretical discussions that were overtly political and couched in increasingly legalistic terms. To the heated debate over the relation between temporal and spiritual jurisdictions, the tremendously active Pope Innocent III, in a series of decretals,[48] made a lasting theoretical contribution to the notion of papal monarchy. Although some have questioned the extent of his actual power, whether he was a lawyer or a trained theologian, and whether he should be viewed as a papal hierocrat or a dualist,[49] there is little doubt that Innocent made various ad hoc claims to ultimate power in secular matters. Faced with specific historical situations, he claimed to have the power to choose between claimants to the imperial crown, and that his was the right to examine and reject, if necessary, candidates elected by the German princes. Because it was the pope who *instituted* the emperor, Innocent III argued that he was also the *source* of imperial authority. Furthermore, he argued in general that the pope could exercise temporal jurisdiction incidentally and that he could perform the office of secular power sometimes and in some things himself, while in some things through others. He appeared to go so far as to make the general claim of the pope's jurisdiction in civil *and* ecclesiastical cases, and certainly that in civil cases where sin was involved (*ratione peccati*) the pope had a right of intervention. Royal power was a derivative of papal power, and papal power, in deriving from divine authority, could transcend canon law usage itself.[50] During the thirteenth century, popes and decretalists actively realized what was once perceived to be the mere potential of royal power in Christ's commission to Peter that he bind and loose in heaven and on earth. And the canonist Hostiensis would go so far as to argue against the lawyer Pope Innocent IV that pagans and infidels could not be recognized as ruling validly at all.[51]

Whatever the success of papal claims in the sphere of temporal jurisdiction (and the emerging territorial monarchies during the thirteenth century resisted them vociferously both in theory and practice), when canon law was applied in matters of church administration we can observe the medieval church thinking and behaving as a proto-state. It has been argued that those institutions destined to play important parts in state formation, such as the impersonal, hierarchical and specialized structure of the office, were first realized in and through the classical canon law of the twelfth century. The legal instruments that created centralized authority in the church, such as the power of a higher judge to summon cases, the right to lodge appeals, the notion of office, the concept of a juridical person, inquisitorial proceedings, forms of collective decision-making, and in particular the majority principle (*maior et sanior pars*), rules on the legal efficacy of agreements and rules relating to the power of dispensation and the granting of privileges, were all in some way to be imitated by medieval 'states'.[52] In practice, the legal and judicial apparatus of the Roman church's *curia* became increasingly elaborate in

48 Especially *Venerabilem* and *Per venerabilem* (both 1202) and *Novit* (1204).

49 See the collected articles in K. Pennington, *Popes, Canonists and Texts 1150–1550* (Aldershot [Variorum], 1993).

50 Differing interpretations in M. Maccarone, *Vicarius Christi. Storia del titolo papae* (Rome, 1952), esp. pp. 110–16; and Pennington, *Pope and Bishops*, pp. 67–74.

51 See J. Muldoon, *Popes, Lawyers and Infidels: the church and the non-Christian World, 1250–1500* (Liverpool, 1979), esp. pp. 29–48, and who takes the story up to the debate over the treatment of Native American Indians in the New World; also see below, p. 103 on Aquinas's view.

52 See the summary in A. Padoa –Schioppa, *Legislation and Justice*, p. 342.

order to deal with what was becoming an overwhelming workload. The officials at the Roman *curia* dealt with church organization across Europe, the administration of ecclesiastical property, the establishment of procedures for the decisions of collegiate bodies of churches or monasteries, the development of the scope of jurisdiction and the procedures for ecclesiastical lawsuits, the placing of the sacrament of marriage within the jurisdiction of canon law,[53] the church's intervention in contracts and legal institutions deemed relevant to the spiritual well-being of Christians,[54] and the establishment of penal canon law including secular and spiritual sanctions against those deemed to have broken church laws. By the thirteenth century, Roman primacy had been realized in practice by legal means, in the universal jurisdiction of the pope and in papal legislation which developed from his jurisdiction. The legal means of this realization were largely the same as those to be used by European states in the process of their own formation: through imitation, differentiation or opposition. But if the church appeared 'first' in applying its canon law theory in practice, especially in the domain of its own governance, the scientific study of Roman law jurisprudence on the part of jurists known as Glossators was not far behind. In the course of the thirteenth century civilian jurists established reasons to support the view that a king was an emperor in his own kingdom, recognizing no superior in temporal affairs, *de facto* if not also *de jure*.

## The Twelfth-century 'Renaissance' and the Civil Lawyers

Indeed, the church's body of canon law and commentary came to vie with the twelfth-century revival of purely secular, civil Roman law as they found it in the full text of Justinian's sixth-century *Corpus iuris civilis*. The revived study of Roman law was further inspired by the German emperor Frederick I (Barbarossa) when he saw his rights being whittled away by the encroachment of the church in matters of sovereign rule. In Bologna, where civil law studies had already been undertaken, he formally established the first civil law school in Europe to study and enshrine civil law and the ruler's legitimate rights to constitutional rule. Germanic customary laws, as these had evolved in different parts of Europe, along with feudal law and the civil law of the Romans with explanations and commentaries by Glossators,[55] followed later by more philosophically orientated but also practical-minded 'post-Glossators', combined to provide a stock of ideas for civil lawyers engaged in determining the kinds of institutional structures that were seen as acceptable to communities throughout Europe.

Justinian's *Corpus iuris civilis* (comprising the *Code*, the *Digest* (or *Pandects*), the *Institutes* and *Novellae* ) is not without its ambiguities, especially when men sought to apply its principles to an evolving medieval society. As Kuttner noted, 'any "continuity" of Roman jurisprudence between the sixth and eleventh century in the West remains a dream, if by "jurisprudence" we understand an intellectually coherent discipline, a

53 J. Coleman, 'The Owl and the Nightingale and Papal Theories of Marriage', *Journal of Ecclesiastical History* 38 (1987), pp. 517–68.

54 J. Coleman, 'The Two Jurisdictions: theological and legal justifications of church property in the thirteenth century', *Studies in Church History* 23 (1987), pp. 75–110.

55 Most notable was the Bolognese jurist Azo *c.* 1208–10, and Accursius whose *Glossa Ordinaria* on the *Corpus iuris civilis c.* 1230 provided the standard commentary until the seventeenth century.

mastery of the sources which can give rational guidance to legal thinking – as distinct from professional routine'.[56] But this sixth-century compilation establishes additional major problems for historians of Roman law itself. We should try to grasp what this collection really is and what kind of society it reflects.

The *Code*, which was rapidly revised to take account of new legislation, consolidated imperial enactments, correcting or omitting what was, by the sixth-century, out of date. It includes a great number of Justinian's own constitutions and deals, among other things, with church law, functions of high officials, private law and criminal law. The *Digest* committee that was established to study and abridge the writings of those jurists (*prudentes*) to whom emperors had given the authority to interpret the law, were directed to eliminate contradictions and choose what they thought were the best views. Conflicts were, however, left standing and certain obsolete doctrines retained. Justinian instructed that the *Digest* was to be the sole authority for the *leges* and the writings of jurists and there were to be no objections raised on the ground of differences from the originals, nor commentaries made. Most of the material comes from few writers, and in particular, the jurists Ulpian (*d*. 223) and Paul (early third century AD). Very few are from Rome's republican period. Although the *Digest* contains earlier material, it is in essence the chief authority for *Justinian's* law: modern students of Roman classical law are warned to use it with caution because a great deal of Roman legal history was concealed by Justinian's compilers. Justinian said he intended to restore classical law doctrine, but much of what was done could be thought of as new doctrine under the guise of ancient authority. The *Institutes* was meant to be a book for beginning law students and its committee of compilers used, in particular, the writings of Gaius (first half of the second century AD). The *Institutes* was meant to have the force of law, but it does not always agree with the *Digest*. The *Novellae* includes new imperial enactments and demonstrates not only reforms but absolute changes of principle.[57]

In the sixth century this collection of law was meant to apply to the whole empire, but in its own times it was soon found incapable of dealing with the variety of custom in the provinces. Furthermore, it may be recalled that Justinian was an emperor established in the East and it is thought he was much influenced by local conditions in the Greek-speaking part of the empire. There was no Western jurist in any of his councils. In short, his compilation is that of an Eastern potentate. Should we be surprised, then, that the principles of absolutist, theocratic, imperial rule stand shoulder to shoulder with principles that reflect older republican and classical practices? Should we be surprised that in drawing on Gaius in the *Institutes*'s treatment of the private law notion of citizenship (*civitas*), Justinian, for reasons relevant to his own times, has hardly anything to say that reflects the older Roman notion of differences in citizenship status? In the sixth century the question of citizenship was not important because practically every free man, by then, was a citizen (*civis*).[58] Therefore, when the whole of the *Corpus iuris civilis* was made available to twelfth-century students and thereafter, they were certainly not being provided with a detailed account of Roman republican law. They were being provided with a late imperial compilation and it was soon discovered that the *Corpus iuris* could be

56 S. Kuttner, 'The Revival of Jurisprudence', in Benson, Constable and Lanham, *Renaissance and Renewal,* pp. 299–323.

57 See Buckland, *A Text-book of Roman Law,* pp. 39–47.

58 Ibid., p. 61; Quaglioni, 'The Legal Definition', pp. 156–8.

scrutinized for authoritative statements to support either monarchy or constitutional government by the people. There were sufficient statements to be found that affirmed both divine and popular sources of rule. Medieval jurists were not averse to citing passages out of context to suit their needs.

Justinian's *Corpus iuris civilis* demonstrated to twelfth-century jurists how Roman jurisprudence was the knowledge of things divine and human, the science of the just and the unjust. Its dominant perspective is theocratic with imperial authority deriving from God: the emperor is the lord of the world (*dominus mundi*). It also showed them that the study of Roman law comprised two branches: public law, concerned with the welfare of the Roman 'state', and private law, of advantage to the individual citizen. Most of what Justinian's compilation provides is private law. But there are also statements that speak of the possession of authority by the Roman people, who then transfer their power to the emperor. And they could find in the *Digest* 1.3.32 the survival of the republican idea that the will of the people makes both written law and custom; laws can be abrogated not only by the vote of the legislator but through the tacit consent of all through disuse.

Furthermore, from the unclear story presented by Gaius and Ulpian on the relation between natural law and the law of nations (*ius naturale* and *ius gentium*),[59] Justinian's compilers presented two contradictory views: Ulpian said that the law of nature (*ius naturale*) was shared by all living creatures, but this was different from the law of nations (*ius gentium*) which is known by each and every individual human through reason. Gaius, on the other hand, held that *ius gentium* and *ius naturale* are the same thing: the law which nature has instilled into all nations. Twelfth-century thinkers would be inspired by these contradictions to examine what was meant by 'nature'. Some would develop a natural law theory well beyond the texts in Justinian, with profound consequences for political theory and practice. Notably, some came to insist that civil law could not contravene what was natural, and that rulers themselves were obliged to act in accordance with the *ius naturale*, that is, reason. The civil law, those laws created by a state for its own members, *added* to, but could not conflict with, those more general statutes and customs prescribed by reason that were common to all humankind.

They would also thread their way among the contradictory statements on slavery and select those texts which argued that captivity and slavery were contrary to the law of nature (*ius naturale*) by which all men from the beginning were born free. But they discovered passages confirming that the universal law of nations (*ius gentium*) served as the source of almost all contracts and allowed for slavery as utility conclusions in the circumstances. Furthermore, they pointed to those passages where the emperor was described as having his authority and power to make and enforce law, the *lex regia*, conferred on him by the people who voluntarily gave him their authority so to act for the common welfare. The Roman notion of a *pactum* between a ruler and his people, along with the emphasis on a natural law which prevented arbitrary government, appears to have made sense to a Europe with feudal characteristics. If feudalism could restrict a ruler's claims to a plenitude of power, despite his increasingly centralized legislative omnipotence, then the feudal contract could be situated within the Roman law analysis of natural law and the law of nations to which all parties of contracts were subject. For this reason both Roman and canon law commentators focused increasingly

59 Buckland, *A Text-book*, pp. 52–5.

on the role of the ruler's will in the making of law, a will that was limited by divine law, by natural law and by the law of nations.[60] These 'limitations' would receive much greater treatment at the hand of medieval commentators than they ever did in classical Roman law.

Furthermore, the legislative capacities of a monarch were balanced by an acknowledgement of the role of the people in the creation of law. Medieval Roman lawyers explicitly discussed whether or not the *lex regia* was irrevocable by the people. It was recognized that a ruler could not exercise unlimited power, despite the Roman law principle that 'law is that which pleases the prince'. And Glossators discussed whether custom could abrogate imperial laws. They agreed that it could. Law, for twelfth-century jurists, had to be consonant with reason and by the thirteenth century they were to go beyond the text in the *Digest* where it said that law could be abrogated by the people's *tacit* consent, evidenced in the customary disuse of the law. They invoked the yardstick of reason and men's *explicit* consent to what was reasonable.

If, by the twelfth century, European medieval society had increasingly come under the sway of written custom and promulgated, written law, then written custom required rational discussion. Custom was to be judged against the criterion of reason, and law had to embody what was deemed reasonable. To clarify the nature of human reason, lawyers originally gave way to the arguments of another group of professionals: theologians. But lawyers also established a distinctive kind of discourse of their own which by the mid thirteenth century was seen as turning many of them into the mere bureaucratic spokesmen of increasingly centralizing monarchs in church and 'state'. Some of them came to argue what can be called the positivist line, that the ruler's will, in being held to *be* reason, *is* law. Canon lawyers like Laurentius Hispanus applied this to the pope so that he could change what was previously held to be just to what is now deemed unjust. This seemed to argue that the pope's will was distinct from the rational content of law, and hence law is simply what is legislated by legitimate, sovereign authority. French canon lawyers employed the terms *ius positivum,* although the law-maker was still viewed as operating within the terms of the common good. But there was opened the possibility of a ruler having an extraordinary power to transcend and even suspend ordinary, objectively rational principles. Some lawyers would coin the terms *potestas absoluta* to extend the scope of sovereignty of the ruler's will, even if in ordinary circumstances the ruler was not meant to deviate from accepted norms.[61]

The appeal to a plenitude of power, first associated with the terms *potestas absoluta* to express the jurisdictional primacy of the pope, would come to be adopted by thirteenth-century secular rulers as well. It is not simply that they read the tracts of the opposing 'camp', but rather that the frequent interchanges of bureaucratic personnel occurred between the spheres of ecclesiastical and secular government. The very word that is used for the royal personnel, king's 'clerks', tells us that these men were 'clerics', holders of ecclesiastical benefices, and literate in Latin, ready to put their skills to work in the service of church and/or 'state'. Especially in the twelfth century many of the same men served both (e.g. Thomas Becket). And many such men would not allow the rift between law as rational and law as will to go unchallenged.

60 See chapter 2 on Aquinas.

61 Canning, *A History*, p. 118.

## Civilians and Canonists

Both civilians and canonists built up a rational jurisprudence which provided them with a recognizable methodology to interpret and harmonize apparently contradictory authoritative texts. Their rational jurisprudence also provided them with a distinctive perspective on the world, a perspective that would come to be resisted by those trained either in the liberal arts or theology faculties in universities. Out of the legal perspective on the one hand, and out of the philosophico-theological perspective on the other, would emerge some of the major treatises of medieval political theory to be discussed below. For both perspectives, at the heart of the discussion of law as rational was the distinction between the two jurisdictions of church and 'state' over the different spheres of Christian lives. It became clear both to lawyers as well as to philosophers in the arts faculties and theologians in theology faculties that the instrument that expressed the shape of society was law as a set of binding rules:[62] law determined property ownership, rights (or their lack) of individuals and groups, the curriculum content of higher education in newly developed universities across Europe, even the intimate relationships between men and women before and after marriage. Law came to be seen as the means to legitimize reasonable practice; law was the justly enforceable acknowledgement of customary structures and relations judged reasonable.

Let us pause for a moment and consider this: local custom, when judged reasonable, is legitimately binding. This may at first sight appear surprising, since there is no doubt that Justinian's *Corpus iuris* contains strong absolutist statements, and civil lawyers in the service of a king, following the language developed from Roman law by canonists which they then applied to the plenitude of power of the pope, often referred to the absolute power of the 'prince' who 'is not bound by the laws' or 'who gives the force of law to whatever pleases him'. In some cases, European monarchs tried to impose a written codification of the law based on Justinian's law, but it is noteworthy that these attempts either failed completely or succeeded only in part.[63] There were always various social groups who were determined to defend their own customs and privileges which Roman law either denied or invalidated. In the practice of defending certain of their traditions, they rejected some Roman law principles in favour of others. The ambiguity of Justinian's Roman law, especially when applied to societies that were different from ancient imperial Rome, allowed men to seek support for their own ways of living, reconstructing the meaning of Roman law to suit their needs: they found support for individual rights to private property against the claims of the 'state', or references to the individual's power to dispose what he owned by will, or support for the individual's freedom in shaping contracts. Certain rights could be defended against individuals as well as against public authority. Furthermore, medieval society was comprised of numerous corporate groups: there were religious collectivities inspired to imitate what they took to be the collective life lived in common by Christ and the apostles, and there were merchant and craft guilds, voluntarily set up for mutual support. Collective bodies, such as city communes or leagues between cities, rural communities and professional and urban trade guilds, appealed to Roman legal texts concerning *universitates*, the generic term which

62 See chapter 2 on Aquinas.

63 See the various contributions to A. Padoa–Schioppa, *Legislation and Justice*.

described the various kinds of corporative associations already constituted in practice.[64] The law was to recognize their *already-constituted*, and now guaranteed, group legal status.

There is no doubt that in Roman law there are corporations. During the republic there were three types: the *populus Romanus*, municipalities and private corporations. But 'as the Emperor waxed the *populus* waned'.[65] There was nothing corporate about the emperor and the *populus* was to lose all importance when the imperial officials were to become the real state officers. Municipalities, on the other hand, during the republic were mainly subjugated communities which received or at least were not deprived of corporate character, but their power of acting as legal persons was variously restricted. During the empire similar corporate rights were conferred on local communities and the very foundation of such a community was an act of state. Such a corporate community could not act for itself. Persons were appointed to it to act for it. There were numerous kinds of private associations such as trade guilds and burial clubs. During the empire private *collegia* could not be founded without state authority and it is not clear that *collegia* had corporate capacity.

After the adoption of Christianity by the state, Constantine had authorized gifts by will to Christian churches, and from here church property was thought of as that of the church as a whole, although each community regarded its property as a separate patrimony under the administration of its bishop. Under Justinian, legislation secured the right of bishops to the general supervision of gifts to various charitable establishments, and these charitable establishments were regarded as corporate juristic persons. The power which resided in the corporation came to be delegated to an official representative who acted on the community's behalf. The representative's power was derivative, revocable and could be modified. But to Romans, the state preceded private corporations which were then partly modelled on it. Their status was a civic creation of state law. *Corpus habere* required a state concession. This does not appear to be the genesis of many of the collective bodies of medieval society which often emerged as local responses to particular ideals or needs in given circumstances, without 'state' recognition, since there was no 'state' to offer the concession. In studying the medieval jurists scholars sometimes tend to associate the emergence of medieval collegial practices with their juristic description and hence give the jurists more of an originating role than they actually had (doubtless following the model of ancient Rome, which gave so much power of legal development to the jurists).

## Individual and Collective Liberties

England is an interesting case in point, but is not unique in demonstrating that prior to legal description and prescription there was presumed to be a royal art of governing which consisted in persuading lords and gentry that there was a close coincidence of interest between them and the crown. This was what was called the common good and it was served in different ways by independent local gentry and self-governing local

64 P. Michaud-Quantin, *Universitas. Expressions du mouvement communautaire dans le moyen âge latin* (Paris, 1970); A. Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (London, 1984).
65 Buckland, *A Text-book,* p. 175.

communities on the one hand, and the king on the other.[66] Without this coincidence of interest, threats to the established order, be they from foreign invasion or from popular insurrection, would ensue and be threats to them all. The king no less than the commons would come to be seen as exercising their respective liberties as means to the common good. The king's liberty was not an absolute power because it was thought to be constrained by the goals of the collective *regnum*. Hence, in practice and theory, the royal art of governing, *when successful*, proved to be a management of personal liberties and political autonomies at the local levels where a centralized state's authority could not hope to establish itself in the manner of much later, early-modern absolutist governments.[67]

If we ask what was thought to be the origin of these personal liberties and political autonomies, we can uncover the answer by observing first that medieval liberty is everywhere in medieval charters and legal records. The words *libertas* or *franchise* mean a power to act in affairs of the community and to exert influence on one's fellows, free from the interference of sovereign government.[68] This kind of liberty is a political liberty, a privilege granted by some higher authority which acknowledges a capacity to engage in independent action, to exercise power and authority. We have already seen that in the early Middle Ages, following Roman and feudal traditions, certain men were the recipients of rights as privileges, granted to designated landowners to act autonomously in territories immune or exempt from extraordinary taxation, official duties and burdens. In Frankish Gaul, lay aristocrats were granted franchises as military vassals of a superior lord, by means of which they held free tenure and were free from private obligations of a servile nature to their superior landlord. In England, franchises developed to signify jurisdictional powers either of a rural aristocracy or of urban corporations. Such jurisdictional powers acknowledged the active capacity to act as a holder of a court or to be a judge, free from official interference within a defined territory or over a specified group of people.

Some historians understand liberties granted by charter to remain, by definition, privileges, even when the recipients were communities; they were not the rights of individual citizens. For liberties claimed as individual rights, they say we have to look at the records of royal justices and parliaments where many of the cases brought are concerned with personal liberty in the most basic sense, i.e. complaints against arbitrary imprisonment and extortion of money for release. Royal courts allowed what had been those rights of feudal lordship to be reduced to civic and economic rights of individuals. The creation of new legal systems and the elimination of intermediate feudal lordships led to the equal subjection of everyone to the sovereign king in territorial communities that established medieval 'states'.[69]

The example that is often given, but it can be applied elsewhere in Europe, is King

66 See J. Gillingham, 'Crisis or Continuity? The Structure of Royal Authority in England 1369–1422', in R. Schneider, ed., *Das spätmittelalterliche Königtum in europaischen Vergleich* (Sigmaringen, 1987), pp. 59–80.

67 J. Coleman, 'Structural Realities of Power: the theory and practice of monarchies and republics in relation to personal and collective liberty', in M. Gosman, A. Vanderjagt and J. Veenstra, eds, *The Propagation of Power in the Medieval West* (Groningen, 1997), pp. 207–30.

68 A. Harding, 'Political Liberty in the Middle Ages', *Speculum* 55 (1980), pp. 423–43; J. Coleman, 'Medieval Discussions of Human Rights', in W. Schmale, ed., *Human Rights and Cultural Diversity* (Goldbach, 1993), pp. 103–20.

69 See A. Harding, *England in the Thirteenth Century* (Cambridge, 1993).

John's signing of Magna Carta with his barons in 1215. Article 39 insisted that 'no freeman shall be captured and imprisoned or disseized [of his property] or outlawed or exiled or in any way harmed except by lawful tribunal of his peers and by the law of the land.' As the private feudal contract shifted into the public domain by virtue of the king being party to the contract, the king was to be seen as the head of public government and his legislation circumscribed by the customary law of the land. By the thirteenth century it seemed perfectly consistent to assert that the king was supreme lord in his own realm and also to say that his judicial and legislative authority was limited, not only by divine and natural law but also by his need to obtain counsel and consent, as well as by the licit rights of his subjects. If King John conceded this right as a privilege to his rebellious barons, the concession was originally devised in the interests of aristocratic 'free men', an estate created by royal prerogative, and it confirmed the traditional rights of the Crown within the law. But from the fourteenth century onwards[70] the very words which spoke of free men's rights to trial by peers were changed by parliament so that 'no free man' became simply 'no man' (1331 and 1352) and 'due process of law' was added. By 1354 we have: 'no man of whatever estate or condition he may be' shall be captured, imprisoned and so on, except by a tribunal of peers and due process of the law of the land. An assertion of law that was originally conceived in the interests of one exclusive estate had been reinterpreted and widened to become a fundamental law concerning the equal rights of subjects before the law and against arbitrary sovereign authority.

But other historians have argued that charters of liberties may be read as providing evidence of two things: they conveyed or simply *acknowledged* already exercised freedoms of even larger numbers of people, for instance, borough communities to which lords granted free burgage tenure and also liberties and free customs of a more active kind, these being obtained as communal privileges but were often enjoyed as individual rights. Susan Reynolds has argued that such charters, rather than offering or conceding legally such 'new' liberties, actually merely reflected in written law the *de facto* collective and individual freedom of action.[71]

All of these liberties, once acknowledged by charter or in some other legal regulation, became by definition privileges granted as concessions by some higher authority. There is no concealing the fact that the growth during the thirteenth century of more centralized governments and their respective academic and legal experts, be they national monarchies in France and England or city-states in Italy, each with its respective attempt to *replace* the diffuse feudal principalities or local *signori* of an earlier period with centralized republican or national law, enormously reduced the real freedom and power of *earlier* franchise holders. Across Europe, in both national monarchies and emergent city republics, liberty as an aspect of lordship suffered a decline from its earlier meaning of autonomous power, to being an acknowledged legal right. In fact, liberty and custom were coming to be detached from, even opposed to, traditional, feudal lordship and instead were coming to be linked with customary 'constitutional' practices.

70 As Holt, *Magna Carta,* has shown, pp. 9–16.

71 S. Reynolds, 'The History of the Idea of Incorporation or Legal Personality: a case of fallacious teleology', in S. Reynolds, *Ideas and Solidarities of the Medieval Laity, England and Western Europe* (London, 1995), esp. ch. vi, pp. 1–20; and G. Post, *Studies in Medieval Legal Thought: public law and the state, 1100–1322* (Princeton, NJ, 1964), p. 69 on the application of Roman law principles to already existing communes and craft guilds with their own institutions and officers.

The importance of understanding that medieval professional law, especially but not exclusively of the civil variety, did not in most cases create but rather acknowledged and confirmed evolving practices, cannot be overstated. The law itself thereby developed creatively to suit new and changing circumstances. Social reality was not the only source of their ideas but the ideas, whatever their source, when put into practice had to apply to the particular problems of life they were meant to solve. Legal practitioners found themselves to be confirming in law *de facto* practices rather than imposing *de jure* Roman law categories and principles on temperaments and in circumstances that could not see the *de jure* rules as reasonable. Civil lawyers recognized and articulated what less learned people took for granted when they said that the *populus* of a city was, in Roman law terms, a *collegium* under the *ius gentium* (the law of nations). This meant it did not need permission from any higher authority to be one. In practice the degree to which towns and other communities were allowed to run their own affairs depended more on their political relations with local superior authorities than on being able to produce written evidence of some formal, legal delegation of authority. The word *universitas* like the word *commune* was often used in documents without implying some new and special kind of unity in the sense of a newly created legal power or corporate personality of the group which, upon such formal legal recognition, suddenly was empowered to act in ways its members had not been free to act before.

There is no doubt, however, that with the increasing deployment of academics and professional lawyers from the thirteenth century onwards, consistent rules about group responsibilities were framed, but these did not consist in newly representing groups or corporations as legal persons so much as turning already known and exercised moral norms into legal rules. In an overwhelming number of cases the *law followed practice*. The strong assumption of medieval community meant that it was taken for granted that everyone had a right to associate with fellows provided that the actions of their association were lawful and did not exceed the customary restriction on their freedom of action as individuals with whatever status they had.[72]

Precisely because it was no simple issue for a king to legislate arbitrarily, the central question for professional civil lawyers, funded by monarchs, concerned the very nature of created law and the clarification of who was entitled to create it. It may be surprising for modern sensibilities to accept that a major topic of medieval discussion was not whether irrational tyrannical rule was possible, but what to do about it. Should a king, whose office was to represent his subjects by bearing the personality of the public corporation, not rule for the common good, as determined by the consent of his subjects or at least his aristocratic counsellors to this representation, he was declared a tyrant. Hence they asked: was such a ruler removable? Under what conditions is there a right of resistance to him? And what is the precise role that consent plays in the development of law? Whose consent is required? In the twelfth century John of Salisbury, England's Henry II's Chancellor and friend of the ill-fated Thomas Becket, famously and influentially put the argument in favour of tyrannicide in his tract called *Policraticus* even if, in the end, he

72 The concern to define the essential nature of a group with legal capacity, what we now mean by the modern corporation, was not a medieval concern. Rather, as Reynolds has shown, it was a concern of nineteenth-century German lawyers who looked back on medieval records to find precedents for trends in their own professions within a nineteenth-century monarchical state, the *Rechtsstaat*, when the free and autonomous behaviour of groups could only be realized, indeed created, through prior legal definition.

appears ambiguous as to whether or not an undoubtedly justified reason for the killing of a tyrant could or should be translated into legitimate action. His argument would be well known to early-modern Europe.[73]

It is not therefore as surprising as perhaps we might think to find that from the twelfth century on, discussions of the natural shape of society frequently used natural, organic metaphors. What was natural increasingly came to be aligned with what was rational. The propagation of power was taken to be a natural process no less than the 'state' was increasingly seen to be a natural phenomenon. What was natural was also increasingly aligned with God's intention for men living according to ordered reason in an organic society. The head and members had distinct functional and natural duties to the well-being of the whole, referred to as the Christian body public, the *corpus rei publica*, the public corporation. By the mid thirteenth century the church itself would be referred to as the *corpus mysticum reipublicae*. Some spoke of the body of the *respublica* as having a head, the king, but that its soul was the clergy. The king's counsellors could then be imagined as the body's heart, judges as the eyes and ears, soldiers the hands, farmers the feet. No part could be removed without the whole deteriorating.[74] Similarly, Roman law's interest in society as a collective entity was selectively put to use in favour of collective associations, especially in towns, that groups of men had themselves established, for instance, as guilds which they set up in order to pursue their trades, or as teachers with collective interests and whose identity was itself represented by the very word university (*universitas*). These discussions filled in the details of what were taken to be the undoubted responsibilities to the common welfare of official individuals at different levels of the socially structured whole.

## Sovereignty and Corporations

European state formation was to emerge progressively, often but not exclusively from the theoretical and practical appropriation by the 'centre' of the task of administering the law in its various manifestations: some medieval nation-states accomplished this through establishing central lawcourts (and schools for national law: the Inns of Court) to control non-royal courts (England); others by establishing a monopoly of royal justice and thereby controlling customary law (France). While the objectives set by secular political power were often the same across Europe, the means to achieving the objectives varied. Europeans, in practice, displayed a set of differentiated but interconnected legal traditions. As Tierney has amply demonstrated, the growth of what we think of as Western constitutional thought can only be understood through a consideration of the simultaneous growth of the theory and practice of both church and 'state' governance because each borrowed from the other from the twelfth to the seventeenth centuries. Indeed, the juridical culture of the twelfth- and thirteenth-century Roman and canon lawyers con-

73 John of Salisbury, *Policraticus*, ed. and trans. C. J. Nederman (Cambridge, 1990); J. van Laarhoven, 'Thou Shalt *Not* Slay a Tyrant! The So–called Theory of John of Salisbury', in M. Wilks, ed., *The World of John of Salisbury* (Oxford, 1984), pp. 319–42; C. J. Nederman, 'A Duty to Kill: John of Salisbury's theory of tyrannicide', *Review of Politics* 50 (1988), pp. 365–89; R. H. and M. A. Rouse, 'John of Salisbury and the Doctrine of Tyrannicide', *Speculum* 42 (1967), pp. 693–709.

74 John of Salisbury, *Policraticus* (1159), vi, 19–21, 25.

tributed to the seedbed from which grew the forest of early-modern political theories, most notably exemplified in the writings of Hobbes, Locke and Rousseau.[75]

The competing and complementary traditions of canon and civil law tackled many of the same issues in order to justify their respective understandings of the nature and source of sovereignty, by which was meant the power to judge, legislate and command. Canonists and civilians treated many of the same themes as they tried to find a place for spirituality and the church's administrative hierarchy in a society that saw its major conceptual and institutional debt to be Roman institutions and law. Often, a text of Roman private law was assimilated into canon law, where it was adapted and altered to establish a principle of constitutional law, whereafter it was reabsorbed into the sphere of secular government in its new constitutional form.[76] Or royal administrators, curial bureaucrats and organizers of new religious orders selectively dipped into the common pool of available legal doctrines to justify certain practices or encourage certain developments. Both treated the following themes: the meaning of the Roman law dictum *maior et sanior pars* in order to clarify how the will of a corporate group was expressed; the meaning of *plena potestas* on the part of the pope, the corporate church and the prince, in order to explain a theory of representation where a group was obliged by the acts of its representative agent with full power, even if the group had not previously consented to the representative's specific acts; the meaning of the Roman law dictum *quod omnes tangit ab omnibus approbetur* (what touches all is to be approved by all), a doctrine of consent applied to corporate bodies where the approval of the whole was required and not that of each individual member. It is this doctrine that came to support the notion that representative assemblies, acting on behalf of the whole who are touched by decisions taken, bind the whole; the distinction between *dominium* and *jurisdictio*, the right to govern one's own and the right to administer what was not one's own.

The notions of consent and representation were as important to ecclesiastics who were concerned to define the role of bishops in the church, the role of the congregation of the faithful, the role of monks in electing their abbots, all in relation to the pope, as they were important to men of different rank and status in the nascent 'states' of Europe who sought to define the origins and source of princely power, the role of a prince's counsellors, his administrators and his subjects. Likewise, members of church and 'state' hierarchies were concerned to define the nature of membership in corporate structures. The church was seen as a corporation just as were the new universities, the trades guilds in towns and the very 'state' itself, made up as it was of corporations with limited rights of self-direction and abilities to delegate powers to a representative in their name.

Tierney has shown how the period from 1250 to 1350 saw these juristic ideas assimilated into an increasing number of political and philosophical writings on the nature, rights and duties of church, 'state' and the members of each. And he has shown that what is most distinctive about these works, whether penned by theorists who were pro-papal or pro-secular monarchy, was their concern for the origins of government. They asked: was it in the people's consent or was it in God's authority? These discussions would be enormously stimulated by the rediscovery of Aristotle's ethical and political writings and their translation into Latin during the thirteenth century. But the reason

75 Tierney, *Religion*; see also K. Pennington, 'Law, Legislative Authority and Theories of Government, 1150–1300', in *CHMPT* (1988), pp. 424–53.

76 Tierney, *Religion*, p. 25.

that Aristotle seemed so relevant was because of real-life circumstances during the thirteenth century where, especially in northern Italy, in Flanders, in France and England, towns were demanding charters of liberties which acknowledged their abilities to run their own economic and political affairs.[77] Aristotle also provided university philosophers and theologians with another discourse about man and the political which bypassed juristic discourse and demonstrated that ethics and politics were disciplines that underpinned positive law. The debates over the origins of government took Augustine's ideas much further, as it was no longer viable to suggest that government was a necessary evil. Rather, it was now being viewed as something natural, something that even existed in Paradise before man's fall and expulsion from the Garden of Eden. Rightful jurisdiction over men's lives on the part of princes and town councils, or parliaments comprised of the various functional estates, were seen as the natural consequences of man's reason rather than as the inscrutable imposition of arbitrary rule on an essentially unruly and irrational human nature.

If we look at the theories of sovereignty maintained by civilians we see a concern to define the nature of supreme jurisdiction over men living socially and collectively within defined geographical boundaries. By 1200 a distinction is already drawn between ruling and owning, between, in other words, the right to act as judicial arbiter and the right to own property. It would later be argued that the prince is not the owner of his subjects' property but he is an arbiter in property disputes which arise among his subjects who are owners. Likewise, within the church there was a distinction between jurisdiction and property rights. A prelate may have jurisdiction over his church but he does not own its property. He is an administrator of what is not his own but of that which is held collectively by, say, all the monks of a monastery or the canons of a collegiate church, or even of Christendom taken as a whole corporation, a congregation of the faithful, which collectively owns church property which the ecclesiastical hierarchy administers.[78] Thus a bishop and even the pope, some argued, could not alienate or sell church goods because they did not belong to them.

Furthermore, in the *Decretum*, Gratian had argued that however superior in wisdom a man may be, his decisions had no juridical force unless he had first acquired public authority. How then is public authority acquired?[79] This question concerning the origins of government as legitimate jurisdiction would remain central to European political theorizing well into and beyond the early-modern period. It lies at the heart of the corollary issue of political obligation of subjects and citizens who unite to confer or convey power to a representative whom they have agreed to obey.

Well before 1300 jurisdiction rather than ownership was seen in both church and 'state' to be the characteristic of rightful power inhering in a ruling office. From where, then, did this rightful jurisdiction arise? Some argued from the consent of the governed; others from God's authority. From here there emerged a further distinction between legislating and judging. Some argued that the people or their representatives legislate, the ruler judges according to the laws set out. Furthermore, we see a distinction being drawn between the allegiance that may be owed by subjects – as members of a 'state' or

77 R. Celli, *Pour l'histoire des origines du pouvoir populaire: l'éxperience des Villes–Etats Italiennes (xi–xii siècles)* (Louvain–La Neuve, 1980) and see below, chapter 6.

78 See chapters 3–5 on John of Paris, Marsilius of Padua and William of Ockham.

79 See chapter 2 on Aquinas.

of a corporation – to the person of the prince, and the allegiance to his office or public personality. If a prince does not act in accordance with reason and the laws legislated, his office is not impugned although he may well be. Similarly, canonists worried about what was to be done with a heretical pope. Although it was claimed that the pope could be judged by no one, it was conceivable that the *status ecclesiae* may be threatened by a particular incumbent who engaged in scandalous crimes and heresy. The need for the offices of prince and the pope is presumed: the need for this particular prince or pope, should he turn respectively tyrant or heretic, is not assumed.

The various hypotheses on the origins of government as legitimate jurisdiction and the nature of political obligation were posed when they were precisely because medieval corporative structures had developed out of custom and sought legal justification in canon and Roman civil law. Canon lawyers in particular argued that men had certain rights prior to government by natural law, and lawyers understood these rights as active and claimable with material consequences, once men had become incorporated into some group like the church or a craft/professional guild. The way men united corporatively and thus defined their joint identity was through the voluntary consent of a gathering of men into a unity, a consent to incorporate themselves as a religious or secular community. Practice spurred theory. Tierney is therefore right to note that government as legitimated by consent is not at all an obvious conclusion for most of the human race during most of its recorded history. The medieval concern for government by consent was an extraordinary development out of the medieval conditions of living from at least the twelfth century onwards. It is a different view from the one we examined in volume 1, in the writings of Augustine, where legitimate government is divinely sanctioned order to keep the peace in history, and it is different from St Paul's understanding of legitimate government as simply the powers that be, which are ordained by God. It is also different from much that they found in Justinian's *Corpus iuris civilis*. If consent figures in these older pronouncements at all it is to an order already imposed, often for inscrutable reasons.

From at least the thirteenth century onwards some began to speak of consent as the *cause* of legitimate government, a consequence of medieval society being saturated with consensual practice. Especially in the towns of Europe, corporate groups, especially craft guilds, chose their leaders by consent, leaders who were representatives and spokesmen for the collective will.[80] Civilians like Azo mirrored this when he argued that the people conceded power to their representative and thus do not transfer it in the sense of totally alienating it irrevocably to a ruler. If a Roman example were needed, they cited the maxim that 'he who rules over all is to be chosen by all'. The Roman people created the emperor by conferring their own authority on him, said the civil law. So too from the thirteenth century, kings summoned assemblies and parliaments in order that members would consent to his taxation. By consenting frequently they won the right to consent: the monarch was justified in his expectation that they would continue to consent and this in turn led kings to continue summoning parliaments. Even Augustine was eclectically read to be in favour of consensual authority when he wrote that a true people, a political community, a *respublica*, was a multitude associated by consent, to that which they loved, God in common. From the later twelfth century and during the thirteenth, then, there were canonists and civilians who argued that governing power ultimately came from

80 Black, *Guilds*.

God as a remote first cause, but through the people's choice and natural reason, which delegated or conferred power on an office holder with what amounted to derived jurisdiction. It is this medieval constitutionalism, through the sovereign people's consent, that would play a role in the writings of the Dominican theologian Thomas Aquinas. It is fundamental to realize that this discourse emerged in a range of milieux and prior to anything we can recognize as a distinctive Italian pre-humanist or humanist discourse of the supposed preference for republics over monarchies.[81]

We have already indicated the counter-tradition in both church and 'state', that of papal and royal theocracy. For proponents of these positions the source of power was God and this power was then delegated either to the pope from whom kings derived their portion, or else God's power was separately rendered to the pope or church for spiritual rule, and to the monarch who stood as Christ's vicar in the temporal world. For these theorists the people had no constituting power granted to them; they passively had imposed on them secular and spiritual rule. An examination of practice, however, indicates that this theory was almost invariably resisted because it did not often match the facts.

## Natural Law, Rights and the Lawyers' Concern for Individual Autonomy

The language of developing theological doctrine in the twelfth and thirteenth centuries focused on the baptized Christian individual who is judged to have his or her own personal soul which is endowed with liberty and is, therefore, responsible for its acts, barring the cases of madness, delirium or hypnosis. Those damned were said to have individually merited their damnation and were to be deprived of the vision of God, having actually sinned by reason of their individual consent to evil. In theological and pastoral texts, the individual is treated *per se* as well as in relation to religious and secular authorities. Both men and women are seen as morally responsible for their acts, although women are deemed weaker vessels than men; penitential remedies were devised to correct both practices and the individual intentions behind acts.[82] Twelfth-century theological texts, in particular, speak of an area of human liberty in which the individual is considered an agent without in the first instance any historically specific political and contingent restraints placed on his own will.

Canon lawyers similarly defined this sphere of agency and we shall focus on their taking up of the theme of *ius naturale* in order to stipulate certain natural, psychological capacities in men which enable them to make claims to certain natural rights that are independent of the civic order in which they may live. Some have argued that the canonist notion of *ius naturale* may already be seen to imply a subjective right of individuals.[83] Without at first making any direct appeals to explicitly subjective rights, canonists discussed a personal sphere of inalienable, individual, moral autonomy where the *ius naturale* is defined as a faculty or ability or power of an individual agent, a power associated with reason and moral discernment that is intimately linked with this person's

81 See chapter 6 on Machiavelli and humanism in the Renaissance; further evidence is in Post, *Studies in Medieval Legal Thought*.

82 Coleman, '*The Owl and Nightingale*', with discussion of the penitential remedies of Burchard of Worms.

83 B. Tierney, *The Idea of Natural Rights: studies on natural rights, natural law and church law 1150–1625* (Atlanta, GA, 1997).

nature, prior to his incorporation into any political structure. Gratian's *Decretum* had taken over from the seventh-century bishop and scholar Isidore of Seville the notion that natural law is that instinct of nature which is common to all peoples. Through the gift of reason to the individual human soul and, in addition, through the teachings of the Old and New Testaments, the law of nature as God's supreme moral law is known to each and every man. This *ius naturale* defines an area of liberty where the individual is free to act as he pleases. This liberty leads to specific claims and powers on the part of humans as humans. The assumption here is that any representative human individual is defined in terms of his capacities as a member of the human species and not as a unique self. Rather, the individual is an example of a class of beings with normative capacities. These views were widely diffused in the law schools of Europe by the end of the twelfth century and were thereafter transmitted in the *Ordinary Gloss* to Gratian's *Decretum*. *Ius naturale* is spoken of as a psychological power or capacity which defines an area of liberty for an individual who acts or not, as he pleases, within the context of other actors.

Gratian also referred to *iura libertatis*, rights of liberty that can never be lost no matter how long a man may be held in bondage. He noted that the human race is ruled in two ways, namely by *ius naturale* (natural law) and by custom.[84] *Ius naturale* is what is contained in the law and the gospels by which each is commanded to do to another what he wants done to himself and is forbidden to do to another what he does not want done to himself. *Ius naturale*, he says, is the *ius* common to all nations, in that it is everywhere held by instinct of nature rather than by human enactment.[85] His examples of *ius naturale* are the union of man and woman, the free generation and education of children, the possession of all things in common, the one liberty of all, the acquisition of those things taken from air, land and sea, the return of a thing deposited or money entrusted, and the repulsion of force by force. These examples comprise a substantive list of 'claims' any human as human may make. The more general principle sustaining a man's rights is: do unto others as you would be done by. And Gratian added that any customary or human law that stipulated something contrary to this *ius naturale* was to be held null and void.[86]

In general, canon lawyers said that the necessity of an individual's defence against injury and force was a principle of natural law, known by reason in man.[87] Some extended this right of self-defence, which was categorized in Roman law as private law, to the public law of the 'state'. States, too, had a right of self-defence from natural law by analogy and extension from the private individual right. Indeed, gradually, in the thirteenth century, we see the growth of the idea that the social contract derives from natural law which gives individuals the right to defend themselves, and the 'state' is the best means of collectively so doing. Where the 'state' was conceived as a corporation, a fictive legal person, it neither existed apart from, nor had rights of its own above, those of its individual constituent members, arranged hierarchically and understood as a gathered collectivity.[88] *Sui generis*, this corporative 'state' had no rights and no interests apart from the common good. It is the public 'reason of state', conceived in this corporative manner, that can be seen at times

84 *Decretum Gratiani . . . cum glossis* (Venice, 1660), C. 16.9.3 *dictum post* c. 15; Dist. 1, *dictum ante* c. 1 and c. 1.

85 Dist. 1, c. 7.

86 Dist. 8, *dictum post* c. 1.

87 R. Weigand, *Die Naturrechtslehre der Legisten und Dekretisten* (Munich, 1967); S. Kuttner, *Repertorium der Kanonistik* (Vatican, 1937).

88 K. Pennington, 'Law, legislative authority', pp. 424–53; J. Canning, 'Law, Sovereignty and Corporation Theory 1300–1450', in *CHMPT* (1988), pp. 454–76 .

to have hindered the development of the individual and his rights. But where Roman law preferred the public welfare to the private, canon lawyers stepped in to argue that should public interest endanger an individual Christian's private salvation, then private right must be asserted first. 'Reason of state' obliged no individual Christian absolutely.

Twelfth-century theological and philosophical texts had already begun to emphasize a kind of ethical personalism by focusing on the sphere of private individual intention behind acts. As the theologian Peter Abelard had proclaimed early in the twelfth century, it was the moral value of a person's intention that gave value to his acts rather than their consequences.[89] Out of this concern for private intention arose the extended practice of private confession as stipulated in the decrees of the Fourth Lateran Council of 1215. On this view, intending, moral, social and rational individuals were considered to function best in corporate groupings, be they guilds, city corporations, universities or religious orders. But such collectivities were constituted by individual consent and individual will.[90] With the elevation of marriage to a church sacrament during the twelfth century, the marriage contract was seen as a typical expression of two consenting individuals, male and female, to a binding relationship which could only be cemented at the age of reason, the age of consent. No marriage would be recognized by the church without an explicit consent of both parties, in words and before witnesses. A doctrine of what we would later call subjective rights was already implicit in marriage law.[91] It is clearly explicit in the writings of the great canonist Huguccio.[92] For Huguccio, the primary meaning of *ius naturale* is a subjective force or power that is inherent in the soul. In a secondary sense he claimed that *ius* could be used to refer to moral laws known through reason, such as the scriptural injunction to do not to others what you would not have done to yourself. But he insisted that such moral precepts *derive* from, are the *effects* of, a prior natural *ius* or right, so that subjective rights should be seen as giving rise to objective rights. His is an analysis of human nature as rational, self-aware and morally responsible before it acts in ways that confirm rationality and responsibility.

It appears that the natural law of the Stoics and of Cicero, by which men's reason could discern a cosmic rational law as objective, and which according to Cicero was an *innata vis* (innate power) in man,[93] came to mean a subjective force, a faculty or power inherent in human beings. It was the twelfth-century lawyers who made this clear in theoretical writings and practical decisions. But it was also a view inherent in the discourse of theologians who were concerned with what we might call human psychology, the functions and capacities of the soul. We shall see that the concern with human psychology was integral to the most elementary education a medieval student might receive, and that students who never even finished their university degree would have become familiar with ways of speaking about human psychology when they studied grammar, logic and rhetoric and what was called practical moral philosophy. The next step was to specify what consequences of possessing such an inherent psychological

89 P. Abelard, *Ethics*: *Scito te ipsum*, ed. and trans. D. Luscombe (Cambridge, 1971), p. 45.

90 See Black, *Guilds and Civil Society*.

91 Coleman, '*The Owl and the Nightingale*'.

92 R. Weigand, *Die Naturrechtslehre,* pp. 215–16; B. Tierney, 'Origins of Natural Rights Language: texts and contexts 1150–1250' in Tierney, *The Idea of Natural Rights*, ch. 2; and B. Tierney, 'Origins of Natural Rights Language: texts and contexts 1150–1250', *History of Political Thought* 10 (1989), pp. 615–46.

93 See volume 1, chapter 5 of *A History of Political Thought*.

power could be observed in those laws that had to be obeyed or those rights that could be licitly expressed. Theologians like Aquinas would provide one view, canonists another. Both were related. Canonists, for instance, divided natural law into commands, prohibitions and demonstrations that men know prior to the 'state's' positive enactments. Some described the primeval state of affairs and others expanded on an original area of permissiveness, a right of nature, when rights could be licitly exercised.

From here arose discussions of whether private property was a natural right or whether it was simply a creature of positive and public law. In general, where positive law was held to be created by the sovereign, all sovereigns were to be conceived as bound by a prior natural law and hence by reasonableness. And prior to sovereigns and 'states' was the individual as a social being, living in a society with fellowship that came before particular, constitutional orderings of men in historical *regna*, as Cicero had also maintained.

## Origins of Property Rights

The debate over the natural or conventional origins of property took the discussions of individual rights further.[94] According to the canonist Huguccio, private property is a social institution which involves a natural obligation to others. While property should be private, he thought there was a sense in which it should also be common, so that ownership and administration of property is the responsibility of individuals, but worldly goods had to be shared with others in times of need.[95] Huguccio did not use this Ciceronian doctrine to assert a natural right of the poor to the superfluities of the rich. But other canonists and theologians did. They argued that the poor man who stole in times of necessity had a right to what he had taken, even without the explicit consent of the owner. Alanus specifically argued that in such circumstances what the poor man takes is really his own *iure naturali*, by natural right. Others argued that the poor man took what he needed 'as if he used his own right and his own thing'. This position became enshrined in Hostiensis' *Lectura on the Decretals*. Canonists, thereafter, insisted that a person in need had a rightful power to do what was necessary to stay alive. While it was realized that a secular judge would not recognize the poor man as having a rightful claim, it was stated that 'many things are owed that cannot be sought by judicial procedure. They can, however, be sought as something due mercifully'.[96] Hence, natural rights were to be considered more extensive than a state's legal and positive systems of justice, indicating that a natural equity was still to be recognized over and above more narrowly conceived systems of positive law. And it was thought that in such a system where a civil judge would not recognize an extension of rightful claims to include equity beyond the strict letter of the law, a bishop could use ecclesiastical courts' jurisdiction to compel a recognition of such a claim.[97] Clearly, this was an argument that accepted the sphere of civil jurisdiction of 'states' but allowed for a more universal, moral correction by

94 Coleman, 'Property and Poverty', *CHMPT* (1988), pp. 607–48.

95 Tierney, 'Origins of Natural Rights Language', *History of Political Thought* 10 (1989), p. 641.

96 Ibid., p. 642; this is different from classical Roman *aequitas* which was meant to be fairness, but in post–classical texts it is used to mean indulgence in favour only of a weaker party; see Buckland, *A Text-book*, p. 55.

97 J. Coleman, 'The Two Jurisdictions'; G. B. Flahiff, 'The Writ of Prohibition to Court Christian in the Thirteenth Century', *Mediaeval Studies* 6 (1944), pp. 261–313; G. B. Flahiff, 'The Use of Prohibitions by Clerics against Ecclesiastical Courts in England', *Mediaeval Studies* 3 (1941), pp. 101–16.

ecclesiastical authority. However, it would also be developed by some to the effect that certain natural moral principles simply could not be contravened by positive law.

As seventeenth-century critics like Robert Filmer would observe, natural law theory leans toward universal equality with the result that women, children and servants can be considered on the same level as adult independent males. A subjective conception of rights means that the community is not the assigner of due, because each person advances claims for him or herself.[98] He was not impressed.

## Medieval Education: Practical Moral Philosophy of Ethics, Economics and Politics

Today a student might ask: how educated did one have to be in order to gain familiarity with the above rather difficult and complicated discussions and issues? Precisely who was involved in these discourses on governance and natural rights, and how vigorously were they disseminated to a wider audience beyond professional theological and legal experts?

During the twelfth century, urban cathedral schools – the precursors of universities – took on the task of educating young men who were not monks for the increasing number of positions in the bureaucracies of emergent 'states' and self-governing cities and in the expanding bureaucracy of the church hierarchy. The requirements of their studies, along with the increasing pastoral needs of the church and the demands of bureaucracies, led to a quite remarkable degree of conceptualizing about government. If we ask where a student might learn how to speak about ethical and political matters, well before he went on (if he ever did) to study the higher disciplines of law or theology, we need to turn to the curricula of twelfth-century schools to provide the answer. It was in the study of the liberal arts, notably in what was called – since antiquity – the *trivium* of grammar, logic and rhetoric that he would come across reference to *ethica* and *politica*. He would learn that ethics and politics were categorized as practical arts or practical virtues. He would be using extracts from an introductory school text, a commentary on Porphyry's *Isagoge*, written by the late fifth-century Roman Boethius (*In Isagogen Porphyrii commenta*), where he would read that the 'science of politics' was part of practical philosophy which aims to treat virtue and is to be distinguished from theoretical philosophy which aims to treat the truth. He would be taught that the good life on earth is conceived of as the virtuous life and it leads on to the heavenly life.

Boethius had said that the 'science of politics' belongs to moral philosophy, which he divided into ethics, economics and politics. In using the terms 'political science' (*scientia politica*) we must be careful not to understand their use of the word 'science' in nineteenth- and twentieth-century terms, thereby implying some kind of empirical, objective, universally applicable, law-bound and value-free method of investigating 'facts'. To medieval thinkers, following Aristotle, 'science' meant a way of knowing that emphasized normative, *human ideas* about a distinct subject matter or object of knowledge. When the term 'science' was modified by 'political' it was taken to be a branch of the wider field of practical *moral philosophy* that was necessarily invaded by value and was concerned with appropriate *human acts* in the world. What they knew about reality was

98 R. Filmer, 'The Anatomy of a Limited or Mixed Monarchy', in P. Laslett, ed., *Robert Filmer: Political Works* (Oxford, 1949), p. 287.

a consequence of what they first knew about human knowing. They theorized about mind and language first in order to get at the extra-mental and the extra-linguistic.[99]

Twelfth-century teachers like Hugh of the Augustinian abbey of St Victor in Paris, in writing a treatise on the appropriate methods a student needed to learn in order to read and interpret scripture, history, grammar and poetry texts, also spoke about the three practical arts of ethics, economics and politics.[100] Hugh placed the study of ethics, as part of practical philosophy, between the study of logic (which included the *trivium* of grammar, dialectic and rhetoric) and theoretical philosophy (by which he meant theology, physics and mathematics). Hence, after a student studied logic he would go on to study ethics. Hugh went on to say that practical moral philosophy, in being divided into ethics, economics and politics, concentrated on the individual (ethics), his private economic relations with others, that is, those acts considered under Roman private law (economics), and public, civil acts (politics).[101] Practical moral philosophy was in effect Hugh's way of describing that part of the liberal arts curriculum pursued by students in his care, which came after their having spent time on grammar, dialectical logic and rhetoric. This means that after students had learned to read Latin texts and write Latin by imitating ancient Latin texts in the curriculum, they would be asked to treat ethics, economics and politics. In dealing with ethics, they would read and discuss ancient texts that treated personal moral conduct; then they would study economics, looking at texts which dealt with the sphere of private household affairs and the relations within the family unit; and then they would study politics by examining texts which treated conduct in the 'city'. Hugh equated the words *publica* with *politica atque civilis*, and he says that *polis* is the Greek term for what in Latin we call the *civitas*. His students would have been rather younger than most university students today.

We can name the texts that twelfth-century students read or heard expounded by their teachers.[102] They learned Latin composition from two ancient Latin textbooks by Donatus (*Ars Minor*) and Priscian (*Institutiones*) and the latter, in particular, includes many quotes from Cicero's *De inventione* and from Marius Victorinus's fourth-century commentary on this work.[103] The educational focus was initially on the art of composition and this was taught by formally analysing the great Latin literature of the past. The increasingly utilitarian application of rhetoric to letter-writing, essential to governmental bureaucracies, brought forth textbooks known as *dictamen* or *ars dictandi*, taught by teachers known as *dictatores*. But the imitation of other literary works was at least as significant, if not more so, in the teaching and learning of composition to acquire elo-

99 See volume 1, chapter 4 of *A History of Political Thought* on Aristotle's logic.

100 *Disdascalion de studio legendi,* 2.19.

101 Solitarium, privatam et publicam, vel aliter ethicam, oeconomicam et politicam, vel aliter in moralem et dispensativam et civilem.

102 See the contribution 'The Twelfth-century Renaissance' by D.Luscombe and G. R. Evans in *CHMPT* (1988), ch. 12; also J. Coleman, 'The Science of Politics and Late Medieval Academic Debate', in R. Copeland, ed., *Criticism and Dissent in the Middle Ages* (Cambridge, 1996), pp. 181–214, and J. Coleman, 'Some Relations Between the Study of Aristotle's *Rhetoric*, *Ethics* and *Politics* in Late Thirteenth- and Early Fourteenth-century University Arts Courses and the Justification of Contemporary Civic Activities (Italy and France)', in J. Canning and O.-G. Oexle, eds, *Political Thought and the Realities of Power in the Middle Ages* (Göttingen, 1998), pp. 127–58.

103 It is worthy of note that discussions of grammatical *regimen* (government) and the ideas of force and government in syntactical relations derive from Priscian's discussion of verbs governing various cases. The notion of concord (*congruitas*) was also initially a grammatical term meaning agreement and was discussed with respect to the section in Donatus's *Ars Minor* on concord (*congruitas*) in syntactical relations.

quence. The rules of *dictamen* were often spoken of as too limited and formal.[104] Hence, more detailed classical works on rhetoric continued to be influential, particularly Cicero's *De inventione*, the anonymous *Ad herennium* attributed to him, and Horace's *Ars poetica*. They read Cicero's *De inventione* to learn how to write and argue logically, Boethius's Latin translations of Aristotle's logical works (including the *Categories* and the *De interpretatione*), and numerous other Latin poets, historians and orators. Perhaps the most influential rhetorical legacy was Augustine's *De doctrina christiana*, book 4, which radically adapted Cicero's theory to the needs of the Christian orator and writer. All were studied in an attempt to acquire what was called 'eloquence', so that they could write correctly, pronounce correctly, argue satisfactorily, and persuade or dissuade in a language that initially had to be learned: Latin.

In the process of acquiring eloquence through studying grammar in the first instance, they absorbed the views of Roman moralists and historians, like Sallust, from whom they learned that the Roman people had flourished and won their most striking victories during the pre-imperial period, that of the republic, when they had shaken off the yokes of their early kings. Students learned how to imitate the speeches found in Sallust's *Catilinarium* and *Iugurthinum* to inspire soldiers. And they learned from Sallust and other Roman historians a variety of proverbs – on friendship, on the contrast between the natures of different peoples – which they then used out of context. The texts of Roman historians were taught to students learning grammar as moral commentaries on Rome's history and as stylists to be imitated.[105]

William of Conches, associated with the cathedral school at Chartres, even insisted that no one could call himself an expert in grammar if he was not also a logician and an orator. What he called the complete doctrine of eloquence (*doctrinam omnis eloquentie*) was the whole *trivium* which he believed was fundamental to anyone who wished to grasp both ethics and physics, making possible the investigation of the very nature of things.[106] The inherent vocational nature of this education is obvious. These skills, William insists, are for the common utility. If you cannot read and write, and furthermore speak, argue and persuade, then the subsequent study of substantial matters in ethics, economics and politics will be to no avail. Once the student had some of the skills of 'eloquence', he focused on ethics, economics and politics, and here Cicero's *De officiis* in particular would become familiar to him.[107]

The liberal arts of the monastic and urban schools of Europe were based on Roman pedagogy which aimed to produce men of letters and culture. Quintilian's *De institutione oratoria* told them that every teacher of oratory was concerned with the moral development of his students. They held Cicero's *De inventione* to be a moral classic, especially book 2 where virtue is discussed. More advanced students read his *De officiis* to discover the relationship between friendship, duty and virtue, and reflected on his discussion of

104 J. Martin, 'Classicism and Style in Latin Literature', in Benson, Constable, and Lanham, *Renaissance and Renewal,* pp. 537–68.

105 B. Smalley, 'Sallust in the Middle Ages', in R. R. Bolgar, ed., *Classical Influences on European Culture AD 500–1500* (Cambridge, 1971), pp. 165–75.

106 The text is in M. Gibson, 'The Early Scholastic *Glosule* to Priscian, Institutiones grammaticae: the text and its influence', in M. Gibson, *'Artes' and Bible in the Medieval West* (Aldershot [Variorum], 1993), p. 251.

107 See K. Fredborg, 'Speculative Grammar', pp. 177–95, and M. Tweedale, 'Logic (i): from the late eleventh century to the time of Abelard', pp. 196–226 and K. Jacobi, 'Logic (ii): the later twelfth century', pp. 227–54, all in P. Dronke, ed., *A History of Twelfth-century Western Philosophy* (Cambridge, 1988).

justice as that which maintains the common bonds of society. Not only did they adapt his view 'that men are not born for themselves alone' to a Christian context, but they also commented on his notion of duties to friends and country. Beginners read Cicero's scheme of virtues, adapted from his *De officiis* in a mid twelfth-century anonymous collection of snippets (an anthology called a *florilegium*), the *Moralium dogma philosophorum*. The subject matter was held to be part of civic studies but students were first introduced to it in their study of grammar and logical argument.

They also became familiar with the notion in classical authors that the ideal of the virtuous life was both private and public and that the individual could not be truly virtuous unless he was also a good citizen. With the twelfth-century revival of urban life and the expansion of city communes, particularly but not exclusively in northern Italy, sovereign communities governing themselves by law were ready to adapt Cicero's teachings to the active life in the *civitas*. The Ciceronian definition of a *civitas* as a union of persons possessing a common view about justice, which they could read in Augustine's *City of God*, was a practical confirmation of their life. Augustine's *City of God* also drew on Sallust's moral view of how peace and security were corrupted by Roman wealth, ambition and discord. Clearly, they accepted that there were many views that were common to both ancient philosophy and Christian doctrine, so that teachers in urban schools, like Peter Abelard, could claim that ancient teaching on the *rei publicae status* and about the conduct of its citizens was not only similar to the teaching of ancient moral philosophers like Plato in his *Timaeus* and in Aristotle's *Categories*, but was in accord with the gospel. Abelard, in his own work called the *Scito te ipsum* (know thyself) or *Ethica*, would draw not only on the Bible and the church Fathers but also on Aristotle's *Categories* for his discussion of virtue as a habit. Abelard would note how Aristotle says that a habit is not simply a disposition of character but a quality acquired by effort. This, he says, is what a virtue is.[108]

John of Salisbury, whom we may regard as an example at the extreme end of the spectrum of twelfth-century, highly educated familiarity with the moralist teachings of classical Latin authors, was well known and much admired for having been greatly influenced by the Roman moralists and especially Cicero. He quoted from them in his *Policraticus* more frequently than he quoted from the Bible or the church Fathers. In his *Metalogicon* he entered a plea for logic to be conceived as an art, as an education in the art of thinking, reasoning and speaking in order that practical wisdom as well as theoretical knowledge may thereafter be acquired.[109] At the other end of the spectrum, where students were beginning their education in literacy and argument, they too were becoming familiar with the ideals of personal conduct and social behaviour as discussed by the ancient classical moralists and philosophers. But we must be aware that they were deriving these views from Roman moralists and not least Cicero, as well as from Latin translations of Aristotle's logical writings, *Categories* and the *De interpretatione* (*Perihermenias*), and *not* from either Plato's *Republic* or Aristotle's *Nicomachean Ethics* and *Politics*, Latin translations of which they as yet did not possess, nor from Cicero's *De republica*, the entire text of which was only rediscovered in the nineteenth century.

108 *Ethica,* book 2 on prudence and the virtues, ed. Luscombe, pp. 128–9; see C. J. Nederman, 'Nature, Ethics and the Doctrine of 'Habitus': Aristotelian moral psychology in the twelfth century', *Traditio* 45 (1989/90), pp. 87–110.

109 *Metalogicon*, ed. C. C. J. Webb (Oxford, 1929), II, 1–3.

## The Contribution of Arabic and Jewish Thinking to the Twelfth-century 'Renaissance'

Until now we have said nothing about the extension of the political boundaries of Latin Christendom from the end of the eleventh until the thirteenth centuries. And there is no time here other than to acknowledge that European 'states' and the universal church engaged in a series of brutal Crusades to regain control of the Holy Land in the Middle East. On the way, Christian armies engaged in pogroms against European Jewish communities and plundered Greek–Christian Constantinople. Latin conquests brought northern Europeans into closer contact with the culture of the Muslims in Spain, Sicily and the Holy Land. This was to be a crucial turning point in the intellectual development of the West, because Arab culture had inherited a wide range of the works of Aristotle and his ancient Greek commentators along with the works of Plato and Greek medical science which were not available in the Latin West.[110]

In Muslim Spain, Islamic, Jewish and Latin culture had intermingled and ancient Greek texts in Arabic and Hebrew translations were avidly discussed. From the twelfth century, Latin translations of the philosophical and scientific writings of the ancients with translations of their Arabic and Jewish commentators began to arrive in Northern Europe. But the story of the Islamic transmission of ancient Greek thinking begins much earlier, in Persia (modern Iran) and Iraq. The Syriac-speaking peoples of the Near East had cultivated the art of translation from as early as the fourth century and they provided Syriac versions of ancient Greek writings on science and philosophy which were then to be translated into Arabic. Especially during the eighth century, Baghdad had been particularly receptive to Hellenistic and Jewish influences and ninth-century Baghdad became a centre where Syriac versions of Aristotle, Ptolemy, Euclid and Galen were rendered into Arabic. The first Muslim philosopher to head a school and who was considered the second Master after Aristotle, Al-farabi (*d*. 950), studied in Baghdad and wrote commentaries on Aristotle's logic, physics and metaphysics. He also recovered the significance of Plato and introduced him to the Muslim community as the supreme authority on political philosophy and the investigation of human and divine laws. He wrote commentaries on Plato's *Republic* and *Laws*. In his *Enumeration of the Sciences* (*De scienciis*) he was to write the earliest and most comprehensive account of the basic themes of political science in Islamic philosophy, where he argued that lawgiving, philosophy and rulership should be linked in one person, a philosopher–king who is also the prophet–lawgiver. Substantial extracts were to be translated into Hebrew and eventually into Latin.

Ibn Sina, known in the west as Avicenna (*d*. 1037), also a Persian, was a physician and a courtier who was to exert an even stronger influence on Islamic, Jewish and Christian thinking, especially because he discussed the ideal state in his book called *The Healing,* which was divided into four parts: logic, physics, mathematics and metaphysics. Book 10, chapter 4 of his metaphysics contains his important discussion on the establishment of the city, the household and the general laws. It would be translated into Latin in the mid twelfth century.

The Jewish thinker Moses Maimonides (*d*. 1204), born in Cordoba in Muslim Spain

110 For a full discussion of translations and bibliography see M.-Th. d'Alverny, 'Translations and translators', in Benson, Constable and Lanham, *Renaissance and Renewal*, pp. 421–62.

and writing in Judaeo-Arabic, was a disciple of both Plato and Al-farabi. He too outlined the scope of the study of ethics, economics and politics and added a fourth class of practical philosophy which corresponded to the religious law of both Muslims and Jews. But in revering Aristotle, as did Arabic philosophers especially in Spain and the Maghreb, he explained in his major work, the *Guide of the Perplexed*, that scripture and the Talmud, when correctly interpreted, fully conform with the ethical and metaphysical teachings of Aristotle. One of his major themes is the rationality of the divine Law's commandments and the limits to that rationality. To Maimonides, Aristotle represented the extreme of human intellect, 'if we except those who have received divine inspiration', and the highest ambition of rational man is to understand him.

Another Muslim philosopher who lived most of his life in Cordoba in Spain, and perhaps the most influential on the Latin West, was Ibn Rushd, known in the West as Averroes (*d*. 1198). To the West he would become 'the commentator', no one needing to refer to him by name. He had studied Islamic jurisprudence and theology and then went to Marakesh where, under the Almohad princes, he was given the task of creating a coherent paraphrase of Aristotle's works. When he returned to Spain he became a judge and composed commentaries, probably the most important for the Latin West being his middle commentary on Aristotle's *Nicomachean Ethics*. His writings were translated into Hebrew and Latin. His ideal state, however, was crafted under the influence of Plato and he wrote a commentary on Plato's *Republic*. Aristotle's *Politics* was not available to him. In fact, there appears to have been no Arabic version of the *Politics*.

This classical period of Islamic philosophy, and the names of only a very few of the many luminaries who contributed to it have been mentioned here, produced a vast amount of literature on Plato's and Aristotle's writings. While a good deal of this literature interpreted both ancient Greek philosophers as capable of being harmonized one with the other, meaning much the same thing but saying it differently, Plato was the thinker to whom many turned for reflections on human society and law. For Ibn Sina (Avicenna) Plato's philosopher–king and lawgiver was assimilated to the Muslim prophet in a 'state' that saw no distinction between church and state. Aristotle was, largely, the philosopher they read for his logic, metaphysics, psychology and ethics.

In the Latin West, however, the overwhelming influence of Plato on Islamic political thinking was to be overlooked in favour of Aristotle. Aristotle was the logician they already knew, in part, and increasingly he became *the* natural and moral philosopher. From the late fifth century, Europeans had already incorporated Aristotle's *Categories* and his *De interpretatione* in Boethius's Latin translations into their education system. These works came to be called the *logica vetus* (old logic) as soon as other Aristotelian works, now called the *logica nova* (new logic) began to be translated from the Greek by James of Venice and other anonymous translators, probably in Italy, including his *Prior* and *Posterior Analytics*. To these were added Aristotle's writings on natural philosophy, notably his treatises *De anima* (on the soul)[111] and the *Physics*. It would be the Greek-speaking East and the Greek-speaking parts of southern Italy which would, thereafter, provide the Latin West with what they needed of Aristotle on ethics and politics. Northern Europeans were prepared for Latin translations of these Greek texts by their developing

111 Also known in an Arabic version and translated by Michael Scot; the archdeacon of Toledo in Spain, Dominic Gundisalvi, collaborated with Jewish scholars to translate Avicenna's commentaries on Aristotle, and Gundisalvi wrote his own *De Anima*.

interest in nature. Aristotle, as an expert on natural philosophy, along with other ancient Greek authors on medicine were being translated first for use by physicians in twelfth-century medical schools, such as the ones in Salerno and Montpellier, and they were coming north to Bologna, Paris and England.[112]

## Aristotle in the Universities

By the thirteenth century, when many universities were established, including Paris and Oxford, Europeans' knowledge of more of Aristotle's works on logic and natural philosophy had expanded and was to have a decisive effect. We can understand this if we realize what a university's vocational course of study, meant to prepare its students for future careers in the church or 'state', had become. We have already seen that the great impetus to scholastic development in the twelfth century, and the emergence of universities in the thirteenth century in which scholasticism flourished, came from a practical need for clear, authoritative solutions to practical questions about collective 'governance' relating to things both personal and public: marriage, baptism, authority in secular society and church, the legitimacy of self-founding groups and their autonomous organization within a social hierarchy of organizations like religious orders, guilds and city governments. Medieval universities like Paris, Oxford and Bologna owed their success to their development of *methods* to answer what we would call moral and political questions. They were set up as 'think-tanks' which serviced church and 'states'. They developed techniques for accumulating, arranging, reorganizing and interpreting a vast body of written materials from the past and present so that answers could be given to those questions it was thought important to ask, with consequences outside the university itself as well as within it.

It is here within what would become a *conservative methodology* for answering questions, the scholastic method, that *scholastic critical freedom* lay. The wide range of substantive questions and arguments within what undoubtedly became a tight, academic, argumentative format, allowed not only for the emergence of numerous personal and regional differences, but also for the growth of 'schools' of interpretation or 'circles' with recognizably distinct 'perspectives' on current issues. All served the same end: to answer questions convincingly and authoritatively from an ever-expanding agenda of practical moral and political issues. That the questions and answers kept changing as the agenda in church and 'state' changed meant that the universities needed to teach rules of analysis and debate, that is, a procedure by which problems could be brought to light and solved. They learned these procedural rules from the ancients and then developed them to serve their own needs. The scholastic *quaestio*, for instance, posed a problem the solution to which was found in apparently conflicting authorities. We have already observed this among the lawyers, both canon and civil, but it was taught prior to legal training in the liberal arts course. Laying out authorities on both sides, they distinguished among meanings of terms with the view to discovering how conflicting authorities

112 See D. Luscombe and G. R.Evans in *CHMPT* (1988); R. Lerner and M. Mahdi, eds, *Medieval Political Philosophy: a sourcebook* (Ithaca, NY, 1963) part 1: political philosophy in Islam, and part 2: political philosophy in Judaism; O. Leaman, *An Introduction to Medieval Islamic Philosophy* (Cambridge, 1985); C. Sirat, *La Philosophie juive médiévale en pays de chrétienté* (Paris, 1988); J. Jolivet 'The Arabic Inheritance', in Dronke, *A History of Twelfth-Century Western Philosophy,* ch. 4; J. Coleman, *Ancient and Medieval Memories*, pp. 328–31.

could be used to bolster one favoured position or another, and at the same time do justice to the authorities themselves.[113]

## Ethics and Politics in the Liberal Arts Course

At the turn of the thirteenth century exactly how much moral and political discourse could be obtained from the texts heard and read in a university's liberal arts course where one studied grammar, the *logica vetus*, then *nova*, to say nothing of the study of *philosophica moralis* or *practica* which came after the study of language and logic, all in the pursuit of learning to argue well? It turns out that in addition to the citation of Ciceronian displays of eloquence in service of civic studies, and well before Latin-reading Europeans had translations of Aristotle's *Ethics* and *Politics*, the new logical and scientific works of Aristotle were mined, not only for moral and political topics but also for modes of argument that were seen as appropriate to moral as opposed to other 'scientific' or epistemic subjects. Most notably, as Arabic works in Latin translation were increasingly read, especially the works of Avicenna (*Metaphysics* X.4) which included excerpts from Al-farabi's *De scienciis*, early thirteenth-century scholars became familiar with ancient discourse on the ethical status of the *civitas* and the degree of human 'happiness' achievable through the right relationship between ruler and ruled. As Aristotle's complete *Organon* was introduced into the arts curriculum they became aware that he had written a *Rhetoric* and a *Poetics* which as yet they did not possess but, following Arabic commentators, they thought of these works as the seventh and eighth books of the *Organon* and therefore classified them as instruments of logic. They could read in translations of Al-farabi's catalogue of the sciences that Aristotle's *Topics* teaches dialectics, which is concerned with probable or contingent things such as ethical matters, the purpose of which is to bring about strong opinion, employing syllogisms which follow from generally accepted premises. Al-farabi also mentions Aristotle's *Rhetoric* and says it seeks to persuade by employing the enthymeme and the example. Western Latin readers would have to wait more than half a century to possess a translation of this work.

Even Robert Grosseteste, one of the earliest and perhaps the first serious Western student of Aristotle's *Posterior Analytics* (as well as of the *Physics*), and well before he set to providing a full translation and commentary on Aristotle's *Ethics*, had a subject index arranged systematically as well as a bibliography where he listed under each subject the authors and the places in their works where important subjects could be found. Aristotle's *De animalibus* is referred to with reference to the unlikely ethical and political topics of education, the law of war, just kingship and honouring one's parents. Grosseteste's Index says Aristotle's *Metaphysics* provides information on electing church officials!

Aristotle's logical works and especially the *Posterior Analytics* (translated *c.* 1140) were undoubtedly difficult,[114] but these texts provided those students who stayed the university arts course with a theoretical account of general reasoning based on observation and

113 As Southern has rightly pointed out with reference to the later twelfth century onwards, 'the remarkable developments of this time in government and society in theology and law and in the application of rational discourse to ordinary life would not have taken the form they did if the schools of Paris and Bologna had not existed'. R. Southern, *Robert Grosseteste: the growth of an English mind in medieval Europe* (Oxford, 1986), p. 50.

114 According to fourteenth-century university statutes, a student by the end of his second year would have heard the *Topics* and the two *Analytics*.

leading to a body of 'scientific' knowledge. In this work students confronted questions concerning the degree of certainty in the acquisition of different kinds of knowledge, along with principles for the systematic organization of human knowledge. The limits of human knowledge were exposed in the specification of *demonstrative* knowledge, where the demonstrative syllogism corresponds to the direction of the process of reasoning regarding necessary matters. Aristotle discussed the logical structure of argument and proposed rules for studying the data that were available to the human senses. And in the final chapter of the *Posterior Analytics* he had made a very un-Platonic point. He asked: how are humans able to obtain the primary knowledge of *principles* which are necessary to *demonstrative* argument? He answered by saying that such principles are not innate, nor are they acquired from pre-existing knowledge. Rather, first principles must come from some capacity of the soul for recognizing general truths which then fit the evidence of the senses.[115]

Grosseteste was not alone in finding in the *Posterior Analytics* a theoretical account of the roles of observation and general reasoning in the building up of a body of scientific knowledge. Since primary knowledge that was necessary for valid demonstration was neither innate nor acquired from pre-existing knowledge, Grosseteste was able to argue that despite the Fall, which overthrew man's natural powers of the higher faculty of reason, man *could* acquire general principles and build up a true image of the universe through sense perception and observation. What, then, might be the relation between these general principles derived from sense perception and observation, and an individual's behaviour according to ethical norms? Students had been taught from the *Topics* that in contrast to the demonstrative syllogism, the topical syllogism corresponds to the direction of the process of reasoning regarding contingent, rather than necessary matters. Indeed, Aristotle had asked in the *Posterior Analytics*, not only how can we know and what can we know about the structure of events which we experience in the world, but what degree of certainty can we achieve in what we know? Aristotle had argued that there were degrees of certainty, dependent on the subject matter under investigation. He was therefore understood as having provided a critical analysis of demonstrative knowledge in every area of science from biology to psychology to ethics and it became clear that demonstrative knowledge and its certainty could not be had in all domains of enquiry. A study of his *Topics* had already indicated that demonstration in matters of probable or contingent circumstances could only attain the probable certainty of strong opinions through syllogisms which followed from accepted, general premises.

As we shall see, when later thirteenth-century scholars had Aristotle's *Ethics* and read book 6 on the nature of 'political science' as *distinguished* from other 'sciences' and arts, they were already prepared to interpret Aristotle's distinction between 'sciences' or kinds of thinking and to accept his classification of political 'science' or prudence as *distinct* from scientific demonstration (as discussed in the *Posterior Analytics*). By this time they were also familiar with a conception of learning that linked, rather than divorced, the soul and the body so that it was now natural to speak of men learning from the particulars of sense experience from which, by induction, they generalized to moral rules of behaviour. Thereafter, prudence, or political 'science' was a way of thinking, a consequence of particular experiences in contingent circumstances, rather than a revelation

115 See volume 1, chapter 4 of *A History of Political Thought* on Aristotle.

from on high. Hence, where dialectical demonstrative logic was seen as appropriate to confirm necessary and unchanging truths, a separate part of logic – rhetoric – would come to be seen as appropriate to ascertain what was plausible in particular and contingent circumstances. The 'science' of politics or prudence would be linked with rhetorical persuasion as its methodology, rather than with demonstrative logic.

The consequences were startling. There was a shift away from Cicero to Aristotle as the educator in *philosophia moralis et politica*, along with the categorization of rhetoric as a distinct, indeed separate part of logic which seeks to persuade an audience of beliefs rather than to prove necessary truths. The shift appears to have begun with the influence of Arabic commentaries on Aristotle, notably Averroes's 'Middle Commentary'. Aristotle's *Rhetoric*, when translated from the Arabic by the monk Hermannus Alemannus in 1256, provided a method for teaching persuasion from the *rhetorical* topics. Around the same time Hermannus translated into Latin that part of Averroes's 'Middle Commentary' in which he interpreted Aristotle's *Poetics*. Hermannus appears to have had difficulties with the text of the *Poetics* and turned for help to Averroes and translated him. Hermannus made clear that although Cicero had made rhetoric a part of civil philosophy and Horace had treated poetry rather as it pertains to grammar, the correct view was that both rhetoric and poetics are to be considered parts of logic.[116]

It was henceforth made clear that the method of rhetoric was distinct from dialectic and rhetoric used its own types of argument based on a psychology of the emotions and the habitual formation of character. From then into the fourteenth century the scope of rhetoric would be linked more closely with the moral sciences of ethics and politics, taking into account the limitations of the audience being addressed, and whether it was educated or not. Rhetoric would be discussed and taught not only in terms of its status among the other arts and sciences, but also as to its practical usefulness within moral sciences and, most significantly, in terms of a psychology of the emotions and their guidance by a practical intellect that had been persuaded by certain kinds of arguments that inspire to action.

## The Purpose of Aristotelian Rhetorical Persuasion

By the late thirteenth century in the liberal arts regimes of medieval universities it had come to be thought that logic was made complete by teaching the method whereby the faculty of desire might be guided by reason. It was said that man acts as regards both himself and others through an understanding that combines imagination and the faculty of desire. The persuasion of rhetoric or rhetorical logic relates to the act of the intellect in respect of the faculty of desire in so far as it is directed towards others. Rhetoric is the kind of persuasion that is addressed to a large number of people and therefore uses the example and the enthymeme.[117] Because men live with each other through mutual trust,

116 W. F. Boggess, 'Hermannus Alemannus's Rhetorical Translations', *Viator* 2 (1971), pp. 227–50. There are more than 90 manuscripts of Aristotle's *Rhetoric*, many of which, including the earliest, have substantial marginal and interlinear glosses. *Aristoteles Latinus*, 696, 433, 1782, 746 for the thirteenth century and 961, 962 for the beginning of the fourteenth century; Hermannus Alemannus, *De arte poetica cum Averrois expositione*, ed. L. Minio–Paluello, *Aristoteles Latinus,* xxxiii (Brussels, 1968), p. 41.

117 See below, pp. 65ff, on Aristotelian Rhetoric.

that is called persuasion which is intended to produce trust in others, whereas poetic persuasion relates to that act of intellect in respect of the faculty of desire through which a man guides only himself. The anonymous author from whom these Aristotelian views are taken noted that because all things which relate to the life of a community have to be watched over by judges and rulers, and those things are concerned with the act of justice – an act which in a sense is judicially dispensed, with some degree of compulsion, to inferiors by superiors – therefore, rhetorical persuasion is said most of all to have its place in the sphere of judicial acts. On the other hand, in his own private domain any person is his own judge and master, providing that he does not annoy those with whom he lives, and therefore poetic composition (which need not be in verse) relates to private and voluntary acts, poetic discourse being concerned with the praise and blame of voluntary acts that are not acts obliged by law. Poetics deals, then, with practical reasoning relating to the acts of man concerning himself and is considered a part of logic, a logical procedure relating to the acts of the practical intellect which fall within ethics. But rhetoric, similarly a part of logic, deals with the acts of practical reasoning which pertain to others and such acts fall within politics. This writer goes on to distinguish the other parts of logic from poetics and rhetoric, emphasizing that poetry and rhetoric attain lesser degrees of certainty. Rhetoric, however, not only aims to teach the pursuit of virtuous ways and the avoidance of evil, but it lays down guidelines in relation to actions which are subject to justice and to compulsion, precisely because it concerns itself with ways of living with special reference to others. The common good, which is aimed at by means of rhetoric, is judged to be more important than the good of the individual, which is poetry's aim. Indeed, citizens have to be drawn away from injustice by means of judicial acts, and this 'drawing away' is achieved by rhetoric, that part of logic which guides a collective morality to serve the utility of the common life of the populace. In true Aristotelian fashion, the author emphasizes that among ordinary people error arises more often from a perversion of desire, and hence from bad habits, than from a naivety of understanding.[118] Among those parts of logic which can be applied to morality, then, rhetoric is judged the more worthy and divine for it concerns itself more closely with the common good.

The author makes plain, however, that the more basic parts of logic, starting with the books of the *logica vetus* and continuing through the *logica nova*, must be studied first and are more applicable to speculative objects, before a student reaches the stage where he engages with practical, moral realities by means of the methods of rhetoric and poetry. He believes that the practical arts of ethics, economics and politics, as the constituent parts of practical philosophy, come after the study of grammar and dialectic in the liberal arts curriculum of the university because he represents a generation that had come to see grammatical studies themselves as under the control of speculative rather than practical philosophy. Grammatical and dialectical studies at university level had come to be linked less with literary style and Ciceronian civil philosophy and more with a theory of reality and a psychology. Logic had come to be studied without regard to its practical applicability, and hence as a 'science', as a theory with its own purpose, rather than as an art. The rediscovery of more of Aristotle's writings had led during the thirteenth century to a perceived intimacy between the reality of things and their conceptualization by the human mind. The interdependence between language and the structure of things, me-

118 Compare Marsilius of Padua, pp. 155–6 below.

diated by the human mind's psychology with its ability to perceive, signify and functionalize these things in language, led to considerations of the relation between those kinds of logical arguments that could demonstrate certitude about the world on the one hand, and those kinds of arguments that could achieve only true-for-the-most-part, or plausible statements about experiences, on the other. The 'sciences' and their respective status, in consequence, had been reclassified.[119]

We can observe this reclassification of the 'sciences' and their respective applications to different kinds of discourse in terms of the degrees of certainty that each 'science' achieved in another way. Just before Hermannus translated Aristotle's *Rhetoric*, Grosseteste and his team completed the translation of Aristotle's *Ethics*. He also assembled and translated ancient commentaries and provided a new commentary *c.* 1250. Grosseteste understood the subject of ethics in an Aristotelian fashion: the subject of ethics was none other than the constitution and operations of the passions and the powers of the soul. Hence, the university treatment of practical philosophy, of ethics and politics, supplementing the speculative insights gained earlier from Aristotle's logical and natural science works, had become by the mid thirteenth century increasingly Aristotelian in focus. Ethics was related to the psychology of motivation and in turn was linked to a certain kind of non-demonstrative, contingent and plausible discourse, that of rhetoric, which affected psychological motivation to action.

If the *Posterior Analytics* had enabled Grosseteste and men like him to argue that men could acquire at least the general principles and build up a true image of the universe through sense perception and observation, then the *Ethics* taught him that the operations of human capacities as they responded *inwardly* through emotions and reason to particular events and situations required that the 'sciences' of ethics and politics be *inexact*. Grosseteste was therefore able to argue that general positive laws could never take account of all the individual circumstances. He invoked Aristotle's notion of equity as an inward quality, a virtue or habit, which needed to be developed by rulers to supplement the law. Grosseteste argued that *epieikeia*, equity, 'is a word with many meanings. Inwardly it expresses a quality which shows itself in thoughtfulness, grace, modesty and love of self-knowledge. Outwardly, it expresses moderation in applying the rules of positive law and in softening the rigours of the law according to the circumstances in unusual cases'. It was these qualities, as discussed by Aristotle, which Grosseteste urged the members of the ecclesiastical hierarchy, even Pope Innocent IV, to exhibit.

## The Thirteenth 'Aristotelian' Century

It can no longer be thought that Europeans were taken by storm when Aristotle's *Nicomachean Ethics* and *Politics* were translated into Latin. The *Ethics* was translated by Grosseteste *c.* 1250 (the *ethica vetus* was available in the twelfth century – books 2 and 3) and the *translatio antiquior–ethica nova* which comprised book 1 and a few fragments

119 The above derives from an anonymous *Quaestio* on the nature of poetry, Paris, BN lat. 16709, transcribed in G. Dahan, 'Notes et textes sur la poétique au moyen âge', *Archives d'histoire doctrinale et littérarie du moyen âge* xlvii (1980), pp. 214–19, and adapted from the translation in A. J. Minnis and A. B Scott, eds, *Medieval Literary Theory and Criticism, c. 1100–c. 1375, the Commentary Tradition* (Oxford, revd edn, 1991), pp. 307–13; this contains an excellent bibliography on all the above issues.

was already available in the early thirteenth century. Book 1 and part of book 2 (the *translatio imperfecta*) of the *Politics* were translated by the Dominican William of Moerbeke in 1260 and by 1265 he provided the rest – the *translatio completa*.[120] The reason usually given for the readiness of Christian Europeans to 'accept' Aristotle's ethical and political observations is that they were in fact impervious to his distinctly ancient Greek political convictions and simply 'translated' what they saw in the texts to bolster what they already believed about their own society, which was constructed in very different ways from that of Greece in the fourth century BC. But by now it should be evident that what by mid century they believed was *already* in large part Aristotelian, once translations of the Arabic and Greek texts and commentaries on the logical and natural science works became incorporated into university studies. By the mid thirteenth century, particularly in Oxford University statutes, Cicero is not even mentioned. Indeed, it is difficult to know how far Cicero was read in universities in the thirteenth and early fourteenth centuries because of the lack of information in the early university statutes, along with the apparent scarcity of thirteenth- as opposed to twelfth-century commentaries either on Cicero's *De inventione* or on the pseudo-Ciceronian *Rhetorica ad herennium*.[121] What had happened during the thirteenth century is that the 'sciences' came to be reclassified and rhetoric was not only taken to be a part of logic, as was poetics, but it was linked increasingly to an analysis of the passions and therefore to the motivating springs of ethical and political agency. Aristotle's writings had provided them with a theory of reality and a series of analyses of how different kinds of arguments might confirm what was to be held as necessary and what was to be considered as plausible about the world of experience. Cicero and the other Roman guides to eloquence, who had been for centuries the teachers of *styles* to be imitated in speech and writing, were replaced with a doctrine that explained the psychology of how and why eloquence was successful, or not. It was this doctrine of how and why rhetorical persuasion succeeded, itself based on a theory of reality and an analysis of human psychology and human modes of argument in relation to that reality, that would become fundamental to men of prudence who governed monarchies or republics.

We have seen that by at least the end of the twelfth century the general question concerning the object of 'scientific' knowledge, belief and opinion had been formulated as an epistemological problem by men whose learning was sufficiently advanced for them to be recognized as teachers of grammar and logic. Debates over the object of scientific knowledge had become central to the arts course curriculum early on, focused as it was on logic, and related to this was the classification of the different kinds of science and their subjects on the basis of the degree of certainty achieved by different kinds of argument, applicable to different subjects of discourse. This guided medieval teachers as to where and when various subjects were to be studied in the university's

120 See C. Flüeler, 'Die Rezeption der 'Politica' des Aristoteles an der Pariser Artistenfakultat im 13. und 14. Jahrhundert', pp. 127–51, and Tilman Struve, 'Die Bedeutung der aristotelischen 'Politik' fur die naturlische Begrundung der staatlichen Gemeinschaft', pp. 153–71, both in J. Miethke, ed., *Das Publikum politischer Theorie im 14. Jahrhundert* (Munich, 1992); and C. Flüeler, *Rezeption und Interpretation der Aristotelischen 'Politica' im späten Mittelalter*, 2 vols (Amsterdam/Philadelphia, 1992). Also G. Wieland, *Ethica–scientia practica. Die Anfange der philosophischen Ethik im 13. Jahrhundert* (Munster, 1981).

121 K. Fredborg, 'Buridan's *Quaestiones super Rhetoricam Aristotelis*', in J. Pinborg, ed., *The Logic of John Buridan* (Copenhagen, 1976), pp. 47–59.

liberal arts curriculum. As we have seen, among the different sciences were those called *practica*. Now, with Aristotle's *Rhetoric* and his *Ethics* to hand, *scientia politica* was confirmed as being the most sovereign of the practical 'sciences'. Linked to politics was rhetoric, defined by the end of the thirteenth century as that science of discourse which moves both the intellect and the emotions, and it is distinct from dialectic which moves only the intellect. Rhetoric is now taken to be part of moral science and it has a subject matter that is different from dialectic. Rhetoric is about human affairs and man, and deals with particular circumstances where one judges the more or less good. Dialectic, on the other hand, is now a speculative 'science' and deals with the truth *per se*.[122]

By the later thirteenth century, then, Aristotle had come to replace Cicero in the university as the master in the 'science' of politics and its related rhetorical strategies of public persuasion. Cicero continued to be cited but mainly for those areas of moral philosophy known as *ethica* and *privativa* , that is, the government of the self and the government of the household.[123] It was Aristotle who became the source not only for a substantive analysis of the public sphere by the end of the thirteenth century; he also became the guide to the form of argument which such a substantive analysis should take. Cicero and other Roman moralists would still be read and cited, indeed increasingly so, in advice on personal conduct and conduct among friends and family (*solitarium* and *privatam*), but many university-trained authors who were engaged in *political* theorizing would simply integrate and harmonize Cicero's views with Aristotle's when their concern was the government of a community (*publicam*). We shall see later how the political theorists under consideration below used these two great but often opposing ancient minds to confirm a synthetic medieval vision of the nature of good politics and its purpose, Cicero supplementing but never replacing the Aristotelian conception of the public realm as it was understood in university milieux.[124] Indeed, once poetry was recognized as the discourse to be linked with the individual's ethical behaviour, and rhetoric linked with moral public behaviour for the common good, practical philosophy and its two kinds of persuasive discourse, as they took Aristotle to understand them, began to structure much of the political theorizing addressed to princes and citizens. This is most obvious in those texts of education and instruction known as 'mirrors for princes'. One of the most widely influential medieval example of such a 'mirror' was *On the instruction of princes*, the *De regimine principum,* by the Augustinian Giles of Rome (Aegidius Romanus) (post 1285). Machiavelli's *Il Principe* (*The Prince*) will provide us with an early sixteenth-century Renaissance version of the same genre.[125]

122 K. Fredborg, 'Buridan's *Quaestiones*, p. 50 on the anonymous literal commentary on Boethius's *De differentiis topicis* [possibly by Kilwardby?] lectio 9 and Nicholas of Paris's commentary, both influenced by Aristotle's treatment of rhetoric; O. Lewry, 'Grammar, Logic and Rhetoric, 1220–1320', in J. I. Catto and R. Evans, eds, *The History of the University of Oxford*, vol. 1: *The Early Oxford Schools* (Oxford, 1984), pp. 401–34; O. Lewry, 'Four Graduation Speeches from Oxford Mss (c. 1270–1310)', *Mediaeval Studies*, xliv (1982).

123 K. Fredborg, 'Buridan's *Quaestiones*, p. 50 on the shift of interest from the Ciceronian–Boethius doctrine of the 'art' of rhetoric to the Aristotelian 'doctrine' of rhetoric.

124 See Aquinas, John of Paris and Marsilius of Padua, below, chapters 2, 3 and 4.

125 See below, chapter 6.

## The Later Thirteenth-century Understanding of Rhetoric's Service to a Prince: Giles of Rome

Giles of Rome (*c.* 1243/7–1316) is the earliest Parisian master whose name is associated with a commentary (*c.* 1280) on Aristotle's *Rhetoric*, using the Dominican William of Moerbeke's recent translation rather than that of Hermannus.[126] Here he argued that rhetoric serves the need of the practical intellect, specifically of the man who uses his reason to discover and practically promote the common good of society. Rhetoric is therefore the proper instrument of a statesman in carrying out his task of persuading those under his government to perform those actions which serve the common good. The orator must be able to deal directly with particular and practical issues and his concern is to use arguments to arouse the passions of his readers/auditors. He must speak in a way which will appeal to the capacity even of the simplest and most uneducated listener. Indeed, the audience of rhetorical orations is presumed to be *grossus* and for this reason enthymemes and examples most suit the capacity of the minds of such people. Giles omits all references to Ciceronian material.

Giles began his enormously popular *De regimine principum* after 1285[127] and dedicated it to the future king of France, Philip the Fair. Book 1, chapter 1 poses and answers the question: what is the mode of procedure in the instruction of princes? Citing Aristotle's *Ethics* and his own commentary on the *Rhetoric*, Giles says:

> In the whole field of moral teaching the mode of procedure, according to the Philosopher [Aristotle] is figurative and broad. For in such matters one should make one's way by use of types and figures, for moral actions do not fall completely within the scope of narrative. The subject matter itself, along with the end purpose of an art of princely government, as well as its intended audience all confirm that the mode of procedure should be figurative and broad. Since the body of knowledge which relates to princely rule is concerned with human actions and is included within the moral sphere, and the subject matter of morals does not admit of detailed and thorough scrutiny but concerns individual matters, because of their variable nature the individual actions which are the subject matter of this work show that we must proceed by way of figures and types. If we look at the intention of this art of princely government, then as Aristotle says in the *Ethics*, we undertake moral study not for the sake of abstract contemplation, nor to gain knowledge, but in order that we may become good. Hence, the end of the science of princely government is not to gain true knowledge concerning its own matter but rather, moral activity. Since subtle arguments are more effective in illuminating the intellect while those that are superficial and broad are more effective in stirring and firing the affections . . . in moral matters, where the goal is an upright will and that we should become good, one must proceed by persuasion and the use of figures. . . . As to the audience which is to be instructed in this art: although the title of this book is 'on the instruction of princes', all of the populace is to be instructed by it. Although not everyone can be a king or prince, everyone ought to do his best to see that he becomes the sort of person who would be worthy to be a prince or king. And this

126 *Rhetorica Aristotelis cum Egidii de Roma commentariis* (Venice, 1515; photorepr.: Frankfurt, 1968); K. Fredborg, 'The Scholastic Teaching of Rhetoric in the Middle Ages', *Cahiers de l'institut du moyen–âge grec et latin*, 55 (1987), pp. 85–105; Ubaldo Staico, 'Retorica et politica in Egidio Romano', *Aegidiana* 3. *Documenti e studi sulla tradizione filosofica medievale*, III, 1 (1992), pp. 1–75.

127 Rome, 1607, repr. Aalen, 1967.

> cannot be achieved unless the tenets which are to be related in this work are known and observed. So, in a sense, the populace as a whole forms the audience for this art. But only a few are endowed with acute understanding. Hence, the remark in the third book of the *Rhetoric* that the larger the population, the farther are they from understanding. So the audience for these moral matters is simple and unsophisticated as I showed in my commentary on the first book of the *Rhetoric*. Because the populace as a whole cannot understand subtleties, one must proceed in the sphere of morals in a figurative and broad way. According to the Philosopher in his *Politics*, the subject ought to know and do what his lord ought to know and command. [*Politics* III, 4, 1277a25–b7]. If, by means of this book, princes are instructed as to how they should conduct themselves and how they should govern their subjects, this teaching must reach out to the population so that it knows how it ought to obey its princes. Since this cannot be achieved except by arguments which are superficial and appeal to the senses (*rationes superficiales et sensibiles*), then the mode of procedure in this book ought to be broad and figurative.

We are being told that this famous 'mirror for princes', perhaps the most famous medieval tract to establish the political theory genre known as 'instruction on princely government', is a work of oratory, following the prescribed form as well as the substantive content of Aristotle on rhetoric, with references to Aristotle's *Ethics* and *Politics* to confirm the arguments Giles himself wishes to make on princely government. He has not written a commentary on Aristotle's *Ethics* or *Politics*; he has his own agenda but draws on quotations or paraphrases from the *Ethics* and *Politics*, and cites numerous worthies including the recently deceased Dominican philosopher and theologian Thomas Aquinas,[128] merely as relevant support or explanatory example.

## Aristotelian Rhetoric

What is implied in the use of Aristotelian techniques of rhetorical persuasion and figures?[129] Aristotle's *Rhetoric* is a curious work when compared with Cicero's *De inventione*, for instance. Aristotle's is a detailed psychology of the human emotions, which can be moved by a kind of informal reasoning and a kind of prose style. It seeks the roots of persuasive discourse and the reasons for its success in the nature of human character and emotion. Its method is that of a kind of demonstration in the absence of deductive certainty. Aristotle describes rhetoric as a counterpart to dialectic (I, 1, 1). And rhetoric, like dialectic, is a 'tool subject' in contrast to politics, ethics and other 'sciences'. Sciences are forms of knowledge of underlying 'facts'. Rhetoric, like dialectic, however, is an art rather than a 'science' in the sense that the art of rhetoric can be taught, it is a skill, but it is one that is a productive activity of the orator rather than a feature of language and argument.

Aristotle speaks of rhetoric as a kind of offshoot of dialectic and of ethical studies (I, 2, 7). As an art, rhetoric is a combination of analytical knowledge and the knowledge of men's characters (I, 4, 50). Its successful use can only be achieved by an orator's grasp of the most important features of human nature, emotional and intellectual. The orator must be a logician in order to understand the principles of his arguments, and a

128 See chapter 2 on Aquinas.

129 Text: G. A. Kennedy, trans. and notes, *Aristotle On Rhetoric: a theory of civic discourse* (Oxford, 1991).

psychologist in order to understand the basis of character and emotion. His audience need be neither. Because rhetoric as a skill is not a field of theoretical knowledge or speculation but a praxis of practical reason, it takes self-evident premises as its starting point and then proceeds by a syllogistic method, aiming at finding the persuasive aspects of a *particular* subject matter in order to motivate rational agents to action. The orator looks to persuade people of a certain sort of what is plausible, so he needs to know of what sort his audience is. Rhetoric is defined as an ability to see the available means of persuasion in *each case* (I, 2, 1). And persuasion occurs through the argument when an orator shows the truth or the apparent truth from whatever is persuasive in each case (I, 2, 6). The orator's task is to find *(inventio*) those aspects of his subject that can be employed in his arguments which are designed to stress certain features which can induce the appropriate emotional state in his given audience. *He* needs to discover the correct premises, where to begin, in order to persuade. Once he has his premises, he argues by means of 'proofs common to all' and these are what are called either the rhetorical enthymeme or the example. The enthymeme, a kind of rhetorical syllogism, contrasts with the logical syllogism, because it uses premises and conclusions that are ordinarily probable, not necessarily logically valid, and sometimes the very premise is omitted if it is thought to be assumed by the audience (I, 2, 8–13; II, 22, 1–17). Furthermore, an orator's premises are not indubitably true or necessary (unlike those of dialecticians using demonstration) (I, 2, 14). Rather, his premise is something considered true for the most part and produces true-for-the-most-part conclusions. He derives his enthymemes from such probable starting premises and the enthymeme is tied to a particular subject matter, applicable only to it, and is not applicable generally (like topics) to any possible subject matter. He may also persuade by using examples (paradigms), either by speaking of things that have happened before (historically) or by making up a fictional illustration (II, 20, 1–9).

Who needs to learn this skill? The prudent man. In the *Nicomachean Ethics* Aristotle had insisted not only that the 'science' that studies the supreme good for man is politics, but that under political science come those arts most highly esteemed: the arts of war, of property management (economics), and public speaking.[130]

Aristotle outlines three species of persuasive oratory: (1) *deliberative* oratory, which offers advice by exhortation or dissuasion and concerns future events, aiming to illuminate the advantageous or the harmful; (2) *judicial* oratory, most common in the lawcourts, which proceeds through accusation or defence and deals with the past and what has been done in order to arrive at a decision concerning the just or the unjust; and (3) *epideictic* oratory, which praises and blames existing qualities in the present, reminding the audience of the past and projecting the course of the future; it aims to illuminate the honourable and the shameful (I, 3, 1–6).

Deliberative oratory aims to establish the advisability of a given position or decision. This final objective is what is called the deliberative objective and is that which is the most worthy and important, indeed the finest form of rhetoric, for Aristotle, because it deals with political judgement. It seeks to persuade by the enthymeme (rhetorical syllogism) and the example, and examples from history are more useful than the fictional variety since generally, he says, future events will be like those of the past.[131] He provides

130 NE I, 2, 4–6. See volume 1, chapter 4 of *A History of Political Thought* on Aristotle.

131 II, 20, 8; compare Machiavelli, chapter 6, below.

political topics that are useful in deliberative rhetoric where advice is offered in public, notably on finances, war and peace, 'state' security, and the framing of laws (I, 4, 7). Here he makes it clear that 'state' security, the safety of the 'city', is in its laws and he advises the orator offering advice to know how many forms of constitution there are and what is conducive to each and by what each is naturally prone to be corrupted (I, 4,12). Furthermore, it is useful when engaged in constitutional revision, not only to know the constitutions in effect in other 'states' but to observe what constitutions are suitable to what sort of people (I, 4, 13). Although these subjects belong, he says, to politics rather than rhetoric, they are the subjects which comprise the agenda of the orator and he needs to have propositions dealing with these subjects if he is going to give counsel by his deliberative oratory. Furthermore, in his effort to demonstrate that a course of action is in the best interest of his audience, a deliberative orator needs an understanding of the objectives and values of human life, and these, in addition to the previous political propositions, provide additional premises for his argument (I, 5, 1ff.).

Because deliberation in public councils and assemblies is designed to promote the happiness or at least the utility of those on whose behalf it is conducted, the orator has first to grasp the constituents of human felicity or 'happiness' in order to understand how certain subjects may appear relevant to an audience seeking plausible proofs. Hence, where the *Nicomachean Ethics* gave a conceptual analysis of human well-being (*eudaimonia*) based on moral and intellectual virtues and their means of acquisition, the *Rhetoric* simply identifies those constituent components of human felicity and then studies (book 2) the human emotions which he wishes to produce or control.

In book I, 6 Aristotle provides some extraordinary definitions for the orator, especially if he has already considered the character disposition of his audience. He indicates a list of what are the more or less agreed upon goods for most men who are of the rather conventional kind. There is no urgency here to explain why a man needs to know and then do the morally right thing as there was in the *Nicomachean Ethics*. Instead, he emphasizes here that the good is simply what all desire and the *many* resembles *all*; in general, things that are deliberately chosen are to be taken for good. He says that ordinary people prefer to do a range of things: evil things to their enemies, good things to their friends, and generally things that are possible. They value things easily done, for since easy, they are possible. And things are good if they turn out as people want; but they want either nothing bad or an evil less than the accompanying good, and the latter will be the case if the cost is either unnoticed or slight. Furthermore, people value things that are peculiarly their own and that no one else has or does and that are exceptional, for in this way there is more honour. And people value things that are suited to them and such things as are befitting their family and power. And people value things they think they are lacking in, even if small, for none the less they choose to get these things. And most of all, each category of people values as a good that to which their character is disposed, and the range of values comprises victory, honour, money (I, 6, 21–30).[132]

Aristotle is making clear that it is no part of the orator's task to preach values that are not shared; rather, it is his task to discover, in given circumstances and in the light of a particular audience, what all desire and he is to begin with this as 'the good' and 'the advantageous' (I, 7, 28). Indeed, the greatest and most important of all things for an orator is an ability to persuade and give good advice by achieving an understanding of

132 Compare Machiavelli, *Prince*, chapter 6, below.

each form of constitution and to distinguish customs and legal usages and the advantages of each. This is because all people are persuaded by what is advantageous and preserving the constitution is advantageous. A constitution reflects the character of a given people and an orator should become acquainted with the kinds of character distinctive of each of the four forms of constitution: democracy, oligarchy, aristocracy and monarchy (I, 8, 1–5). It is significant that Aristotle defines monarchy in accordance with its name, as that in which one person is sovereign over all; of these, some are a kingdom with orderly government, some a tyranny where power is unlimited. The orator, therefore, is to know the aims of each constitution and why choices are made in light of these aims, by the characters of persons that are formed by different constitutions. The skilled orator simply adapts his persuasive speech to the character of his audience.

If he is successful, and his deliberative oratory is preserved in writing, a disinterested reader of another time and place would have no way of determining the personal preferences of the orator. He would simply have revealed the values and characters of those whom he has successfully addressed and advised!

The orator is meant to be able to come up with recognizable, exemplary archetypes of agents' characters and how they were formed by social and material conditions, or age, and he addresses them in ways that would appear most convincing to them. In this way he is able to provide types of proofs or conclusions, be they logical (for the educated), emotional (for the many) or ethical (for all who are part of a given community with established conventions). The conclusions of proofs are suited to the character who is the recipient of his speech. His style is functional: it aims to secure the conviction of the audience, and Aristotle emphasizes clarity (book 3) without excluding ornate embellishment, imagery and metaphor. Indeed, he speaks of the style of deliberative oratory as like shadow-painting, providing an outline without detail as it is intended to be seen at a distance; the greater the crowd, the further the distance of view, and exactness is wasted effort.[133]

If rhetorical argument in general proceeds by enthymeme and example, Aristotle believes that deliberative oratory, which deals with the possible and the future, best uses populist arguments which employ examples, either narrating a version of the facts of past events as the speaker sees them, or inventing similar stories. It is in narration that clarity and descriptiveness are most important, but the orator is no mere narrator.[134] In persuading by enthymeme and example, the orator is using a kind of induction, or he is using a kind of dialectical syllogism, but it is a syllogism that is formally imperfect. A medieval university student would have studied the species of enthymeme, not least when he treated Aristotle's *Prior Analytics*.[135] What is sought in the use of Aristotelian rhetorical persuasion, then, is the construction of plausible arguments that sway the emotions of a given, large audience to conclusive opinions that appear true to it, or at least plausible for most similar cases. There is no recourse to universal conclusions because the orator only argues his particular case with particular conclusions. If the audience is, in general, the

133 III, 125; compare Machiavelli's dedicatory letter to the *Prince*, where he compares his method to landscape painters who station themselves in the valleys in order to draw mountains or elevated ground, and ascend an eminence in order to get a good view of the plains.

134 For parallels with this method, see chapter 6 on Machiavelli.

135 II, 27, 70a 30.

uneducated people who understand only rhetorical enthymemes that *prove consequences*, then it is assumed that they cannot understand the *causes* of things or else have no interest in causes.[136]

## Returning to Giles of Rome's Rhetorical *De regimine principum*

This, then, is the rhetorical method that determines the substance of Giles of Rome's *De regimine principum*. The work was a product of the arts curriculum of the later thirteenth century, following Aristotle's *Rhetoric*, and the tract's divisions follow the division of *philosophica practica* as *solitarium/monasticum/ethicam* (book 1: on the government of the self); then *privativam/oeconomicam/dispensativam* (book 2: on the government of one's household); and last, *publicam/politicam/civilem* (book 3: on the government of the city or *regnum*). If Giles holds this to be the method of the orator, he also holds it to be the method of the prudent man, the king, so that his argument is that kings must learn how to be orators.

This is a conclusion that most of us have been taught could never have emerged from university scholasticism and the arts course of Paris, or elsewhere; indeed, that we would have to await the humanists, especially from the city-states of Renaissance Italy, to hear it.[137]

We can take one interesting example of how Giles puts this method to use when in book 3 he discusses the government of the city or *regnum*. He describes the *regnum* as a concrete, territorial state, rather than as an abstraction, and he gives examples of cities which have several neighbourhoods in which men practise various crafts and arts. The *regnum* is defined functionally as a great multitude in which there are many noble and free men, living virtuously, according to institutional arrangements (*ordinati*) under an optimum regime, as under a king: *multitudo magna in qua sunt multi nobiles et ingenui,viventes secundum virtutem ordinati sub uno vivo optimo, ut sub rege* (book III, pars 1, c. 9).[138]

On the question of whether a king who is elected is preferable to one who inherits his office (book III, pars 2, c. 5), Giles first presents a rhetorical argument to be used to convince princes, *ex parte regentis*, of the benefits of being concerned for the common good if they have inherited their office, and then another to convince the people, *ex parte populi,* of the merits of hereditary monarchy. These are arguments from differential emotional motivations on the parts of different social ranks in a monarchy that already operates with the hereditary principle, as did France. Giles, following Aristotle, knows the character of his audience. His argument to convince a hereditary prince of the merits of serving the common good starts with the emotional self-interest of a father: he notes that it is natural for a king to feel a love for his own, and naturally he cares more for his own kingdom when he believes its well-being to be consonant with his own good. He

136 Compare Marsilius of Padua, chapter 4, below, on ordinary men not seeking the causes or principles behind the laws but having enough sense to judge the consequences of laws proposed to them; the above considerations should be kept in mind when we come to discuss Machiavelli's *Prince* (chapter 6) and Machiavelli's debt to this tradition.

137 See chapter 6 on Renaissance humanism.

138 Compare below with Machiavelli's understanding of *vivere politico*, *Discorsi* 1, 18 and his statement in *Discorsi* 1, 25: 'e questo . . . debbe osservare colui che vuole ordinare uno vivere politico, o per via di republica o di regno'.

wishes therefore not only to be the ruler during his own lifetime, but to rule through his own sons, and since the future hope of the country resides in his sons, he must be convinced that the good of his country is his own good, so that he is moved to love his country as he loves his sons whose good depends on the good of the realm after he dies. Thus, those who wish to achieve the good of the realm (*ad procurandum bonum statum regni*) that is governed by a hereditary monarchy must rhetorically motivate a king to love his realm by showing him that his natural and ardent love for his sons will be best achieved if he provides well for the realm that they will inherit.

The argument *ex parte populi* is based on a given tradition of behaviour: he says that when it is the case that the people are used to obeying the descendants of the king, then they are of a certain disposition to follow the rules of one person who has already received respect as the designated successor.[139] Giles, however, goes on to argue that *election* of a king is valid absolutely (*absolute*), that is, theoretically and speculatively,[140] but in practice, and in France, he prefers hereditary kingship here because when one considers the concrete condition of men (*experimentaliter*) hereditary succession is best in these circumstances. He has started with given and particular cultural premises, and then argued that if and when men have become used to living under kings, then hereditary kingship is most likely to be accepted. Giles has not presented a general truth but a rhetorical particularity using the enthymeme and the example, given his knowledge of his audience, the future king of France and his people.

He goes on to argue that right reason (*recta ratio*) is *always* decisively superior to positive law and tradition, but that it is plausible that where there is an *optimus rex* (the best king) there will be *optima lex* (the best law). And for this reason he thinks that the king must take up the lessons taught by the orator because only then will his own right reason coincide with the natural law which God impresses in the mind of man, the consequence being that the king will then be able to direct the positive law but be above those laws himself (not above either natural law or right reason). He will be the prudent man who has acquired virtues and whose desires, when guided by practical reason, will issue in those exterior deeds, justified by effective good reasons (*boni rationis effectiva*), that will enable him to be seen as justice itself in action.

Indeed, previously (book II, ch. 1, 14) Giles had distinguished between what he calls a *regimen regale* and a *regimen politicum*. The distinction refers to those who are seen as the authors of the laws of any *civitas,* be it the ruler who governs according to his own will and according to those laws he has himself instituted (*regale*), or the ruler who governs according to laws instituted by the citizens according to their own traditions and customary agreements (*regimen politicum*). He expresses no preference. Rather, he is distinguishing between what these respective types of regimes are called (*est denominandum*) and the distinction rests on who institutes the laws. As Aristotle had noted in *Rhetoric* (I, 8, 1), the edict of the central authority is authoritative and central authorities differ in accordance with constitutions. For Giles, both the *regimen regale* and the *regimen politicum* are orderly governments. The *regimen regale* is not what Aristotle referred to as a tyranny, where power is unlimited, but rather, a monarchy where one person is sovereign over all and where there is orderly government. Someone who governs and deploys oratori-

139 Compare Machiavelli's *Prince*, chapter 6, below.

140 *Contra* M. Viroli, 'Machiavelli and the Republican Idea of Politics', in G. Bock, Q. Skinner and M. Viroli, eds, *Machiavelli and Republicanism* (Cambridge, 1990), pp. 143–72.

cal persuasion had better know which kind of regime he is addressing. An *optimus rex* instituting *optima lex* is as much bound by natural law and right reason as would be the citizens who, in a *regimen politicum*, institute laws.

## Rhetoric outside the University and Aristotle within the University

If we turn briefly to what has been called the pre-humanist rhetorical culture that began to flourish in the Italian city-republics of the early thirteenth century,[141] we find what has been called a new and distinctive form of political literature emerging, a literature of advice-books devoted to explaining the duties of a city official known as the *podestà*. These works were the compositions of *dictatores* who prepared model speeches to be imitated, like Guido Faba, as well as the more specialized treatises on city government.[142] All demonstrate a heavy reliance on the views of the Roman moralists. These were most often available to them in the same florilegia that were available to cathedral schools and students in the university arts courses. Cicero's *De officiis* was known to them from the twelfth-century *Moralium dogma philosophorum* and from the thirteenth-century compilation by Guillaume de Peyrault, *Summa virtutum et vitiorum*. The writings of these Italian *dictatores*, even before that moment when Aristotle's *Ethics* and *Politics* were made fully available in Latin, were engaged in integrating Ciceronian and Aristotelian insights, as we shall see below when we discuss the twelfth- and thirteenth-century experiences of Italian cities.[143]

Doubtless, the ideology of self-governing republican city-states of the early thirteenth century pre-dated the recovery of Aristotle's moral and political works. But of course in the twelfth- and early thirteenth-century schools and universities, what was understood as practical moral philosophy, comprised of ethics, economics and politics, also pre-dated the recovery of Aristotle's *Ethics* and *Politics*. Aside from the Roman moralists like Cicero, we have seen that the logical and increasingly known natural-science works of Aristotle were studied for their teachings on moral and political topics. And we should not think that the teaching of Aristotelian philosophy was limited to the universities of Paris and Oxford; it was also pursued on a very large scale in thirteenth-century Italy.[144] In Italy, Aristotelian philosophy was especially connected with the study of medicine and law. The older Italian universities like Salerno, Bologna, Padua and Naples had no theology faculties, but where there were isolated courses and chairs of theology they were usually part of the faculties of arts. The teachers of Aristotelian philosophy in Italian universities were laymen and lay Aristotelianism continued to dominate philosophical teaching in Italian faculties of art until and throughout the Renaissance, well into the sixteenth century.

141 See further below, chapter 6.

142 For instance, the anonymous O*culus pastoralis c.* 1220s, Orfino da Lodi's *De sapientia potestatis* (1240s), Giovanni da Viterbo's *Liber de regimine civitatum* (*c.* 1253) and Brunetto Latini's famous encyclopedic *Li livres dou trésor* (*c.* 1266, written in French).

143 Q. Skinner, 'Ambrogio Lorenzetti: the artist as political philosopher', *Proceedings of the British Academy* LXXII (1986), pp. 1–56 has argued, on the contrary, that there was no such integration, as well as that Aristotle did not come to replace Cicero and other Roman authorities.

144 As P. O. Kristeller long ago showed in *Medieval Aspects of Renaissance Learning: three essays*, ed. and trans. M. P. Mahoney (North Carolina, 1974), esp. 'Thomism and the Italian Thought of the Renaissance', pp. 29–94.

In universities across Europe, then, it appears that Aristotle came to replace Cicero as the analyst of the public sphere among arts faculty students and lecturers studying practical moral philosophy who were increasingly interested in the psychology of motivation behind political agency. But as we will see, the familiar texts of Cicero that had once been studied for eloquence would be re-read with a view to his teachings on the legitimate origin of government – like the *De inventione*, book 1 – and integrated back into an Aristotelian framework by university graduates who had entered the employ of diverse patrons to serve as their 'political theorists'. Cicero would be used by political theorists to supplement the ammunition already provided by Aristotle in order to establish normative proposals for the arrangement of secular political communities that seek not only the peaceful and self-sufficient communal life but the life which could be described as a *vivere politico*. An ongoing familiarity with Roman law and an interest in rediscovering Rome's historical legacy to a Europe experiencing increasing turmoil would ensure that Cicero *and* Aristotle could be integrated in texts that sought to justify the natural origins of government and the *de facto* arrangements of popular sovereignty.[145]

Despite the early thirteenth-century alarm on the part of church authorities that the pagan Aristotle was coming to dominate university discourse, by 1255 all the known works of Aristotle were placed on the arts faculty lecture programme at the University of Paris. The study of the 'authentic' Aristotle, as translated into Latin, was increasingly pursued by arts faculty philosophers who were concerned primarily to 'read' the texts literally to an audience of scholars, most of whom would never proceed to a higher faculty of law or theology, or even obtain a BA. Most students went to university in order to qualify for lucrative employment within the established orders of the church, government service or one of the organized professions. Their skills were meant to be utilitarian, enabling them to compose propaganda on behalf of papal, imperial or royal and civic patrons. Rigorous training in the logical analysis of texts and adversarial argument underlay all the university disciplines and the techniques of disputation were taken to be foundational for later occupations, not least for those allied to the law. The Parisian ruling that no theology should be taught in the arts faculty enabled arts faculty philosophers to read Aristotle 'literally' and allow him to speak for himself, as it were, without in the first instance trying to determine whether or not what he said was true. As we have seen, by 1255 the works of Aristotle that were read in lectures were largely translations of his logical and natural-science/philosophy books that had flooded into Europe from the later twelfth century onwards. Then to the works of logic were added not only Aristotle's *Nicomachean Ethics* (*c.* 1250 onwards) and to a much lesser degree his *Politics* (*c.* 1260 and 1265 onwards) but also his *Rhetoric* (1256 Hermannus and *c.* 1269 + Moerbeke), which seemed to follow on directly from his *Topics* and other related works of commentary by Boethius.

It appears, then, to have been the *Topics*, the *Rhetoric* and the *Ethics* rather than Aristotle's *Politics* which taught arts students of the later thirteenth century and increasingly throughout the fourteenth century, what kind of 'science' politics was meant to be. There are very few mentions or surviving manuscripts of commentaries from arts facul-

145 See below, chapters 3 and 4 on John of Paris and Marsilius of Padua. This argument modifies C. J. Nederman, 'Nature, Sin and the Origins of Society: the Ciceronian tradition in medieval political thought', *Journal of the History of Ideas* 49 (1988), pp. 14–24; also see C. J. Nederman, 'Nature, Justice and Duty in the *Defensor Pacis*: Marsiglio of Padua's Ciceronian impulse', *Political Theory* 18 (1990), pp. 615–37.

ties on Aristotle's *Politics* until the late fourteenth and the fifteenth centuries.'[146] But as we have seen, students in the arts faculty had already become familiar with Aristotle's different logical works where he analysed the diverse kinds of argument and proof required by different subjects, with their attendant discussions of degrees of certainty attainable in each, supplemented with his ethical and political observations in these very works. And by the end of the thirteenth century a student would know, for instance, that rhetoric was a kind of *dialectica moralis*, a kind of science whose conclusions were true in *most* cases. He would see that the rules of logic and rhetoric, which he had spent so much time acquiring, were tightly allied to the kind of 'science' Aristotle understood politics to be in the *Nicomachean Ethics* book six, on which he would by now have heard lectures. Aristotelian discourse concerning the nature of 'scientific' thought and the place of ethics and politics within an intellectual frame of practical moral philosophy was already known from his works on logic and rhetoric, so that lectures on his *Ethics* would seem like a furtherance of a perspective students had already adopted. University statutes tell us that from the later thirteenth century and during the fourteenth century, familiarity with the *Ethics* was increasingly required for BAs who had just graduated (determined) and who were then to proceed as more advanced students, lecturing to younger undergraduates but still going to the lectures of their masters. What would such a student have heard and studied?

## Aristotle's *Ethics* for Medieval University Students

In book 6 of the *Nicomachean Ethics* Aristotle discusses five different 'states of mind/soul' by which the soul arrives at truth 'by affirmation and denial'. Aristotle classifies each mind-state in relation to the kind of truth each may attain, and each mind-state has a different mode of proceeding and a different object. His five mind-states are art or technical skill, scientific knowledge, prudence, wisdom and intelligence. What kind of mind-state is political thinking? The third mind-state, or mode of thinking, Aristotle calls prudence (*phronēsis*). He says that we call someone prudent if he is able to deliberate rightly about what is good and advantageous for himself, not in particular respects as, for instance, what is good for health or physical strength, but what is conducive to the good life (for man) generally. A prudent person calculates successfully with a view to some serious end, and since one deliberates about variable things and about things that can be done by oneself (this is what deliberation is), one is not in the sphere of 'scientific' thinking *per se* which deals in the realm of the necessary. Aristotle had already discussed how scientific knowledge (*epistēmē*) implies the ability to demonstrate and he refers back to his treatment in the *Posterior Analytics*.[147]

Furthermore, he distinguishes between art and prudence, saying that the class of things that admit of variation includes both things made and actions done. For Aristotle, *making* is different from *doing*, and therefore the rational quality or mind-state that is concerned with doing is different from the mind-state or rational quality concerned with making. This distinction between making and doing will reverberate throughout

146 See B. Michael, 'Buridans moralphilosophische Schriften, ihre Leser und Benutzer im späten Mittelalter', in J. Miethke, ed., *Das Publikum politischer Theorie im 14. Jahrhundert* (Munich, 1992), pp. 139–51.

147 See volume 1, chapter 4 of *A History of Political Thought* on Aristotle.

the later Middle Ages and find its recapitulation in Machiavelli's distinction between founding or making a state, on the one hand, and maintaining it, on the other.[148] All art, says Aristotle, deals with bringing something into existence and to pursue an art means to study how to bring into existence a thing which may either exist or not. Since art does not deal with things that exist or come into existence of necessity or according to nature, there is a sense in which art and chance operate in the same sphere. The efficient cause of such making or production lies in the maker and not in the thing made. In short, the kind of reasoning that is engaged in founding a state is not the same as the rational quality or mind-state that is required for governing it. And the kind of mind-state required for governing is called prudence, which he goes on to call a virtue rather than a science or an art.

Since it is impossible to deliberate about things that are necessarily so, prudence is not a 'science' (*epistēmē*); nor is it an art. Prudence is concerned with action whose end is doing well. Prudence is a reasoned state of mind that is capable of action with regard to things that are good and bad for man. The prudent man deliberates about means to an end, and the end is itself a practical good that can be attained in action; he *calculates* about means to the best of goods attainable by man. Prudence, then, is a *quality* that belongs to those who can envisage what is good for themselves and for people in general. One is not born with this quality but acquires it from experience. Prudence is a *virtue* rather than an art, and it is the virtue or excellence of that part of the soul that is susceptible to reason, and there are two parts of the soul so susceptible. It is the virtue of that part of the soul that deals with the variable and contingent. The part of the soul that deals with the necessary, however, is engaged in 'scientific' thinking. Prudence, however, is the virtue of that part of the soul that forms opinions. Opinions are formed with regard to the sphere of possibles or variables where something can be or cannot be, can be done or not be done. Although prudence *is* concerned with universals, that is, with the *principle* that the end of all deliberation is the good for man, prudence *as a virtue* takes cognizance of particulars. It is practical: a prudent man needs to have *some* theoretical knowledge, but to be effective in action he needs experience and practical knowledge. Hence, prudence as a virtue is concerned with conduct whose sphere is particular circumstances. And the 'science' that *co-ordinates* prudence is the 'science of politics'.

The prudent man will find it useful to acquire the art of rhetorical persuasion. But Aristotle does not identify rhetorical excellence with prudential excellence because rhetorical invention is an art or skill associated with a different, productive mind-state or rational quality from the mind-state or rational quality that engages in deliberative calculation and doing. Governing is, at best, either supplemented by productive arts or the consequence of an 'artistic' first founding.[149]

The kind of prudence that is confined to the daily administration of public affairs and deals with particular circumstances is practical and deliberative. It is called deliberative because it considers a course of action that is not yet decided and, therefore, is not necessary. A prudent man acts as the result of the deliberating process. Therefore, politics cannot be a demonstrative 'science'. It is, none the less, a kind of thinking, a state of

148 See below, chapter 6.

149 P*olitics* I, i, 1253a30: the impulse to form a partnership of this kind is present in all men by nature; but the man who first united people in such a partnership was the greatest of benefactors. See volume 1, chapter 4 of *A History of Political Thought* on Aristotle and below, chapter 6 on Machiavelli.

mind. Aristotle implies that to be involved in deliberating for the collective good of men is a different species of knowledge from that deployed in deliberating about one's own good. Then he says something crucial to link an individual's prudence with a kind of collective prudence or political 'science'. Although people tend to call prudent those men who are concerned only with the self and the individual and therefore seek their own good, he says it is impossible to secure one's own good independently of domestic and political 'science' which seek the collective good, in family and in the 'state'. Politics, that is, political thinking about the collective human good is, then, the full realization of prudence, the latter being found also at the levels of household and individual. Political thinking or prudence is, however, an intellectual virtue, and since thought by itself moves nothing, deliberative calculation of means to a moral end must be supplemented by an agent's choosing to act in one way or another. It is here that Aristotle links thinking with desire, in so far as man as an originator of action is a union of desire and intellect. Acquiring the art of rhetorical persuasion will enable the prudent governor to motivate men to action with a view to the common good.

Aristotle mentions how people tend to speak of prudence when they discuss the collective entity 'the state'; the implication is that men tend to generalize in speech from personal prudence to deliberation about collective well-being. Hence, one aspect of 'generalized' prudence or political 'science' is controlling and directive and is called legislative science. But the other, indeed primary, aspect of prudence deals with particular circumstances and, he says, bears the name that properly belongs to both aspects: 'political science'. This is because, without the virtue of deliberative reasoning about particular circumstances and conduct, a virtue learned from experience and with a moral end in view – the good for man – the controlling and directive aspect of political science, legislating, would be inadequately carried out. One cannot legislate for a collectivity unless one has first developed virtues and learnt to be prudent from experience of particulars and deliberation on these with a moral end in view. Prudence belongs to all the forms called domestic, legislative and political 'science' and the latter may be divided into deliberative 'science' on the one hand, and judicial 'science' on the other. Prudence, in dealing with enactments, the last step done as a consequence of deliberation in particular and variable circumstances, apprehends the *ultimate* particular which cannot be apprehended by epistemic, 'scientific' knowledge.[150]

A student who had heard lectures on the *Ethics* would recognize the divisions of practical moral philosophy into individual, domestic/economic and political/civic. He would also be told that if he followed a career in the 'state' or in the church bureaucracy, and hence deliberated about means to the general, collective human good, he would find his logical and rhetorical training useful, especially if his audience were educated men in *parlement* or the papal *curia*. If they were uneducated and vulgar, he would be told that experience would count more to them than ornate and closely argued syllogisms because such an audience would want to know the consequences of actions rather than the cause of things, and hence would be satisfied with the enthymeme and example, with plausible reasons.[151] He would know that lawyers and legislators needed to be trained first in the difference between demonstrative reasoning, on the one hand, and deliberative reasoning with a moral end in view, on the other, before they took up roles

150 See volume 1, chapter 4 of *A History of Political Thought* on Aristotle.

151 See Fredborg, 'Buridan's *Quaestiones*'.

as law-makers. Most of all, he would know that a student who had not studied university 'logic' in this wide sense with its moral underpinning, would not be suitably trained to advise legislators or be able to take up judicial posts in church or 'state' hierarchies. Furthermore, Aristotle's *Rhetoric* (I, 13, 1374a–b) would have made it clear to him that legal statements, being universal and therefore general, are not applicable to each and every case but only to most. Hence, actions which should be leniently treated are cases for prudent judgement and equity, looking not to the letter of the law but to the intention of the legislator; the prudent man's judgement of particular cases according to his own developed sense of equity is what enables him, in the circumstances, to pardon human weaknesses.[152]

## Lawyers versus the Arts Faculty Philosophers

But it was not accepted by everyone that the sciences called *practica*, the most sovereign being *scientia politica,* were to be taught only in the arts course curriculum, followed by the theology faculty. Disputes arose, which would last for centuries, between arts and theology moralists on the one hand, and the law faculties on the other.

Already in the thirteenth century civilian lawyers were calling themselves *politici*; but philosophers who dealt with the *science of politics* as practical moral philosophy insisted that lawyers knew nothing of the moral virtues and hence were no more than Sophists. Hence, they argued that the appropriate place to study practical moral philosophy, divided into ethics, economics and politics, was, in the first instance, in the university's arts course. There a student would read and analyse the texts of the ancient philosophers and church Fathers and from these texts he would learn how to rule himself, his family and the city. The academic argument over the 'science' of politics that was to have most effect on the future of the university itself was with respect to which expert, in arts or law, was best able to influence legislators and princes. Who was best able to apply himself to the significations of events as written down in authoritative texts from the past in order to render such texts of use to the present: someone knowledgeable in language theory, logic and modes of argument, someone familiar with human psychology and the effects of persuasive speech on men's motivations to act morally and for the collective good, or those who had lost all their morals and simply went into the employ of bureaucracies and massaged the law to suit their patrons? Academic philosophers and theologians joined forces especially against the civil lawyers in a battle for power inside and outside the university that would run from the thirteenth to the sixteenth centuries with increasing virulence.[153]

This contest would have important effects on the kinds of political theory written especially during the thirteenth and fourteenth centuries. It would affect what was said

152 It is also important to realize that Masters in the higher faculty of theology were also treating some of these same texts, linking them notably to other texts that dealt with the soul and with metaphysical issues. The point is that some of Aristotle's writings were doubly treated.

153 For the course of this debate in England see J. I. Catto and T. A. R. Evans, eds, *The History of the University of Oxford*, II: *Late Medieval Oxford* (Oxford, 1992). G. H. M. Posthumus Meyjes, 'Exponents of Sovereignty: canonists as seen by theologians in the late Middle Ages', in D. Wood, *The Church and Sovereignty, c. 590–1918: essays in honour of Michael Wilks (*Oxford, 1991) [= Studies in Church History, Subsidia, 9], pp.299–312, provides a useful discussion and bibliography on the opposition between theologians and lawyers.

about universalist conceptions of rule by German emperors, by monarchs, and by the papacy on the one hand, and on the other, about self-governing corporations and representative institutions. By the fourteenth century, theologians would observe that the lawyers who circled round kings like France's Charles V were bad counsellors because their vast influence on public policy was through flattery. It would be claimed that they treated Roman law as dogma rather than interpreting law in relation to the common good. They did not understand the moral principles behind the law and consequently it was the lawyers who led states into tyrannies by attributing to princes a *plenitudo potestatis*, showing themselves in favour of tyrannous absolutism.[154] Lawyers were said to be turning the prince into a God on earth (*Deus in terris*). This anti-jurist opprobrium would continue well into the future.

## The New Mendicant Orders: Franciscans and Dominicans and Political Theory

We have spent a good deal of time examining the nature of the university arts curriculum. However, thus far we have not been sufficiently specific about a certain group of scholars whose interest, especially in Aristotle, would far surpass the average arts faculty lecturer or his students, with enormous consequences for the future of political theorizing. These were members of what are known as the mendicant orders, namely the Franciscans and Dominicans. The impetus for their foundation in the thirteenth century goes back to the rise of new religious orders and movements during the twelfth century, which may best be described as a reformation from below.[155] A new emphasis had come to be placed on the literal interpretation of the gospels and the Acts of the Apostles as codes of behaviour to be imitated through literal observance, in order to purify and revive what were taken to be the practices and ideals of the primitive church. For centuries, centres of religious life in medieval Europe had been monastic communities, specially endowed and set apart from secular life. To the Benedictines had been added other monastic orders such as the Cistercians, living according to St Benedict's sixth-century Rule, and the Augustinian Canons. But a new lay piety put particular stress on material poverty, and the withdrawal and contemplation that was so fundamental to the ideals of older monastic orders came to be replaced by an engaged ministry and an active apostolate that preached to the faithful. The process of adjusting the religious life to the social and economic changes that had occurred during the twelfth and thirteenth centuries was brought to a culmination by the papal establishment of the mendicant orders, namely the Franciscan and the Dominican friars.

St Francis, the founder of the Franciscans, had grown up as the son of a cloth merchant in the flourishing Italian town of Assisi. He established a Rule (*c.* 1209) for his followers in which he avoided reference to social hierarchies in an attempt to level social degrees by means of a vocabulary that raised to spiritual prominence all the social

154 See Coleman, 'The Science of Politics', pp. 204–6; J. Krynen, 'Les Légistes "idiots politiques": sur l'hostilité des théologiens à l'égard des juristes en France au temps de Charles V', in *Théologie et droit dans la science politique de l'état moderne* (Rome, 1991), pp. 171–98.

155 B. Bolton, *The Medieval Reformation* (London, 1983), chs 3 and 4; R. I. Moore, *The Origins of European Dissent* (Oxford, 1985).

inferiors of his day. He called upon his followers to associate with and be considered poor, feeble, vagabonds, beggars, labourers, illiterates, the powerless and the dispossessed. They were to own nothing and beg for daily subsistence in cities. He and his movement soon became enormously popular and influential.[156] There is a revision of his Rule, dated 1221 (*Regula prima*), in which his followers are admonished that they are to have no property.

> Franciscan candidates should sell all possessions and give the money to the poor; friars may not meddle in the candidate's property affairs; no one is to be called 'prior' for there is no distinction amongst friars minor; they may not accept positions of authority in houses of their employers; friars who have a trade should remain at it; their payment is never in money; otherwise, they seek alms; they may not claim ownership of any place. In general, they should have neither use nor regard for money, considering it as dust.

The *Regula prima* clearly condemns the action of brethren arrogating to themselves as an individual corporation any goods which should remain the common property of all men. The friars were voluntarily to refuse both ownership and possession of temporal goods because they believed themselves to be imitating the spiritual perfection of Christ's poverty. But Francis died without clarifying the legal aspects of the friar's relation to property, and the final version of his Rule (1223) would be revised through reinterpretation with the help of juristically minded brethren and a cardinal protector who would become pope. By the third quarter of the thirteenth century, the true owner of goods and property offered to the Franciscans was legally determined to be the papacy in lieu of Christ.[157]

About the same time, the Dominicans were established by their founder, an Augustinian canon St Dominic. His aim was to combat heresy, especially in southern France, through preaching. To succeed in preaching, Dominic thought it vital to be seen as setting an example by living a simple, more apostolic life than that of the church's ecclesiastical dignitaries. Like the Franciscans, Dominicans set up in cities, but unlike the early Franciscans, Dominicans showed an immediate appreciation of the role which universities were to play in the recruitment and development of their Order. Poverty was merely a channel of communication for Dominic, whereas for Francis it was the very purpose of his order. If the two orders were in principle very different, they rapidly borrowed aspects of organization from one another. The Franciscans, in particular, followed the Dominicans into the university. By the middle of the thirteenth century, wherever there was a town, there were friars who lived by begging for alms, and wherever there was a university, the friars established their own *studia* and then entered the university's theological faculty, against much opposition from the secular clergy who had previously established themselves as university teachers.

Although both the Franciscans and the Dominicans were mendicant orders with distinctive views on the nature of apostolic poverty, their attitudes to ownership and use of property would gradually become formalized and noticeably divergent. In this diver-

156 The classic study in English is M. Lambert, *Franciscan Poverty: the doctrine of absolute poverty of Christ and the apostles in the Franciscan Order, 1210–1323* (London, 1961).

157 See Coleman, 'Property and Poverty', in *CHMPT* (1988), pp. 631–37 and further bibliographical citations therein.

gence lay the foundations of two fundamentally opposing strands of political theory whose differing attitudes to property led to different doctrines about ruling. It was initially through the in-house debate between the Franciscans and Dominicans themselves, over the relationship between jurisdiction, ownership (*dominium*) and use, and their respective views on the legitimacy of ecclesiastical wealth and its relation to so-called apostolic poverty, that some of the most powerful, more general political theories would emerge to influence the remainder of the Middle Ages and well beyond. The Franciscans would argue the theocratic line that the pope had supreme jurisdiction and *dominium*, whereas ecclesiastics and kings exercise a delegated jurisdiction alone.[158] The Dominicans, on the contrary, would argue that the use of material goods could not be separated from their ownership, but that proprietary right and ownership over property was not the same as having jurisdiction over it, so that neither princes nor popes were owners of the property over which they exercised jurisdiction.[159] The Dominican Thomas Aquinas would contribute to this debate and establish foundations on which his later fellow Dominican, John of Paris, would erect a theory of individual rights to property, where he argued that the origin of property rights was in the labour of individuals, and that the 'state' was established by owners as a fiduciary power to protect these rights.

A good deal of what is recognized as later medieval political theory, to say nothing of the distinctive influence of developments in fourteenth-century philosophy and theology on European political thinking well beyond the sixteenth century, was the consequence of the intellectual efforts of Franciscans and Dominicans. Indeed, if we look to thirteenth-century Dominican *studia* and to university theology faculties where the mendicant orders had numerous distinguished masters, we see a much greater influence of Aristotle's ethical *and* political discussions penetrating their various treatises where they compared the organization of secular society with that of the church. If we cannot find many widespread or influential arts faculty commentaries on Aristotle's *Politics*, we can certainly see them proliferating in the *studia* of Dominicans where they produced literal commentaries on the *Ethics* and *Politics* as soon as these works appeared in translation.[160] Even before the Dominican William of Moerbeke had translated the entire *Politics* (*c.* 1265), Dominicans seemed interested in what he provided in the imperfect translation of book 1 and part of book 2 (*c.* 1260). And they rapidly expressed an interest in the *Politics*'s analysis and evaluation of different constitutions – monarchies/tyrannies, popular versus aristocratic constitutions – its discussion of citizenship, and its emphasis on political agency. When Thomas Aquinas, whose works we will examine in chapter 2, returned as a master in theology to the University of Paris in 1269, he worked not only on the second part of his encyclopedic S*umma Theologiae* but also on literal commentaries on Aristotle's *Ethics* and *Politics*. His teacher, the Dominican Albertus Magnus, had previously lectured at the Dominican *studium* in Cologne on Aristotle's *Ethics*. Aquinas's notes and questions on these lectures have survived. But it would be in Aquinas's theological works, for example his *Summa contra gentiles* and the *Summa Theologiae* as well

158 See below, chapter 3, on John of Paris. See also Coleman, 'The Two Jurisdictions'.

159 J. Coleman, 'The Intellectual Milieu of John of Paris, OP', in J. Miethke, ed., *Das Publikum politischer Theorie im 14. Jahrhundert* (Munich, 1992), pp. 173–206.

160 For a more sceptical view on the importance of the *Ethics* before the second half of the fourteenth century see G. Wieland, 'The Reception and Interpretation of Aristotle's *Ethics*', in N. Kretzmann, A. Kenny and J. Pinborg, eds, *The Cambridge History of Later Medieval Philosophy* (Cambridge, 1982), ch. 34.

as his commentary on the arts faculty core text, the *Categories*, written for Dominican students, that he would specifically refer to Aristotle's *Politics*. Many other citations from the *Politics* appear, as we might expect, in his only strictly political work, the fragmentary 'mirror for a prince', *De regno*, *ad regem Cypri*, written for the young king of Cyprus. In being able and willing to cite from the *Politics* books 1–3 of the complete translation in *c.* 1268 and from books 5–8 by 1271, Aquinas brought Aristotle into a scholastic synthesis that insisted that political engagement in the city was a natural goal for rational men seeking the good life, and this goal was related to man's final end, his salvation.

Well into the fourteenth century Dominicans continued to write political tracts on the powers of the pope (*De potestate papae*), comparing them to powers exercised by kings, each drawing notably on Aristotle and firmly Thomistic in their theology, but differing in their aims, emphases and methods, to provide a wide range of theories of government in church and state. They would be matched by Franciscans who likewise drew on Aristotle in distinctive ways for their range of theories. After we examine the works of Aquinas, we can observe the different uses of Aristotle in the works of the Dominican John of Paris, the Franciscan William of Ockham, and the former University of Paris arts faculty lecturer turned political ideologue, Marsilius of Padua.