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978-0-521-08808-4 - Religion, Law, and the Growth of Constitutional Thought,
1150-1650

Brian Tierney

Excerpt

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I

Introduction

The main themes of this little book can be summed up in a couple of sentences. First: It is impossible really to understand the growth of Western constitutional thought unless we consider constantly, side by side, ecclesiology and political theory, ideas about the church and ideas about the state. And, second: It is hardly possible to understand unless we consider the whole period from 1150 to 1650 as a single era of essentially continuous development.

These are not new or startling thoughts; but they are not quite universally taken for granted among modern scholars. A few historians still feel able to reconstruct the political theory of the fifteenth century without any reference to the great struggle over the constitution of the church which was taking place in that era,¹ and to argue that a doctrine of the constitutional state could emerge only when (and because) civic humanists turned their backs on the whole thought-world of the Middle Ages. I want to suggest on the contrary that the juridical culture of the twelfth century - the works of the Roman and canon lawyers, especially those of the canonists where religious and secular ideas most obviously intersected - formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought.

Many older historians emphasized one or the other of my basic themes. The Carlyles, in their standard history of medieval political thought, observed that 'The Renaissance may or may not represent a really new beginning in philosophy and science, it did not do so in political ideas.' But on the next page they added that relations between political and religious authorities 'did not in any significant way affect the development of the general political ideas of the Middle Ages'.² On the other hand, great social historians like Weber and Tawney saw that the interaction of religious and secular ideas was all-important in the formation of Western ideologies, but they emphasized areas of thought where

¹ This is happily not true of the most recent general survey of early modern political theory, Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge, 1978). Skinner's valuable work includes a good treatment of fifteenth-century ecclesiology.

² R. W. and A. J. Carlyle, *A History of Mediaeval Political Theory in the West*, 6 vols. (Edinburgh-London), 1903-36, v, 2-3.

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(they held) the religious changes of the sixteenth century led to a sharp break with medieval tradition.

Perhaps the best introduction to our subject is to be found in the old work of J. N. Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625*.³ Figgis was concerned with precisely the topics we shall be pursuing - the relationship of ecclesiology to political theory, and the problems of continuity and discontinuity in the transition from medieval to modern thought. Indeed my theme is manageable at all only because we have this fine old classic work which explores very discerningly the interplay between ecclesiastical and secular constitutional thought from the fifteenth century to the seventeenth. My task will be largely to supply some connective tissue linking the world of the twelfth-century lawyers with that of the fifteenth-century constitutional theorists whom Figgis discussed.

Figgis was a Cambridge don of the early twentieth century, a disciple of Maitland and Mandell Creighton, much influenced also by Gierke. In his *Studies* he set out to explain the growth of a theory of the constitutional state in the early modern world. He considered two major topics: the emergence of autonomous national kingdoms from the universalist society of the Middle Ages, and the change in the idea of political authority itself, 'from a lordship into an association'. Figgis related both of these developments to the religious crises of the late medieval and early modern eras.

He began his book in the early fifteenth century, not because that was an era of dawning civic humanism, but because it was the age of the Great Schism in the church and of the conciliar movement that eventually ended the schism. The dispute began in 1378. First two, then three pontiffs emerged, each claiming to be the true pope. The nations of Europe divided their allegiances between the rival claimants; intricate diplomatic negotiations failed to end the conflict; it seemed that, barring a miracle, the schism might go on forever. In this desperate situation an argument was put forward asserting that a general council could judge and, if necessary, depose all three 'popes'. (The Gerson of Figgis's title was a principal exponent of this point of view.) A great volume of theoretical writing appeared asserting that ultimate authority in the church resided in the whole community, that a general council representing the community could depose an unjust ruler, even a pope, that the best form of government for the church was some form of mixed constitution. These ideas, moreover, were put into practice. A general council actually met at Constance in 1414, removed all three would-be popes and installed a new one, so ending the schism. But, after that one success, conciliarism of

³ Figgis's book, based on his Birkbeck Lectures of 1900, was originally published by Cambridge University Press in 1907. A revised edition appeared in 1916. This was reprinted as *Political Thought from Gerson to Grotius, 1414-1625. Seven Studies* (New York, 1960). References are given to this edition.

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course failed to establish itself in Catholic ecclesiology. The writers of the Counter-Reformation turned more and more to doctrines of absolute papal monarchy.

It was Figgis's great insight to see that the ideas of the fifteenth-century conciliarists did not die away altogether, that they had a continuing afterlife in writings on secular constitutional theory. The conciliarists, he wrote, had formulated universal principles of politics that could be applied to any society. They had expressed the theory of limited monarchy 'in a way that enabled it to become classical'.⁴ Their writings were often used by major political theorists of the sixteenth and seventeenth centuries who borrowed the ideas of the conciliarists on church government and used them in constructing theories of the state. Figgis also pointed out that religious issues remained of central importance for the development of constitutional thought all through the early modern period. Most obviously, the breakdown of universal papal authority after the onset of the Reformation facilitated the emergence of independent kingdoms and encouraged a new emphasis in some quarters on the divine right of kings. But the Reformation also created religious minorities - sometimes Catholics, more often Calvinists - who found themselves persecuted by monarchs of different religious persuasions, and this circumstance stimulated a renewal of constitutionalist thought; it led to frequent questioning of divine-right theories, and to affirmations of popular sovereignty and of rights of resistance to unjust rulers. Figgis was a man of true Christian piety himself but he occasionally viewed the whole situation with a certain detached realism. He observed, for instance - it was one of his sharper comments - 'The two religious bodies which have done most to secure the "rights of man" are those which really cared least about individual liberty . . . the Roman Catholic church and the Presbyterian.'⁵ Figgis of course was an Anglican.

Still, he was only repeating here a position that one encounters often enough back in the seventeenth century, though then it was usually expressed with a different animus. The remark of James I is well known: 'Jesuits are nothing but Puritan-Papists.' The royalist, David Owen, discerned a 'Concord of Papists and Puritans . . . for the Coercion and Killing of Kings'. Similarly John Bramhall, Bishop of Derry and a future Archbishop of Armagh, wrote in 1643 that the doctrine of divine right had two principal enemies; and they were again the Jesuits and the Puritans. (Bramhall thought that the papist error began in the eighth century when a pope first authorized the deposition of a reigning monarch; as for the Puritans, their spiritual ancestors were the Pharisees of the New Testament who refused to recognize the kingship of Christ.) The similarities of thought among writers of very different religious convictions are not merely coincidental. In seventeenth-century writings we can find

⁴ pp. 56, 63.

⁵ p. 154.

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Calvinist and Catholic political theorists quoting each other's works approvingly, relying on one another for authority in this particular sphere without any evident sense of embarrassment. I think they could do this only because they were all drawing on a common tradition of thought.

The roots of this common tradition probably lay deeper than Figgis supposed. In considering the problem of continuity between medieval and modern political theory he displayed an extreme ambivalence. In one mood Figgis wrote, 'No subject illustrates more luminously the unity of history than the record of political ideas'; but he also wrote that 'when all is said . . . there remains a great gulf fixed between medieval and modern thought'.⁶ He held that Gerson and Cusanus 'are, though we do not know it, a part of our modern world', but also that 'we have been divided from them by a revolution'.⁷ Figgis's pages are strewn with such *obiter dicta*; his book remains fascinating in part because it is so full of paradoxes.

On one point Figgis was quite clear. He discussed not only the influence of conciliar ideas but also their origins; and he was certain that the conciliar theorists were reacting against the whole previously accepted teaching of the medieval church. Their movement, he held, strove 'to turn into a tepid constitutionalism the Divine authority of a thousand years'.⁸ Much of Figgis's uneasiness when he faced problems of historical periodization arose from the fact that he wanted to present the conciliarists as a link between medieval and modern ideas, but he could find no precedent for their doctrines in the earlier tradition of medieval ecclesiastical thought. Instead he saw in preceding church doctrine (expounded, as he noted, principally by the medieval canonists) an imposing vision of world-order based on total theocracy, a vision of 'a universal Church-state with power ultimately fixed in the Spiritual head, bounded by no territorial frontier'.⁹ This 'Canonist theory of sovereignty' provided a model for later doctrines of royal absolutism, Figgis noted; but in such a world-picture there could be no room either for autonomous secular states or for theories of constitutional government.

Figgis observed, however, that some pragmatic experimentation did occur in the sphere of secular institutions. (After all by 1400 England had a Parliament and France an Estates-General.) Figgis thought that, although the conciliarists ostensibly supported their theories with appeals to Aristotle and the Bible, they were really 'arguing from the precedent of constitutional States'.¹⁰ On the basis of contemporary practices in the temporal sphere, they built up generalized theories of church

⁶ pp. 3, 15.⁹ p. 71.⁷ pp. 3, 70.¹⁰ p. 55.⁸ p. 41.

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government which later could be taken over and adapted by secular political theorists.

There is a difficulty in the argument at this point. Figgis never really explained how secular constitutionalism had emerged from his theocratic world order of the Middle Ages. Perhaps he thought that no explanation was needed. In the days of optimistic liberalism before the First World War many historians supposed that constitutional government was a kind of normal, natural end toward which human history inevitably progressed. For them, it was the survival of ancient absolutisms that constituted an exception, an anomaly calling for explanation.

If the question were asked why limited, representative government first arose in Western Europe a simple, obvious answer was at hand: Western representative institutions grew from a primitive heritage of Teutonic virtue and liberty. This view remained fashionable over a surprisingly long period of time. Even so great a historian as Stubbs found it entirely convincing. Explaining the origins of English constitutionalism, he wrote, 'The English nation is of distinctly Teutonic or German origin' and, 'Freedom was in the blood.'¹¹ Figgis too, repeating the platitudes of his age, could write happily and thoughtlessly about Germanic liberty. More reasonably, Figgis mentioned the contractual relationships of medieval feudalism as a source of later constitutional theory. Also he was by no means insensitive to the importance of Roman jurisprudence. Figgis's treatment of the medieval background was far from naïve; but the whole thrust of his argument required that 'political liberty and secular politics' could emerge only when the dominant, theocratic, canonistic ideology of the Middle Ages had been challenged by the religious upheavals of the fifteenth and sixteenth centuries. How could it happen then that 'constitutional States' were already conveniently at hand in 1400 to provide a model for conciliar theories of the church? I doubt that Figgis ever thought seriously about the problem or was aware that any problem existed that called for serious thought. Figgis saw a need to explain how sophisticated constitutional theories first came to be formulated; but he apparently took for granted the growth of constitutional practices.

Nowadays no historian could set out from such a premise. The emergence of new absolutisms in Europe after the First World War destroyed the liberal dream of inevitable progress toward free institutions.¹² The

¹¹ Three hundred years earlier John Hare wrote, in similar vein, 'There is no man that understands rightly what an Englishman is, but knows withal, that we are a member of the Teutonic nation.' He explained that the 'free born men from Germany' had brought liberty to the 'servile body of the West'. *St Edward's Ghost* (1647), in *Harleian Miscellany*, VI (London, 1810), 92.

¹² But as late as 1936 A. J. Carlyle could still write: 'The conception of the divine right of the monarch has happily . . . disappeared, and the theory of the absolute sovereignty of the State only lingers on among politically uneducated people or societies.' *Political Theory*, VI, 2.

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rise of National Socialism in particular made theories of innate Teutonic virtue, which had long been criticized, seem finally absurd. The American constitutional historian, C. H. McIlwain, reacted strongly against such ideas in a little work of synthesis, *Constitutionalism: Ancient and Modern*, published in 1940. ‘“Racism” may be a convenient cloak for national aggression’, he wrote, ‘but it is a very inadequate explanation of national constitutional development.’¹³ McIlwain re-emphasized the importance of Roman law in medieval political thought. This was a significant contribution; but McIlwain was still ignoring a whole religious dimension of medieval society. By this time, however, other scholars were beginning to insist on the significance of the medieval church as a major influence on the whole evolution of Western government. One thinks of scholars like Maud Clarke in England, Georges de Lagarde in France, Otto Hintze in Germany.

Despite the work of such scholars, down to the 1930s a kind of mental block existed which inhibited the formation of an adequate synthesis in this whole field of study. Everyone agreed that the church exercised a pervasive influence on all aspects of medieval life; everyone knew that constitutional forms of government grew into existence in the medieval world; but the canon law that regulated the life of the medieval church was widely regarded as an essentially absolutist system, ‘a marvellous jurisprudence of spiritual despotism’ (in the words of Hastings Rashdall). Figgis too observed that ‘The claim of the Popes to exercise illimitable authority had been worked out logically by generations of canonists.’¹⁴

In recent years several studies exploring Figgis’s thesis have appeared.¹⁵ The results are interesting. It seems that Figgis was quite right about the influence of conciliar thought. But he was wrong about its origins. Conciliarism was not simply a reaction against a canonistic theory of absolute papal sovereignty. On the contrary, the main conciliar doctrines had already been formulated in canonistic glosses of the twelfth and thirteenth centuries (works that were not readily available to Figgis and that still remain for the most part unedited). Moreover the fifteenth-century conciliar thinkers knew these writings and cited them as major authorities. Recent research on the medieval canonists, especially on the generation of great lawyers who wrote in the days of Innocent III, around 1200 – Huguccio, Laurentius, Alanus, Ricardus Anglicus, Johannes Teutonicus – has shown that their thought was less monolithic than Figgis supposed. Some favored papal theocracy; others defended the independence of the secular power. Some supported a doctrine of universal empire; others acknowledged the autonomy of national kingdoms. The

¹³ C. H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, 1940), p. 91.

¹⁴ Figgis, p. 49.

¹⁵ The contributions of Francis Oakley are particularly useful. See especially his articles, ‘On the Road from Constance to 1688: the Political Thought of John Major and George Buchanan’, *Journal of British Studies*, 2 (1962), 1–31, and ‘Figgis, Constance, and the Divines of Paris’, *American Historical Review*, 75 (1969–70), 368–86.

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canonists wrote extensively on constitutional law, on the proper limits of lawfully constituted authority, on representation and consent. They discussed at length the deposition of unjust rulers. Moreover their work influenced the growth of the constitutional state - the point that Figgis never explained - from the twelfth century onward. It is mainly the new research in this area of legal studies that makes it possible for us to see an essential continuity in the growth of constitutional thought from the twelfth century to the seventeenth. We should not forget or neglect Figgis's insights about the conciliarists; but a fresh approach to the subject can best set out from a different starting point, from the works of the medieval canonists and the society that produced them.

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II

Juridical foundations:
society, church, and law, 1150-1250

The growth of a distinctive medieval tradition of constitutional thought was a complicated, difficult process. That is not surprising. Western constitutionalism itself is an unusual phenomenon in the general history of human government. In the past, when primitive peoples emerged from tribalism to form a civilization and a state, they most commonly turned to theocratic absolutism as the only effective way of maintaining order and unity in a complex society - to the rule of a sacred monarch, a priest-king, a divine emperor. So too, during our present era, the new 'third-world' nations, which everywhere began with brave dreams of democracy, have almost everywhere found it necessary to accept some form of dictatorship in order to survive. The classical age provides examples of city-states that learned to practice self-government within the framework of a small-scale society; but the Greek cities were eventually assimilated into a Roman state that moved from avowed republicanism to military dictatorship to overt theocracy. Humans find it consoling to imagine that the order imposed by their rulers reflects a divine ordering of the universe; most of the time, as Bernard Shaw observed, 'The art of government is the organization of idolatry.' (The great advance of the twentieth century has been our discovery that it is possible to combine all the advantages of theocracy with all the conveniences of atheism.) I do not suggest that this is an inevitable outcome of human affairs - merely a statistical probability. The historical problem of how constitutional theories and practices could first emerge and persist is a fascinating one partly because the practical problem of whether constitutionalism can survive and expand in the modern world remains so delicately poised.

ASPECTS OF MEDIEVAL SOCIETY

In Western Europe, from the twelfth and thirteenth centuries onward, events took an unusual turn. Nations turned aside from anarchy without stumbling into absolutism and began to build structures of constitutional government - and structures of thought - some elements of which have persisted into the modern world. The perception by modern historians

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that new constitutional ideas were growing up (especially among the jurists) at the same time that new institutions of government were emerging helps to make the situation more understandable; we need not suppose that institutional development was taking place in an intellectual void. But the emergence of the new ideas themselves calls for some explanation. They were related to the whole configuration of medieval society, and in the final analysis nothing less than the whole configuration will serve to explain their development; but, since we are dealing with such an uncommon set of ideas, it seems reasonable that the first question we might ask is: What was unusual about the society?

The question leads us necessarily to the religious aspects of medieval civilization. For, after all, there was nothing very unusual about the early substructure of Teutonic folkways that scholars used to find so fascinating. Ancient notions of customary law and of popular participation in local assemblies did persist throughout the Middle Ages and did continue to influence medieval ways of thought. But such practices are in no way peculiar to the Germanic peoples of Western Europe. They are found in primitive societies in many parts of the world; and such societies, as we have said, do not normally evolve into constitutional states. It is the same with the later growth of medieval feudalism. We can find rather close analogues for Western feudal institutions in other parts of the world, especially in Japan, but feudal practices elsewhere did not lead on to the distinctive forms of experimentation in the art of government that occurred in the medieval West. One could hardly exaggerate the importance of feudal attitudes in stimulating local hostilities to centralizing absolutisms throughout our period; but the preconceptions of a feudal society, taken by themselves and carried to all their logical conclusions, do not lead on to a doctrine of the constitutional state simply because they lack the basic concepts of the state itself - ordered public authority, rational jurisprudence, legislation regarded as a deliberate product of reason and will. In any feudal society tensions between central and local authorities will exist, and such tensions have to be resolved if an effective centralized government is to emerge; but the usual solution is a sacral monarchy, not a constitutional state.

It is only when we turn to the religious aspects of medieval civilization that we find situations which are extremely abnormal by the standards of other societies. Otto Hintze saw the significance of this. In studying representative institutions, he wrote, 'one faces a phenomenon that is characteristic only of the Christian West'.¹ This remark seems to me true and important but by no means self-explanatory. Obviously, the different forms of Western Christianity have co-existed happily enough with a variety of absolutisms at different times and places. If things turned out differently in the Middle Ages, it could not have been simply because of

¹ O. Hintze, 'Weltgeschichtliche Bedingungen der Repräsentativverfassung', *Historische Zeitschrift*, 143 (1930), 1-47 (p. 4).

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the presence of Christianity; rather we have to consider the exceptional role of the Christian church in the organization of medieval society.

The most obviously distinctive feature of that society was an unusual duality of structure. In the first great struggle of medieval empire and papacy, the Investiture Contest of around 1100, neither side was able to make good its more extreme theocratic pretensions. From then onward a duality persisted. There was never just one structure of government, presided over by an unchallenged theocratic head, but always two structures, ecclesiastical and secular, always jealous of each other's authority, always preventing medieval society from congealing into a single monolithic theocracy. Ecclesiastical criticism diminished the aura of divine right surrounding kingship; royal power opposed the temporal claims of the papacy. Each hierarchy limited the authority of the other. It is not difficult to see that such a situation could be conducive to a growth of human freedom, and the fact has often been pointed out. Lord Acton long ago wrote, 'To that conflict of four hundred years we owe the rise of civil liberty.'

Moreover, internal tensions existed within each hierarchy. In the thirteenth century feudal barons resisted royal centralization in the secular world while feudally minded bishops resisted papal centralization in the ecclesiastical sphere. The barons had more real power, but the bishops had a whole ancient theology of the church to draw on in defending their position and so were able to give to their arguments a more sophisticated and enduring formulation.

If we were to ask now, in a merely negative sense, why medieval society did not develop into a simple, theocratic absolutism, it might be sufficient to point to these various tensions within it and leave the matter at that. But if we ask a more positive question - not merely why absolutism was avoided but how constitutional theories and practices grew into existence - another aspect of medieval church-state relations becomes important. The institutional structures that we have described as being often in conflict were also in a state of constant interaction, mutually influencing one another. Frequent interchanges of personnel occurred between the two spheres of government; a medieval king's 'clerks' were also 'clerics', often holders of ecclesiastical benefices. The career of Thomas Becket, alternating between service to king and church, was unusual only in its dénouement. This situation facilitated an exchange of ideas and practices between the two spheres. Kings were anointed like bishops, and popes were crowned like kings. Papal sovereignty was defined according to rules derived from civil law, and imperial elections were conducted according to rules derived from canon law. One could give endless such examples. The interchanges become especially important for constitutional thought when ideas concerning representation and consent are involved. Such ideas often emerged first in the academic writings of the medieval canonists; but the canonistic doctrines themselves