CHAPTER 1

Introduction

The subject of this book calls for some general observations on the nature and kind of what are called political ideas in the Middle Ages. Concerned as this book is with the sources, it is profitable to realize that political ideas in the Middle Ages had some peculiarities which are perhaps not at once obvious to people in the twentieth century. For politics and the study of political ideas now belong to a branch of scholarship which is autonomous and self-sufficient and which rests on its own laws, premisses and framework. It is as much an independent science as history, philosophy, theology, or, for that matter, law. Another point to be considered at the outset is the public at large. Today and for some time past the public that is engaged in framing, discussing and applying political ideas is to all intents and purposes identical with the electorate, and this in its turn comprises all men and women over a certain age. The presupposition for this is the dissemination of political ideas, whether by books, pamphlets, handbills, sound broadcasting, television, daily and weekly papers, quite apart from speeches by professional politicians. The literacy of, and response by, the public at large are indispensable. There is a virtually constant interchange between the mass media and the public, because the latter has a direct stake in both the major and minor questions of politics. The participation of the public—either directly or indirectly through their own representatives—in the decisions resulting in the law fosters this interchange of ideas and promotes mutual fructification.

Politics, political aims, political ideas, political programmes and the like are not an end in themselves, but are merely means to an end—the end being the law that results from a particular political ideology or even cosmology. Throughout the globe the present age provides daily confirmation of this situation. There is on the one hand the Marxist programme: one of its essential

features is the abolition of private property, of the means of production and the dictatorship of the proletariat. As a political ideology this has been argued in literally speaking countless publications and broadcast in thousands of addresses and speeches, all of which amount to a solid political ideology. But political ideologies are not disseminated for drawing-room discussion, but are to serve as foundations upon which the configuration of a society can be shaped. The instrument by which this shaping if not transformation of society can be effected is the law as the binding rule which prohibits private ownership of the means of production and institutes the agencies and organs by which this state of affairs can be administered and enforced. In a word, the law must by its very nature be crisp, clear, unambiguous, easily comprehensible and devoid of jargon. There is therefore some considerable gap between political ideology and its effect—the law. To the voluminousness of the political programme corresponds a brief set of rules. The tangible reality that operates as a force in society is the law, not the ideology which gave birth to the law. It is self-evident that there are considerable shades within the framework of a political ideology which postulate modifications of the existing law. To take an obvious example, the Marxist programme in the hands of Trotsky was not the same as that practised by Stalin—in fact, there is what might be called a whole rainbow of colours from one end of the ideological spectrum to the other.

The capitalist ideology, to take the opposite example, not only makes a virtue of private ownership and especially of the means of production, but supports this also by adequate means: as an ideology this capitalist programme is in no wise different from the Marxist counterpart and is also set forth in books, pamphlets and so on, the common denominator of all of which is the recourse to either a natural law or a hallowed tradition or a psychological or an economic argument. By itself the capitalist ideology is incapable of changing the complexion of society, however numerous and well-argued the means of advocating the system are: what, in conformity with the Marxist ideology, is needed is the law. And the gap between the voluminousness of

the ideological writings and the resultant effect, the law, is as striking within the capitalist system as it is within the socialist or communist programme. The distinction between political ideology and the law demonstrates the close interdependence between them.

Yet precisely because they are distinct and separate, ideology and law follow their own principles, their own lines of development and have, in a word, their own autonomous existence based on their own premisses. That is to say, the elaboration, amplification and modification of political ideology is the task of the political scientist who in this undertaking can have recourse to a variety of doctrines as well as to observation and experience, and among the relevant matters to be taken into account is also the law itself. The law as the concrete manifestation of a political ideology shows the weaknesses and deficiencies of the latter. On the other hand, the interpretation (as well as application) of the law also follows its own course which is charted by jurisprudential considerations. And yet in the final resort the interpretation of the law also takes into account ideological features. Hence although they are distinct and separate, ideology and law have an undisputable kinship and internal relationship.

For the greater part of the medieval period, however, it cannot be said that law was separated from political ideology if by the latter is understood an articulate system or scholarly aggregate of general and specific themes, premisses and theories, based on its own presuppositions. What on the other hand there was, was a science of government which was an integral part of scholarly jurisprudence and therefore had no autonomous character. But even this scholarly jurisprudence did not come about until the late eleventh century. Before then it was the governments themselves, the royal, imperial, papal, and so on, which formulated their own principles of government, embodied them in their own laws, and frequently enough argued in quite a scholarly manner about certain governmental topics in the preambles (the Arengae) of their laws. The historian's task is to extract from the law the governmental maxims and ideas and aims by a process of analysis in depth. Political ideology was built into the law or decree issued by the Ruler. There were no books on political ideology, no

pamphlets or other expository means: all there was, was the law which therefore had a far wider scope and framework than has its modern successor. Law in the Middle Ages is one of the indispensable gateways to the recognition of governmental principles and ideology. It should also be kept in mind that these considerations apply with particular force to public law of which principles of government formed an essential ingredient. Until the late thirteenth century the study of political ideas is primarily part of historical jurisprudence with special reference to public law.[1]

Because of the illiteracy of wide sections of the populace which only slowly decreased, the importance of the law in the Middle Ages as the most readily available source can hardly be exaggerated. Moreover, during the early and high Middle Ages the public at large had little say in the weighty matters affecting the common weal, and one of the reasons for this non-participation was in fact the people's illiteracy and a consequent inability to comprehend questions involving general issues. The circle that was at times consulted was exceedingly small, but on the whole well-educated and well-informed: it was an intellectual élite. Elitism was indubitably a feature which the historian meets at every turn throughout the period. This explains partly at least the comparative paucity of literary works relating to the field of government even at a time when education had begun to advance. And this also explains why the law itself assumed a role which it did not possess either in antiquity or in the modern age. The law became the most crucial and vital element of the whole social fabric. It was viewed, quite in consonance with the prevalent Christian theme, as the soul of the body public: the application of the ancient allegory of soul (law) and body (society conceived as the body public) is therefore highly significant.[2] Thereby the idea of

[1] Cf. F. Calasso *Medio evo*; H. Mitteis, *Vom Lebenswert der Rechtsgeschichte* (1947); id., *Die Rechtsidee in der Geschichte* (1957); F. Wieacker, *Vom römischen Recht*, 2nd ed. (1961), 288ff; id., *Privatrechtsgeschichte der Neuzeit*, 2nd ed. (1968), 26ff (marred by numerous inaccuracies); H. Kantorowicz, 'Rechtswissenschaft und Soziologie' in *Ausgewählte Schriften* (1962), 83ff.

[2] This goes back to the Hellenistic period. For some sources cf. the passages cited from Isokrates, Demosthenes, Sextus Empiricus in *PK* 37f at note 63.

the rule of law was given concrete shape which is perhaps the most enduring bequest of the medieval period to the modern age.

It is no exaggeration to say that the law has at no other time played such a pivotal role in society as in the Middle Ages, and this at a time when the enforcement of the law presented some virtually unsurpassable obstacles.[1] But—it is advisable to stress this point at the very beginning—it was apparently due to this difficulty of enforcement (a difficulty which concerned communication in all senses of the term) that the law came to be continually re-enacted in order to make the populace aware of it: the constant need for re-enactment was evidently also caused by the general lack of availability of the law: there were no statute books, no public libraries, no record offices to which an ordinary man could repair to acquaint himself with the state of the law. The consequence was that the law survived in an almost unimpaired form, and frequently enough in an exemplary manner: it was transmitted in a great number of copies which are, generally speaking, of very high quality. Further, the vital importance of the law necessitated the steady supply of a trained personnel that was capable of drafting the law and expressing the thoughts of the law-creative organ exactly and faithfully. In a word, it was due to these historically conditioned circumstances and the peculiarities of the contemporary situation that the principle of the rule of law became implanted in the mind as well as in the actions of man.

Considering therefore the fundamental role that was allocated to the law, it is not difficult to see why within the precincts of government the central problem of the Middle Ages was the creation of the law. Who was, to put the question briefly, entitled to create law? Today in civilized communities it is not difficult to give an answer to the effect that it is a representative assembly which has the power to create law and modify or abolish old law, but this has been only fairly recently achieved in the

[1] About this problem in late antiquity see F. Wieacker, 'Zur Effektivität des Gesetzesrechts in der späten Antike' in *Festschrift für H. Heimpel* III (1972) 546–66.

history of the Western world. And the story of this achievement belongs very largely to the history of political ideas, or more correctly, to the history of the science of government.

It is consequently advisable to state at the very outset the two contrasting themes which portray the creation of law.[1] Historically speaking, the one called the ascending theme of government and law, can claim priority and appears to be germane alike to lowly and highly developed societies. Its main point is that law-creative power is located in the people itself (who belongs or does not belong to it, is of no concern in this context): the populace at large is considered to be the bearer of the power that creates law either in a popular assembly or diet, or, more usually, in a council or other organ which contains the representatives chosen by the people. The main ingredient of this ascending theme is that because original power is located in the people, the latter always remains in charge of the direction of its own society. Consent on the part of the populace is a structural element of the theme. Further, the idea of representation is essential to it, that is, that the representatives do not act or speak or treat on their own behalf, but on behalf of the electing populace and are therefore empowered to give consent to legislative measures. Evidently, the Ruler too is no more than a representative of the people, and remains responsible to those who have elected him and they in turn to the people at large. Power ascends, allegorically speaking, from the broad base of the whole people and culminates in a Ruler who has no power other than that which the people have conferred on him. They can depose him or restrict his power or modify it in any way it appears right and proper to them. The right of resistance is built into this theme. This is the state of

[1] This cluster of problems was first expounded in *RHD* 26 (1958) 360ff (book review), and further developed in *PGP* 20ff; *HPT* 12ff; *IS* 30f, 145ff, and for the gradual replacement of the one theme by the other cf. *CR* 174ff. The view still frequently held that in the MA law was 'discovered' or 'found' and not created by a special organ, is one of the myths that dies hard. Cf. on this now K. Kroeschell, 'Rechtsfindung: die mittelalterlichen Grundlagen einer modernen Vorstellung' in *Festschrift f. H. Heimpel*, III (1972) 498ff: the term cannot be found in the sources. See also id. on the direct and indirect sources of the law in his *Deutsche Rechtsgeschichte* I (1972) 21.

affairs that can partly be witnessed in ancient Greece, partly also in republican Rome and especially among the Germanic communities and tribes for which the explicit statements by Tacitus are incontrovertible testimonies.

Opposed to this ascending theme is the descending one according to which original power is located not in the broad base of the people, but in an otherwordly being, in divinity itself which is held to be the source of all power, public and private. The totality of original power being located in one supreme being was distributed downward—or 'descended from above'—so that the mental picture of a pyramid emerges: at its apex there was the Ruler who had received power from divinity and who distributed it downwards, so that whatever power was found at the base of the pyramid was eventually traceable to the supreme head. But, and this is one of the crucial differences from the ascending theme, the office holders are not representatives: they are only delegates of the supreme Ruler. He can therefore withdraw the power conceded to them for reasons for which he has to account on the day of judgment: the people, because it is governed by him, cannot call him to account. Hence there is no *right* of resistance because the officers are appointees and have power as a matter of grace, as a matter of good will, exercised by the supreme head.[1] And just as there are no representatives, consent plays no role within this framework. What enters here is the principle of suitability. Suitability for a particular office can in the last resort be fixed and measured only by the organ that possesses the totality of power and hands part of it on to a lower-placed delegate. Whereas within the precincts of the ascending theme there is, in a strict and dogmatic sense, no necessity for society to be ordered according to rank, a hierarchical order is of the very essence of the descending theme, for there are higher and lower officers according to their office's proximity to, or distance from, the supreme Ruler.

[1] F. Kern, *Gottesgnadentum & Widerstandsrecht*, 3rd ed. R. Buchner (1962) is still fundamental. Special attention should be paid to J. Spörl, 'Gedanken um Widerstandsrecht und Tyrannenmord im MA' in *Widerstandsrecht und Grenzen der Staatsgewalt*, ed. B. Pfister & G. Hillmann (1955) 11ff with copious lit.

The kernel of both themes is the creation of law. Now, for reasons which are irrelevant to this enquiry, during the period of the principate in ancient Rome the ascending theme[1] came to be supplanted by its descending counterpart. To be specific, this descending theme was clothed in the Christian garb which was to set the tone and complexion of society from the early fourth century onwards.[2] The point that is to be made is that Christianity had absorbed a great deal of Hellenism, oriental law and ancient philosophy, notably Platonism.[3] By virtue of its contact with the Roman civilization nascent Christian organizations furthermore came to absorb Roman institutional ideas, of which none was more important than the very concept of law. Here indeed the Bible, notably the Old Testament, and wholly independent of it, the pagan (Roman) law, found a common basis and kinship[4] which explained why the most profound feature of ancient Rome, the law, could, as indeed it did, effortlessly penetrate into the very matrix of the rapidly growing Christian doctrinal body.

The point must be stressed that it was purely private efforts by private writers which in the second and third centuries A.D. began the process not only of assimilating the pagan Roman law to Christian conceptions, but also of infusing the very language, substance and method of Roman law into Christian ideology. That is to say, at the cradle of what later became known Christian dogma stood the Roman law, swiftly to become part and parcel of Christianity itself. One such source was the work of Tertullian,

[1] Cf., e.g., C. B. Burns, *Fontes iuris Romani antiqui*, 7th ed. (1909) 120: *Lex Tarentina* (with Mommsen's headnote). Republican Rome sharply distinguished between 'legis*latio*' and 'legis*datio*', the former referring to the 'making' of law ('legem ferre'), the latter to the law given or imposed on dependent communities. Further Th. Mommsen, *Römisches Staatsrecht*, 3rd ed. (1889) II-2, 888ff.

[2] It is regrettable that 'La théologie chrétienne et le droit' in *Archives de philosophie du droit* 5 (1960) contains no historical contribution. For a stimulating study cf. J. Hoffmann, 'Droit canonique et théologie du droit' in *RDC* 20 (1970) 289ff.

[3] Cf., e.g., E. v. Ivánka, *Plato christianus* (1964).

[4] For this ancestral kinship cf. some of the works of D. Daube, e.g., *Studies in Biblical Law* (1947); also 'Princeps legibus solutus' in *Europa e il diritto romano* (1954) II, 401ff.

a Roman jurist of the old stamp.[1] Tertullian (150–230) cast the religious idea into legal forms and shaped the at the time (turn of the second and third centuries) embryonic Christian doctrine by the instrument of Roman law. In particular—and this is especially important in the context of political ideas—he viewed the relations between God and man as legal relations which he conceived as rights and duties. His thought-pattern could easily be pressed into the jurisprudential scheme of the Roman law. It is quite astonishing how easily Roman law conceptions flowed from his pen when he tried to explain difficult religious and biblical themes. For example, the idea of the *corpus* which was to assume a fundamental importance in later governmental ideology when the full Pauline cosmology came to be harnessed to the service of a governmental programme,[2] was in the first instance utilized by Tertullian so that one could speak of a marriage of the Roman law corporation with the Pauline concept of the corporate body of Christians. Numerous other Roman legal terms and ideas came to be utilized by Tertullian to clothe religious tenets with Roman law garments.

It is in this context that one of the crucial Roman law notions, that of jurisdiction, demands a few observations. This term designated the power to fix in a final manner what is right and just, to determine what is the law. The notion covered what a later age was to call legislation in the technical sense: *ius dicere* was the solemn declaration of the law.[3] In practical terms this meant that

[1] Ed. in *CSEL* 20, 47, 76. For some details cf. L. Buisson, art. cit., below, 41 n. 3, at 150ff; T. D. Barnes, *Tertullian* (1971), esp. 22ff on him as a jurist. See further P. Vitton, *I concetti guiridici nelle opere di Tertulliano* (1934); A. Beck, *Römisches Recht bei Tertullian und Cyprian* (1930); P. Lehmann, 'Tertullian im MA' in his *Erforschung des MA* (1962) V, 184ff. His works are now easily available in *CC* (1954).

[2] Cf. M. Roberti, 'Il corpus mysticum di s. Paolo nella storia della persona giuridica' in *Studi E. Besta* (1939) IV, 37ff.

[3] For this see F. Calasso, 'Iurisdictio nel diritto comune classico' in *Studi V. Arangio-Ruiz* (1955) IV, 423ff; J. Gaudemet, 'Études juridiques et culture historique' and B. Paradisi, 'Le dogme et l'histoire' in 'Droit et Histoire' in *Archives de philosophie du droit* (1959) 1ff, and 23ff; W. Ullmann, 'Law & the medieval historian' in *Rapports XI^e Congrès internat. des sciences historiques* III