MEDIEVAL POLITICAL IDEAS

by

EWART LEWIS

VOLUME II

ROUTLEDGE & KEGAN PAUL

First published in 1954
by Routledge & Kegan Paul Ltd.
Broadway House, 68–74 Carter Lane
London E.C.4
Made and printed in Great Britain
by William Clowes and Sons, Limited
London and Beccles

MEDIEVAL POLITICAL IDEAS

PREFACE

THIS book was planned in the hope that it might be useful to teachers and advanced students of political theory and of medieval history who feel the need of a more intimate acquaintance with the political ideas of the Middle Ages but find considerable difficulties in their way.

The source material is voluminous, and a great deal of it is inaccessible to the non-specialist. Only a small fraction of the important writings of medieval publicists can be found in English translation; modern editions even of Latin texts are lacking in many instances, so that firsthand acquaintance with such well-reputed works as, for example, the *De Regimine Principum* of Aegidius Romanus, the *Dialogus* of Occam, or the conciliarist pamphlets of Gerson can be pursued only under the rather forbidding auspices of the rare book rooms of the largest university libraries. Some progress, indeed, is being steadily made, especially in the modern publication of Latin texts. But much remains to be done; and the barriers imposed by language and sheer extent do not yield readily to attack. It is hard to imagine a day when the average professor of political theory, preparing his lecture on the conciliar movement, will be able to dip into his well-underlined copy of Cusa's *De Concordantia Catholica* with the same facility as that with which, earlier in the semester, he had turned to the *Politics* of Aristotle or that with which he will later turn, with a sigh of relief, to the *Second Treatise on Civil Government*. If ever a book of 'readings' is justified, it would seem to be justified in the field of medieval political thought.

This assumes, of course, that the field is one worth knowing. Its significance for the medieval historian need not be argued; he is, presumably, already committed to the proposition that what happened in the Middle Ages is interesting and important, though he may question whether the thoughts that happened then are as interesting and important as certain other phenomena. My remarks are addressed primarily to the political theorist, who tends to be much more comfortable among ideas more directly related to the values and problems of the modern world, and who often, no doubt, surreptitiously wishes that merciful oblivion would again blot out those teeming centuries that intervene between, shall we say, Cicero and Machiavelli. Of course, as a historian of theory, he is well aware that the ideas of those centuries were links in an intellectual chain, so that some understanding of medieval patterns of thought helps in the precise recognition of what Bodin, or Hooker, or Locke was driving at. He also knows that modern Catholic thought is self-consciously continuous with constructions developed in the Middle Ages. But he is less likely to appreciate that medieval political thought has some significance besides its significance as a background.

A good deal of it was directed upon problems that remain the central problems of any political theory; and some of the minds that worked on those problems were excellent ones, highly trained in sharp definition and logical analysis. True, their frames of reference, both practical and ideological, were different from ours; but for that very reason acquaintance with their ways of handling the eternal questions can be an illuminating experience, revealing new dimensions for conceptual problems that we tend to treat within the perspectives of our own world. In a sense, knowledge of medieval thought helps to make the study of political theory a really comparative study. There were, moreover, points at which medieval political thought reached, it seems to me, a definitive statement in the sense that it pursued the implications of a certain point of view about as far as they could be pursued. The explorations of the problem of political obligation by Aquinas and by Occam, for example, are remarkable achievements in clarification on normative, rationalist premises and are, accordingly, an absolute contribution to discussion. In this general context, the points at which medieval thought bogged down are quite as suggestive as the points at which it pushed through to lucid and comprehensive statement.

Medieval political thought has another kind of interest. It is common, and in a sense correct, to refer to the unity of medieval civilization, but there is a sense in which one could as plausibly refer to its exceptional dichotomy. The medieval centuries were, roughly speaking, an age in which the conceptual frameworks used by the intellectuals were much more remote from the shape of contemporary institutions than is usually the case. Accordingly, a great part of medieval thought developed from its inherited intellectual chromosomes with comparatively little influence from its environment; and a great part of what seem to us the obviously salient characteristics of that environment were only gradually, painfully, and incompletely formulated into usable conceptual schemes. This is one reason, of course, why the field of medieval political theory is so baffling to the novice, who expects to find in any system of thought some kind of rationalization or, at any rate, some evident reflection of contemporary life. But, if one starts by recognizing the fact of dichotomy, even a superficial acquaintance with medieval political thought can be a fascinating experience. It is a case study in the remarkable vitality of ideas uprooted from the soil in which they had grown; it is a case study in the extreme difficulty which men find, without the help of a continuous and relevant intellectual tradition, in defining the terms of their own daily life and work; it is a case study in the slow and devious ways in which the culture of one civilization can meet and blend with the routine patterns of a civilization that is very different. For the process of assimilation did go on throughout the Middle Ages: concept and custom interacted and finally merged. Perhaps the process was completed, so far as such a process is ever completed, in the sixteenth century.

It seemed, then, worth while to ease the terms on which modern students can gain access to the world of medieval political thought, through making a collection of translated passages, numerous enough to plot out the variety of opinion, long enough to indicate the process of thought as well as its conclusions. It also seemed desirable to orient the reader in this material through introductory essays which would trace the development of thought, point out the interrelated influences that shaped it, and attempt to suggest its ultimate significance.

The period covered by this book begins with the investiture struggle and goes through the fifteenth century. Earlier political thought, less

systematically explicit, did not seem to lend itself to the projected treatment. The temptation to carry the story into the sixteenth century, when, as I have suggested, many trends of medieval thought reached a kind of culmination, was a strong temptation; but one must stop somewhere, and the century of Machiavelli and the Protestant Reformation presented not only some culminations, but also some very fresh starts. The reader will notice that I have often found it convenient to divide my period into an 'earlier' and 'later' Middle Ages, with a rather wobbly dividing line somewhere around the latter part of the thirteenth century.

I have followed a topical organization in the hope that it might make for a clearer and more significant presentation than I could manage if I tried to follow a single chronological line. It also seemed possible that a topical organization might be of use to readers particularly curious about particular topics, whose history is often obscured by the dominance of the theme of church *versus* state. For that reason, the separate essays have been written so as to be fairly independent of one another. This has entailed some repetition and gerrymandering, for which I ask everybody's forgiveness. Of course, as frequent cross-references testify, no theme of discussion really developed in isolation from the others. But perhaps the more complex and more variously debated themes may become more meaningful, and more readily intelligible, if they are approached by way of the more basic concepts which served as premises to the great debates.

In choosing selections, I have tried, on the one hand, to cover the characteristic features of the systems of the most original publicists and, on the other hand, to provide clear statements of viewpoints typical of all medieval thought or of important schools of medieval thought. Recent research has revealed the importance of civilists and canonists in first developing many medieval concepts; I have, however, given preference to the less technical, more generalized statements of these ideas by philosophical publicists, which may be more directly intelligible to the non-specialist reader. The translations have been made from the best published texts I could lay my hands on. Where they have been abridged, the fact has been indicated. My goal in translation has been to keep as close to the original as possible rather than to achieve a graceful English style. A number of medieval publicists wrote well, in the sense that they wrote in a clear and orderly fashion, but few of them

wrote gracefully; on the other hand, the way they said things had meaning to them and may well have meaning to us. I have changed references to the *Corpus Juris Civilis* and the *Corpus Juris Canonici* to brief modern forms of citation. References to Aristotle's *Politics* have been given in terms of the system of books and chapters established by Schneider and followed in, for example, the Loeb Classical Library edition. Biographical data on each medieval author introduce the first selection from his works.

The introductory essays have been written on the assumption that they will be read in connection with the selections they introduce. They have been written also on the assumption that the reader will have no more than a text-book knowledge of medieval history, but will have that. Medievalists and political scientists will both, I hope, forgive me. I must also ask their respective forgivenesses for sweeping generalizations about medieval institutions, which seemed desirable, and for technicalities in the discussion of medieval ideas, which seemed unavoidable. A good deal of medieval political thought was technical, and its meaning is most accurately described in its own technical terms. I have continually tried to suggest the long-range significance of medieval ideas, but I have also tried to keep such suggestion distinct from analysis of the ideas as they were held by those who held them. The implications of an idea are certainly part of its interest, but the first problem is to define the idea itself.

Accurate presentation of the thought of medieval publicists is no easy task. The study of medieval political theory is still a developing field of specialized scholarship. Many conclusions of scholars of previous generations have become suspect; many conclusions of present-day scholars remain tentative and controversial. A great deal of rigorous and sensitive work still remains to be done to help us to define with certainty what a medieval publicist meant by what he said and whether he was the first to say it. I trust that this book may claim some originality of statement and comment, but it has no pretensions to be a contribution to the intensive sort of scholarship. It rests—I hope—on the best of present-day opinion. So far as it treats of the ideas of lawyers, it rests almost exclusively on secondary writings. I have, however, read substantially in the writings of medieval publicists other than the lawyers, and my own reading has inevitably affected my interpretation or my choice among interpretations. Where reputable scholars disagree

with one another, or where I disagree with a reputable scholar, footnotes will indicate.

I know that errors must have got into this book; I hope, not so many as to undermine its usefulness. Like William of Occam, 'I beg and entreat that whoever reads the things to be written here, if he thinks that I have erred in any way, may deign to show me my error. . . .'

I hope this book may serve as a partial payment on my large and pleasant debt to George Sellery, a great teacher, who knew how to communicate to his students, among many valuable things, something of his own friendliness with medieval minds. I owe a good deal also to John Gaus, whose teaching of the history of political thought continually suggested the bearing of the past upon the present and of the present upon the past. Charles Howard McIlwain encouraged me in the early planning of the book and gave generous and very useful advice, for which I thank him heartily and humbly. I also warmly thank all who read parts of the manuscript and helped me with detailed criticism: in particular, Jane Ruby and Gaines Post. I am glad to acknowledge the kindness of the libraries where I have worked: especially Oberlin College Library, which was most cooperative in arranging interlibrary loans, and Widener Library, the excellence of whose hospitality is happily combined with the excellence of its resources in this field. I am very glad to record my reverent admiration of Miss June Wright, a typist without a fault. Finally, I am grateful to my husband, John D. Lewis, not only for judicious support and counsel in the preparation of this book, but also for diligent and expert instruction in various branches of the science of politics.

EWART LEWIS

Oberlin, Ohio
October 1953

CONTENTS

CONTENTS

Chapter One

THE IDEA OF LAW

NOWADAYS, most people think of law as the command of a definite will or group of wills endowed with legislative authority. The authority that a legislator exercises may be regarded as its own, as in the case of an absolute monarchy or a dictatorship, or it may be considered a delegated authority, as in the case of a democracy; but, in either case, law appears as the product of human will. So it is with the limitations set to legislative authority: sometimes these are formally expressed in a constitution, sometimes there exist only the uncharted but real limitations of public consent, but both these limits are conceived as limits set by the volition of men.

This is the conventional modern view, whose origins, however, can be traced back far behind Austin, who gave it its definitive statement. Yet there are those who attack it; and even the common man's thinking on law—to say nothing of the pronouncements of judges—bears traces of an older, different approach. May not one look behind a constitution and find it a reflection of certain necessary relationships based upon the very nature of social life? Does law really proceed from will, or from a recognition of norms of right that are independent of human will? If it is true that the government makes the law, is it not equally true that law makes the government? Are there not higher standards by which enacted law may be measured—standards which sometimes sanction disobedience to the legislative will?

In the Middle Ages, laymen and experts would have had no doubt about the answers to such questions; and their answers would not have

been the Austinian answers. While the role of human will in the formulation of law was not unnoticed, a great body of thought concerned itself with a kind of law whose existence and content were independent of human decision; and, while modern thought subordinates law to government as its expression, medieval thought subordinated government to this kind of law as its corollary and instrument. 'Whereas the modern democrat is prepared to respect a law in so far as he can regard himself as its author, medieval obedience was founded on the opposite sentiment, that laws were respectable in so far as they were not made by man.'[1] While modern thought regards legislation as the highest activity of the state, to which judicial enforcement is logically subordinate, medieval thought typically admitted legislation only as 'a part of the judicial procedure—a more or less surreptitious incident of "*jus dicere.*"'[2]

The study of medieval political theory, therefore, must begin with the medieval idea of law—or, better, medieval ideas of law. For the common man of the Middle Ages and the feudal lawyers who spoke for him did not think of fundamental law in quite the same way as the scholars and philosophers.

The law in which medieval institutions were actually enmeshed was largely customary law. Its content was miscellaneous: rights and practices which came into play with the growth of feudalism were combined with age-old Germanic customs and, particularly in southern Europe, with a body of modified Roman law that had become traditional, its origin forgotten. The origin of customary law had no significance for its validity: it was valid simply because it existed and had long existed as the law by which a particular region was accustomed to be judged. And although, till it came to be congealed in written codes, custom actually underwent continual gradual change, it was conceived as theoretically changeless.

In a society which had few techniques for controlling its human lords, the customary law was naturally regarded as a precious possession of the community. It had the dignity of age, and the intimacy of communal experience. It seemed just because it was old, and also because it was familiar: it was not locked away in the books of specialists, but rather was immediately present in the common usage of those whom it affected. It was the cherished safeguard of personal rights and of property, the immutable authority to which men could appeal against

innovation, which too often meant new exploitation. For a man to be deprived of the right to live under the law of his group—to be 'outlawed'—was naturally considered a penalty harsh enough for the gravest crime.[3]

Now this customary law, although or perhaps because its validity was so completely accepted, was never given a thorough basis of systematic theory. Living and known through the customs of its users (*moribus utentium*), it was not even systematically recorded till the thirteenth century, and then not completely, though here and there partial codes were promulgated by royal authority before that time. But the early development of governmental institutions and the academic study of Roman law, whose orderliness was a grave challenge to the defenders of local custom, did result in the more or less precise definition of certain facets of custom-law theory. Among the thirteenth-century compilers of customary law, there are some whose comments illuminate the doctrine of the law that they record. Otherwise, medieval thought about customary law must be gleaned from scattered phrases in the recorded law itself or deduced from the typical patterns of medieval practice.

From these sources it is evident that the development of governmental institutions and familiarity with Roman law did not at once alter the medieval concept of the immutability and supremacy of tradition. But that development did carry with it an increasing emphasis on the importance of authoritative promulgation in the 'establishing' of law—a process which was not conceived as the making of law, but as the formal finding of a law that already existed, and as the formal declaration of what the law already was. It was generally agreed that in the promulgation of law the king should be assisted by a council of magnates to represent, not the law-making will of the community, but the community's best knowledge of the law. A naive description of the ideal process is to be found in Jean d'Ibelin's narrative of the method by which he assumed the Assizes of the Kingdom of Jerusalem to have been formulated. A briefer description of the elements which enter into the authoritative promulgation of law is found in Bracton. And some combination of 'the authority of the king, the advice and agreement of the magnates, and the general guaranty of the community' —however expressed—was the typical medieval procedure.

As a matter of fact, the promulgation of customary law often

involved an actual modification, whether through misunderstanding of the original meaning, or through a deliberate attempt to apply old custom to new circumstances. But this practical modification of custom proceeded without a theory of legislation. It was rather assumed that the law, recently distorted and abused, was being restored to its original purity, or that the bearing of old law on new conditions was now being clearly defined. The extent to which this fiction might be stretched is vividly illustrated in the case of the English statute of *Quia Emptores*,[4] which actually made a radical change in the land law in the guise of the removal of an abuse. Even after the development of estates, popular thought still tended to find in past custom rather than present will the ultimate authority of law.

Indeed, the promulgation of fundamental law in the Middle Ages was more like an act of jurisdiction (*juris dictio*) than an act of legislation. The king with his council or the king with his parliament declared the law as a court declares it, except that it was declared in general terms rather than applied to the settlement of a particular dispute. The authority given to custom by such formal declaration was parallel in its significance to the authority which, according to Beaumanoir, a custom received through its 'proving' in a successful lawsuit.

Custom was not the only kind of law the Middle Ages knew. The growth of effective royal government gave increasing prominence to a type of law which did proceed from the authority and discretion of the king as the administrative and judicial head of the realm, responsible for the enforcement and maintenance of the fundamental law and the security of the public peace. Such ordinances were not always clearly distinguished from customary law. Beaumanoir, for example, speaks of the king of France as making 'new customs' when his obvious reference is to administrative orders rather than to an alteration of basic legal relationships. In the early days of the medieval monarchy, the promulgation of such ordinances, like the formal promulgation of customary law, was often done with the advice and consent of a great council of magnates. But as time went on, the growing pressure of governmental business made such formalities impossible, while the growing prestige of the king made them unnecessary. The great bulk of such ordinances in France tended to be made simply in the king's regular council; and English practice and terminology in the fourteenth century distinguished between the statute, which involved basic custom

and therefore needed the consent of Parliament, and the ordinance, which did not affect fundamental relationships and therefore needed no authorization beyond the king's will.[5]

But long before differences in procedure had developed, some feudalists had grasped the logical distinction between the law which was changeless custom, defining a permanent structure of rights and obligations, and the laws of the king, which were mere administrative orders, temporary and changeable, designed to supplement and enforce the permanent law itself. And in their definitions they had blocked out one pattern for medieval legal thought: a pattern controlled by the network of changeless custom, but in which the limited though important areas of policy and administration, procedural and penal law, were left to the legislative discretion of the king.[6] They made it clear that they regarded custom as the higher law. The royal edict must conform to its principles; if the royal edict conflicted with custom, it was invalid—unless, as Beaumanoir indicated, a special emergency might make the customs of normal times temporarily inapplicable.

This conviction was forcibly though variously expressed by feudal lawyers in their solutions to the problem of terminology forced on them by acquaintance with Roman jurisprudence. Custom, in the Roman system, was the lowest variety of law; it was considered as an expression of the popular will, and there was much debate among students of the civil law as to whether the popular will, having transferred its authority to the emperor, was competent to make law at all; its competence to make law that should take precedence over imperial legislation was even more dubious. The term *lex*, in the civilists' vocabulary, was reserved for law, substantive as well as procedural, enacted by government; custom (*consuetudo*) was definitely inferior in prestige. The feudalists were obliged to deal with this conflict of terminology, confused further by a tendency to stress the accident of writing as a distinguishing characteristic of a *lex*. Their solutions varied: the Norman author of the *Summa de Legibus* employed the term *lex* for the administrative and procedural enactments of the ruler; the Lombard author of the *Libri Feudorum* thought of *lex* as written law, particularly Roman law, and frankly subordinated it to custom; Glanville and, following him, Bracton saw *leges* as the term implying the highest prestige and attempted to show that the customs of England corresponded to the *leges* of other nations and deserved to be so called.[7] In

this attempt, both were led to stress the importance of formal promulgation as a factor in the authority of the law, but they saw it as only one of several factors. They were not assimilating the Roman theory but under its pressure were attempting to formulate their own.

Thus the great feudal lawyers set down their conception of law. But when we inquire what was the ultimate basis of the customary law which they revered, the feudalists have no answer to give us. They may have felt that custom could be equated with reason; but they made no search for general rational principles underlying its details, nor had they any theory to describe how reason is transmuted into law. They were not trained philosophers and did not easily think in abstract terms.

It is evident that such an approach to law would, if consistently applied, keep human institutions in an eternal and untidy stagnation. But the naive feudal belief in the supremacy of custom as the touchstone of right did not satisfy philosophical and scholarly minds, which, even if they were not troubled by its lack of flexibility, did demand a rational and uniform standard by which human laws and institutions might be measured. For such minds the obvious point of departure was the natural-law doctrine of the Stoics, which was transmitted to the Middle Ages through the Roman juristic writings collected in the *Corpus Juris Civilis* of Justinian and through the discussions of the church Fathers. The organization, analysis, and assimilation of the antique theories of law became an important intellectual exercise, which ultimately reacted on medieval thought about medieval problems. But, since natural-law theory had originally developed in an environment very unlike that of the Middle Ages, scholarly discussion of law was inevitably somewhat formal and abstruse; and the application of the scholars' concepts to the medieval scene was a process never completely carried out.

Three groups of scholars contributed to the medieval philosophy of law: the students of the Roman civil law, the students of the canon law, and the students whose first concern was theology and whose second concern was the philosophic structure of man's world.

With the twelfth-century recovery of the complete text of the *Corpus Juris Civilis* and the development of the University of Bologna and of civil-law faculties in other universities, Roman law became a field of intensive critical study. This study included the study of Roman