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## Juridic Origins of Representation I

### Cover Page Footnote

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## JURIDIC ORIGINS OF REPRESENTATION I

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IN A trilogy of articles on *Politeia*,<sup>1</sup> we maintained that the two major contributions of Catholicism to politics were the sound constitutionalism of medieval provenance and representative governance as its complimentary institutional safeguard. Ecclesiastical and royal rulers constructed in the unison of a common faith, civilization, and culture the unique historical phenomenon of Western Christendom upon a body of doctrines which had evolved in unbroken sequence from patristic literature and whose momentum made them the dominant force in political thought down to at least the middle of the sixteenth century. This Catholic heritage of ideas had fecundated the institutions of the earlier middle ages, gave direction to feudal interdependence, and gradually channelled the power of governance into definite organs of political and juridical control. We cannot stress too strongly the efficacious influence of St. Augustine and St. Isidore—to mention only two—during the centuries when the *City of God* was the favorite reading of princes and the *Etymologies* and *Sentences* were the encyclopedias of the political theorists. The christianization of the Merovingian dynasty, the legislative achievements of the councils of Toledo, the Laws of the Visigoths, and the Carolingian *capitularia* illustrate the concrete results of the all-pervading influence on the social order. Slowly and surely, in the unity of Faith, a Christian polity evolved with deepening roots and expanding tradition. The central medieval doctrine<sup>2</sup> was the absolute and imperishable value of the human personality in the image of its divine Creator and its eternal transcendence and the correlative, the inborn and indestructible rights of the individual. The formulation and classification of such rights belonged to a later stage in the growth of the theory of the natural law. Still, as a matter of principle, a recognition of their existence worked forcibly and immediately upon every social and political experiment, and at the beginning of the thirteenth

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1. Cf. Graeco-Roman *Politeia*, 20 *Ford. L. Rev.* 119 (1951); Catholic *Politeia* I, 21 *Ford. L. Rev.* 91 (1952); Catholic *Politeia* II, 21 *Ford. L. Rev.* 236 (1952).

2. von Gierke, *Political Theories of the Middle Ages* 81-82 (Maitland's transl. Cambridge, 1900).

century, when legal precision began to be stamped on a great number of previously indefinite relations, the inviolability of the individual worked for judicial processes to secure immunity from arbitrary action. The *juridical* resultant of this ethico-legal fermentation was that constitutionalism which Bracton so aptly summed up, *sub Deo et lege*, the rule of law, divine and human. The *political* concomitant was the institutional development of representative governance to ensure the supremacy of law in a government *by* the people as well as *of* and *for* the people. Representative democracy better secures the supremacy of law over the governors of the state and administrators of justice as well as over its subject citizenry and holds both to accountability equally and impartially.

Constitutionalism is at best a legal barrier, dictated by the metaphysics of law and freely assumed, that is to say, it is a self-imposed limitation. But so long as this *definition* has not been fixed in inviolable practices—due processes, its survival and preservation will depend wholly upon the goodwill and moral conscience of the governors and of the administrators of justice. It is not sufficient in the order of practice (though necessary as a speculative and legal presupposition) to temper power and its exercise with pacts and with all those prescriptive immunities and privileges which constitute bills of rights. What is wanted is not simply the elimination of the arbitrary factor in the *concept* of power. Rather, institutions must be devised by which law would be sovereign, rights respected, responsibilities of office accounted for, and the individual able to vindicate his claims so that no one would be able to assume arbitrary power without encountering a *legal obstacle*. The act of violation, subversion, or defiance of a duly established order of justice on the part of a public officer must be as obvious and obnoxious to society as that of any private citizen. Macchiavelli pointed out only too patently the consequences of politics that are embodied in individuals and not in institutions.

The medieval christendom of the West did evolve just such institutional means, albeit in rudimentary forms, which subsequent centuries have confirmed to be the best human safeguard of constitutionalism namely, representative government. Out of their rudimentary provisions, the historical struggles for constitutional supremacy in Western countries forged a political and legal maturity which by its inner logic and historical continuity derives from the identical Christian principles which were constantly immanent in the entire process. The Christian solution was, truth to say, remarkably modern. For it provided the answer to Austin's dilemma and resolved the specious antinomy implied in Lord Acton's dictum. Austin's jurisprudence pivots the dilemma:

either the king is sovereign or no; if he be sovereign then he is not legally below the law, his obligation to obey the law is at most a moral obligation; on the other hand if he is below the law, then he is not sovereign, he is below some man or body of men who say what is the law and they are sovereign.<sup>3</sup> Centuries earlier, Bracton, Archdeacon of Barnstaple and justice of the king, had formulated in part the Christian response—*sub Deo et lege*. Supremacy of Human Law will prevail if there is prior acknowledgment and submission to the Divine Law, the law which is superior to those which are imposed by men. In this manner, Austinian sovereignty, which is characteristically *personal command*, is conditioned by an objective due order which is to be discerned by reason and with which human governance must accord. As an *ordinatio rationis* it invests the sovereign command with the virtue of moral justice as well as with the compulsion of legal justice. As we have noted, it was a partial answer because discretionary and prudential actions may yet err in judgment or risk presumption. Efficacious means must be devised to hold to accountability and review the legal justice of these commands. When Lord Acton observed that power tends to corruption,<sup>4</sup> we think he was expressing a scepticism as to the reliability of all men in positions of power; and when he added that absolute power corrupts absolutely, surely he expressed faith in the soundness of the judgments of the generality of men. The second partial answer, which complements the constitutionalism of Bracton, is that accountability to men which, as we shall see in the course of the *argumentum* of this article, obtains in representative governance.

But the problem is not so easily resolved. Modern history discloses the failures of democratic representative governments of the 1930's to be no less tragic than the collapse of the monarchical regimes which preceded them and, if the virtues of one are no more durable and efficacious than the other, there is no point in arguing for a preference save perhaps for purely sociological considerations of adaptability. In his Christmas Message of 1945, Pius XII urged for the first time in the history of papal enunciations the preference of democratic rule for Western nations as comporting with their political maturity and as an assurance against the recrudescence of dictatorial discretionary rule. Truth to say, the significant fact is that the democratic states that disappeared after the 1920's were spurious democracies; their peoples lacked the historical basis, and, indeed all real aptitude, for representative government and democratic freedom. This is not to say, however, that these spurious democracies were simply the impromptu

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3. Maitland, *The Constitutional History of England* 101 (London, 1920).

4. Lord Acton, *The History of Freedom* 16 (London, 1922).

contrivances of Wilsonian romanticists imposed upon a people in the disillusioning aftermath of a World War. Rather, they were degenerations of a constitutionalism of medieval provenance which had been severed from its historical roots and had lost its Christian inwardness principally through the triple defection of ". . . heresy and unbelief, Roman law, and heathen philosophy, . . ." <sup>5</sup> We have intimated in an earlier issue some of the reasons why representative government survived in Protestant England and fell into desuetude in Catholic countries of the Continent. The objectives of our present study are to ascertain the historical and juridic origins of representative government and, by identifying it in terms of its inward life to differentiate it from specious claimants. We will maintain that the Anglo-American system of representative governance was originally native to the English, that is to say, it was not an alien import. It did not derive from the Teutonic polity, as was staunchly argued by the Oxford historians of the latter half of the nineteenth century, nor from the Roman polity. Secondly, this English achievement is historically of Catholic origins, of Catholic promotion, and must remain within its original Christian tradition in order to preserve its vitality and viability. To this end, we must, as we proceed, note the ideal and practical motives that inserted themselves into the historical process and trace their lineage with the past.

#### THE TEUTONIC POLITY IN ENGLAND

In the fifth volume of his monumental *opus*, the *History of Political Theory in the West*, the eminent English historian, A. J. Carlyle, wrote:

"It is, indeed, a somewhat curious and even humorous thing to find, as we occasionally do, persons who claim to be attached to the traditional aspects of political institutions, criticising the representative system as though it were a modern thing, a product of some crude political idealism of the nineteenth century, or discussing the merits and demerits of a representative system upon merely abstract grounds. *While all the time the truth is that the representative system was not only created when the civilization of the Middle Ages was at its highest point, but that it was also the natural and logical outcome of its political conditions and ideas.*" <sup>6</sup>

Dr. Carlyle dismisses as somewhat curious and humorous the pretensions of the nineteenth century political idealists and the imaginative postulates of the Romanticists because they are simply without historical roots in human events. Nonetheless, he views rather sympathetically the Teutonic polity theory which came in vogue at Oxford during the later half of the nineteenth century without drawing the significant

5. Lally, *As Lord Acton Says* 55 (Newport, 1942).

6. 5 Carlyle, *A History of Medieval Political Theory in the West* 129 (London, 1928). (Italics added).

distinction between the heathen and Christian Teutonic societies as well he must in order to accord with the above citation.

The fabrication and evolution of the Teutonic polity theory is a sorry instance of the fusion of fancies, facts, and prejudices under the austere guise of scientific research. What is remarkable is that it should gain such wide credence as to dominate the historical literature of the second half of the nineteenth century, and, in spite of its complete discredit, still persists in the works of our own American historians on the Anglo-American tradition of law and government. When we search for its earliest assertion, we find that it is but a passing allusion in Montesquieu's, *The Spirit of the Laws*:

"Whoever shall read the admirable treatise of Tacitus on the manners of the Germans, will find that it is from them the English have borrowed the idea of their political government. This beautiful system was invented first in the woods."<sup>7</sup>

This is the full context, uncritical and unsubstantiated. To see representative government in the forests of Germany, as Montesquieu did, is indeed a frightfully dangerous simplification of history. In effect, this would explain civilization and institutional advance in terms of primitive practices and the crudities of barbarians. Appearances deceived Montesquieu;<sup>8</sup> he merely glanced at the externals of representative government. Rather, ought we to look into the embodied forms of civilized society in order to ascertain what purposive motivations led it out of barbarism. Montesquieu naively ascribed to pre-societal conditions that which can only be the attribute of a matured body-politic. Nonetheless, his reversal of the processes of history found warm climate in the expanding Romanticism of the period which was to culminate in the apocryphal state of nature of Jean Jacques Rousseau.

Montesquieu's statement was in accord with the Romanticists' *motif*—and in its reaction against the scientific rationalism of the Age of Enlightenment logically led the healthy animal kingdom of men to political primitivism. When reason ceded to the exaltation of emotion it is not surprising that the Teutonic polity theory should be out of sorts with the historical science of the period. Nor were the romantic idealists alarmed at this disjunctive dichotomy. But history has a persistent way of betraying its perverters. Silence may be exploited in the name of ignorance but facts are stubborn witnesses against the reconstructing synthesis of the visionary. Seventeenth century England

7. Bk. XI, c. 6 (Dublin, 1751).

8. "The history of institutions is often a history of deception and illusions; for their virtue depends on the ideas that produce and on the spirit that preserves them, and the form may remain unaltered when the substance has passed away." Acton, *op. cit. supra* note 4, at 2.

was vibrant with the political controversies of the Stuart reign as to the source and nature of original power. Yet we shall search in vain for any evidence or even superficial reference to the Teutonic polity on the part of the English Parliamentarians and of their traditional allies, the English lawyers, in their appeal to historical precedent and English law for a confutation of the absolutist pretensions of James I. During the Civil War and at the trial of Charles I, neither the Rump Parliament nor the Levellers amongst the military are aware of any tradition of the primitive Teutonic community as the original sovereign. Surely a more opportune time was never in greater need of such a theory of constitutional history. But we find not even an intimation of it. How then shall we account for the vogue of this theory and to what factors shall we attribute its formulation and persistence against the actualities of history?

The theory as eventually completed has been summarized as follows:

"Representative government is an outgrowth of the constitution of the primitive Teutonic community, a community of freedom whose territorial domain was the Mark—lands which were held both in severalty and in common. The assembly of the Mark—men constituted the legislature which in its primitive form was attended by all the freemen. This primitive Teutonic polity was the germ from which constitutional government and representative institutions developed, with results that have varied owing to historical accidents. The original polity found a shelter in the forest cantons of Switzerland, in which it has been preserved to our own times. In general, on the continent of Europe, it was extirpated by the absolutist systems that arose out of feudalism. In England it was overlaid by feudalism but not wholly destroyed, and its vitality was evinced by the growth of parliamentary institutions. Representative government originated as a delegation of the ancient right of personal attendance common to all freemen. . . . Thus the original source of all existing models of constitutional government is the community of freemen embraced in the Teutonic Mark."<sup>9</sup>

The Teutonic origin of English representative government was compounded by the English historians, Turner, Kemble, and Freeman, in three successive contributions each modifying the prior. It began with Turner's *History of the Anglo-Saxons* (1799-1805) and the endeavor to reconcile the apparent discrepancies between the charming picture of primitive social conditions such as the Romanticists described and the historians' crude portrait of the barbarians. Turner resolved the artificial problem by a theory of an aboriginal culture in conformity with Rousseau's interpretation of political history. A freedom-loving Nomadic branch of the Anglo-Saxon tribes succeeded to preserve their native characteristic habits of free communal association while the others gradually lost their pristine liberties by submitting to the yoke of civil institutions. To this supposition, he added the conjectural

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9. Ford, *Representative Government* 49-50 (New York, 1924).



beliefs that the Anglo-Saxon Witenagemot and the modern English Parliament essentially resemble one another both in the manner of selecting their representatives and—strange as it must seem to the present-day political sociologist—in the possession and exercise of the principle of no taxation without representation. Turner's account of the Anglo-Saxon parliament is hardly more than a casual assemblage of vassals summoned at the king's instance, and Turner himself frankly admits he has adduced no historical evidence for the maturity he nonetheless persists to ascribe to their primitive political conventions. The attractions of a preferred theory blur Turner's valuation of facts and he reveals himself more of a Romanticist than a historian, still much less a historian of the growth of institutions. John Mitchell Kemble in his volume, *The Saxons in England*, sought to cure the weakness of Turner's argument by supplementing the theory with the recent researches of German scholars on the establishment of the *Mark*. This they described as the self-governing community of Teutonic freemen. Kemble could find no direct evidence of its existence amongst the Anglo-Saxons and he accordingly argued by a ratiocination of "must have been's" and suppositional inference for its transposition from Germany to England, and its inherent evolution into the English representative institutions. Though Kemble gave the Teutonic polity theory an authoritative quality by a German borrowing which was wanting in Turner yet the theory operated less as an hypothesis than as a fixed principle of interpretation of facts. The strongest impetus to the theory was provided by Professor E. A. Freeman. He strengthened the argument for the continuity of Teutonic Anglo-Saxon polity simply by eliminating the hazards which Turner's and Kemble's explanations allowed. Turner had restricted the freedom-loving virtues to the nomadic Teutonic tribe; Freeman made them a common Aryan possession. Kemble had maintained, as some present day scholars still do, that the original Celtic population largely survived the Saxon invasion and in time shared in the rule of their conquerors; Freeman cleared the land of all the Celts. By this dual elimination, the transposition of the Mark to England is assured and its development into the English representative institutions a matter of unquestionable deduction. What historical record did not provide, logical inference from suppositional premises deduced. What did it matter if there was no direct evidence extant that the Mark ever existed in England, a fact Freeman himself admitted. Freeman was an active proponent of the Teutonic polity theory and in his visit to the United States from the autumn of 1881 to the spring of 1882 he lectured widely and repeatedly for its acceptance. In his addresses at Johns Hopkins he advocated the study of American local institutions in their relation to Teutonic origins. Surely, he argued,

the transposition of English law and governance to American shores involved the original inheritance of the Teutonic polity. Indices of his influence are evident in the works of many of the American historians such as John Fiske and our contemporary, George Burton Adams. Thus did a mere allusion of Montesquieu fostered by the Romantic movement gather strength by the abstractionist logic of those captivated by theoretic prepossessions.

Freeman's epitome of the Teutonic origin of English representative government did not go unchallenged. It was to be definitively undermined in its two vaunted arguments of the elimination of the Celts (or their status and role as survivors) and the existence of the Mark and its meaning. With these two props demolished, the original credits of medieval Christian polity were reestablished on stronger foundations than ever before. The opposition began with Thomas Wright's major work, *The Celt, the Roman, and the Saxon*. He found that Anglo-Saxon society was comprised of Celts and Roman descendants who worked the fields and served their Saxon conquerors and rulers. There is no evidence of a communal deliberative assembly—no mention at all is made of the Mark—and whatever municipal gatherings occurred were solely for the purpose of facilitating the payment of tribute. C. H. Pearson's volume on *England during the Early and Middle Ages* reaffirmed the survival of the Celts notwithstanding the successive Teutonic invasions and discredited the conjectural reasonings as to the transposition of free self-governing communities by the conquering invaders. On the contrary, the invaders introduced rather rude conditions of graded servitude. Elton's *Origins of English History* added strength to Wright's and Pearson's portrayal of the Teutonic contribution. The Saxon lords and their attendants did not extend personal liberty to the conquered but rather reduced them to subjection, socially and politically. However, the ulterior position as to the existence of the Mark amongst the Teutons themselves in Germanic lands and their significance as free self-governing communities had not yet been invalidated. So far the survival of the Celts had been vindicated and this position was corroborated by the researches of ethnologists; and the denial made that the Teutons had ever transposed representative governance from Germanic to English soil.

A decisive blow was to be struck at the roots of the Mark theory from an unsuspecting quarter—by a French historian and economist. German scholarship had accumulated evidence that established the Mark as the self-governing community characteristic of Teutonic freemen. That granted, the continuity of that native polity was assumed (in default of contrary historical evidences) when the Saxons imposed their governance on English soil. The extermination of the Celts

reassured such an assumption; their survival made it less certain but still highly probable. In the April 1889 issue of the *Revue des Questions Historiques*, Fustel De Coulanges published a lengthy essay wherein he scrutinized the evidence adduced for the Mark theory. He concluded that ethnologically the Mark connoted for the Teutons the terminal boundaries of private property and only in a secondary sense dignified the property itself. In no way did it mean an intermediary agency representative of the community nor was there any extraneous evidence for such an ascription. The obvious deduction was disastrous for the English proponents of the Teutonic origins of English representative institutions; for the Mark, "in the sense called for by the theory, had not existed among the Teutonic tribes," and consequently the confident presumption of its continuity in the Saxon conquest of England proved to be a baseless optimism. Subsequent research by Sir Paul Vinogradoff, F. Seebohm, and H. Munro Chadwick disclosed that the Teutonic plant bore a different fruit. At the time of the invasion the constitution of the Germanic society was autocratic and it transmitted to English soil not personal liberty but a harsh servitude. The casual assemblies which Turner, Kemble, and Freeman mistook (as did Montesquieu) for representative parliaments were scarcely more than a gathering of the king's personal attendants or, as Bishop Stubbs described them, "mere retainers of the nobles." It was not till the Norman Conquest that this imposed servitude upon which Saxon aristocracy rested was tempered and modified by Continental feudalism. It is accordingly not without righteous indignation that Lord Acton pronounced the theory which asserted liberty to be the aboriginal property of savages "an invention of men without fastidiousness in their political tastes."<sup>10</sup> The theory that traced the free institutions of Europe and America, and elsewhere, to the life that was led by the Teutonic tribes, he described as one of the desperate enterprises of historical science. Professor Maitland has expressed himself just as unequivocally on the suppositional inference about primitive institutions in England:

"We do well to remember that the oldest laws that we have, however barbarous they may seem, are none the less Christian laws. . . . This is well to remember, for it should prevent any glib talk about primitive institutions: Teutonic law (for what is true of England is true also of the continent) when it is first set in writing has already ceased to be primitive; it is already Christian, and so close is the connection between law and religion, that we may well believe that it has already undergone a great change."<sup>11</sup>

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10. Lally, *op. cit.* supra note 5, at 136.

11. Maitland, *The Constitutional History of England* 2 (London, 1920).

## ROMAN POLITY IN ENGLAND

There is much less question as to the enduring influence of the Roman occupation. On the Continent, Roman law once knitted together the Roman Empire and even survived its downfall for at least two centuries; but in England it failed to take root.

"Roman legal institutions do not appear to have survived the abandonment of Britain by the Romans; at least they do not appear to have contributed materially to the formation of the laws of the pre-Norman period of English history. 'We speak of law,' declares Maitland, 'and within the sphere of law everything that is Roman or Romanized can be accounted for by later importation. . . . And, in point of fact, there is no trace of the laws and jurisprudence of imperial Rome, as distinct from the precepts and traditions of the Roman Church, in the earliest Anglo-Saxon documents. Whatever is Roman in them is ecclesiastical. . . . This inroad of the Roman ecclesiastical tradition, in other words, of the system which in the course of time was organized as the Canon Law, was the first and by no means the least important of the Roman invasions, if we may so call them, of our Germanic polity.'"<sup>12</sup>

Thus far we have discounted the unfounded pretensions of the Teutonic origin of English Constitutional and Institutional history. It simply isn't an historical actuality. Romanism is doubly non-relevant. It did not survive the Saxon conquests and what is obviously more to the point, it is in the very essence of its polity incompatible with English constitutionalism. The English development is then neither Teutonic nor Roman. The maturity it attains is distinctly an English achievement. The contributory factors, religious, ecclesiastical and civil, were those of Western Christendom. The English heritage is the logical result of the historical process common to all the nations of medieval Europe. The exigencies of logic then require that we ask whether the Romanism inherent in the Justinian renaissance of the eleventh century disturbed or became part of the Christian tradition that had evolved since St. Augustine and St. Isidore. Arnold Toynbee has focused for us the true measure of the Justinian revival within the comprehensive perspective of the sociological-political civilization of Western Christendom.

"It is true that, after the interregnum and the Dark Age, the Justinian *Corpus Juris* was, so to speak, rediscovered—in Orthodox Christendom in the tenth century and in Western Christendom in the eleventh—and this discovery undoubtedly produced a profound effect thereafter upon legal thought and practice in both these societies. This, however, was in the nature of a legal 'renaissance'; and, in making a comparison between Justinian's and Benedict's legislative work, it is perhaps more pertinent to bear in mind that, whereas Benedict's Rule was a new kind of legislation which broke new ground, and, in breaking it, fulfilled an urgent need, Justinian was codifying a law which was not merely old, but was on

12. Hazeltine, *Roman and Canon Law in the Middle Ages*, 5 Cambridge Medieval History 756 (Cambridge, 1934).

the verge of becoming an anachronism owing to the disappearance of the social conditions which the Roman Law had been designed to meet. For fully three centuries after the Justinian codification was completed, this code was altogether inapplicable to the new social conditions that supervened upon the final bankruptcy of the Hellenic culture. And, in view of this, Justinian's work may fairly be called 'labour lost'.<sup>13</sup>

In conclusion, then, the English representative system is neither derived from nor in any way indebted to the Teutonic polity theory not only for want of valid historical credentials but also for the marked antithesis between the two polities. As for Roman legal institutions, they do not appear to have survived the withdrawal of the imperial troops. The Roman laws that are in evidence from the earliest Anglo-Saxon documents are the ecclesiastical laws of the *new* Rome, the canon law of the Catholic Church. Nor is there any palpable evidence that the rediscovery of Justinianism in the eleventh century influenced to any enduring measure the legal and institutional development of Western Christendom. We need scarcely advert, as an aside, that there is no question of the influence of ancient Greek polity on medieval development. The *Politics* of Aristotle, which gave medieval thought direct contact with Greek political ideas, was unknown in Western Europe before the second half of the thirteenth century and the Renaissance had yet to dawn.

Some modern historians have a disdainful way of misconstruing the virtues of medieval civilization. While respectfully admiring its achievements in the reconstruction of a *pax christiana* out of the chaos of barbarian disruption, they fear to admit such accomplishments as they would reserve only to modern invention. Possibly their reluctance to admit the indebtedness of our most advanced political and juridical institutions to medieval christendom is motivated by the Comtian formula for progress. Professor McIlwain, for instance, will maintain that constitutionalism is but a product of Roman law revival and the Protestant disruption of the unity of Christendom, which, if preserved intact, would have promoted and fostered political autocracy. The distinguished Carlyle brothers, on the contrary, maintain ". . . that the representative system was not only created when the civilization of the Middle Ages was at its highest point, but that it was also the natural and logical outcome of its political conditions and ideas."<sup>14</sup> These conditions and ideas were universally uniform in the West. ". . . the political civilization of Western Europe in the Middle Ages was homo-

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13. 3 Toynbee, *A Study of History* 266 (London, 1935). For the failure of the Roman Reception in England at the time of the Renaissance confer Maitland's admirable Rede lecture given at Cambridge in 1901, *English Law and the Renaissance*.

14. 5 Carlyle, *op. cit.* supra note 6, at 129.

geneous, that, whatever may have been the cause of the later divergence of the political organization of England from that of the Continental countries, the medieval political systems were in their origin similar—we would almost say identical—and the ideas or principles they embodied were the same.”<sup>15</sup>

Three observations are to be made: first, the representative system reached its most advanced stage of development in England while it suffered indifferent fortunes on the Continent; second, the development of representative principles and methods took place in Spain even *earlier* than in England and the Spanish Cortes of Leon and Castile provided tried precedents for the English; third, the nature and extent of this development in the thirteenth century did not belong to any one western country, but was rather the common product of the common elements of medieval political civilization. The rise of the representative system was the intelligible and logical development of the fundamental principles of the political civilization of the *pax christiana*. This development, the Carlyles repeatedly insist, “. . . was not an accidental or isolated phenomenon, due to conditions peculiar to England or to any other country, but rather represents the operation of forces and tendencies which belonged to the whole of Central and Western Europe.”<sup>16</sup> The need in the thirteenth century of an organization of national determination and resources more effective than the feudal system could furnish activated certain Christian principles, particularly, the principle of equality and consent to the development of some new organization which should relate the king to the whole body of his subjects, and which should make his governance effective and legitimate because it was founded upon the counsel and consent of the community as a whole.

Prior to a scrutiny of the Christian history of representative government we should review the pre-Christian practices of viceregency in order the better to ascertain the distinct virtues of the former and their inward essence. We will observe that essential differences derive first from the Christian doctrine of equality and its correlative of consent as applied by St. Augustine to the juridical order; second, from the Christian notion of prudential judgment as formulated through the *maior* and *sanior pars* principle of Canon law; and third, the Christian interpolation (by the Papacy) of the private Roman law maxim, *quod omnes tangit ab omnibus approbetur*, also differentiates it from its pagan antecedents. These three constitute the Christian ethico-theological foundations by which the representative government is elevated above the empirical level of administrative expediency.

15. 6 Carlyle, *A History of Medieval Political Theory in the West* 90 (London, 1938).

16. 5 Carlyle, *op. cit.* supra note 6, at 139.

## REPRESENTATION IN THE PRE-CHRISTIAN ERA

The idea of vicarious action is elementary and so fundamental that it has a history as ancient as the multiple cares of man when these exceeded either the competency or opportunities of one person to attend personally to his entire business. The office of stewardship arose particularly in large households. Conversely, vicarious action becomes an exigency when not the cares but the number of men multiply so as to call for the unity of deliberation and action of the few in the name of the many. Ambassadorial tasks are as dated as wars and international relations. The significant element in vicarious agency is not the action or transaction itself but the mandate or commission which qualified and authorizes the action. This can be either transient, an *ad hoc* action, or a permanent office; it may extend generally to all business or only to certain designated assignments; it may exclude or confer personal discretionary powers upon the agent within the limits of the commission; it may represent the interests of a single person or of a corporate collectivity. It may have a private character (civil) or it may be public (political).

From the historical experience of vicarious action in the political domain we may distinguish the representative *idea* which simply connotes vicarious action; the representative *principle* on which the legitimacy of vicarious action rests; the representative system which *presents* but does not govern; and the representative *government* wherein the representatives themselves govern, i.e., they legislate, adjudicate, and execute. Each level of development presupposes authorization, human or divine, and a mandate. The institutionalized *idea* gradually descends from above, the monarch, to the many and becomes *incorporated* therein till it matures into the popular sovereignty of the body politic.

Among primitive peoples<sup>17</sup> before and within the Christian era we find scarcely any evidence of a vicarious office functioning in the name

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17. For studies of primitive practices of representation and Greek and Roman practices confer: Aristotle's Government of Atheni cc. 63-9 (*Atheniensium Respublica*) (Kenyon's transl. 1920); Bonner, *Lawyers and Litigants in Ancient Athens* (U. of Cal. Press, 1927); also his, *Aspects of Athenian Democracy* (U. of Cal. Press, 1933); Bonner and Smith, *The Administration of Justice From Homer to Aristotle* (U. of Chi. Press, 1930); Clarke, *Medieval Representation and Consent* (London, 1936); De Coulanges, *The Ancient City: A Study of the Religion, Laws, and Institutions of Greece and Rome* (1874); Ferguson, *Athenian Juries*, 5 *Cambridge Ancient History* (Cambridge, 1927); Fowler, *The City-State of the Greeks and Romans* (London, 1926); Hammond, *City-State and World State in Greek and Roman Political Theory* (Boston, 1951); 2 Vinogradoff, *Outlines of Historical Jurisprudence: The Jurisprudence of the Greek City* (London, 1922); 1 Wigmore, *Panorama of the World's Legal Systems* (St. Paul, 1928); Heinberg, *The History of the Majority Principle*, *American Political Science Review* (Feb. 1926); Baty, *The History of the Majority Rule*, *Quarterly Review* (Jan. 1912).

of a corporate association. Primitive communities are tribal, familial, patriarchal; and the entirety of government consists in the exercise of a paternal authority within an intricate maze of traditional customs and immemorial practices. An inviolable sanctity shrouds them and renders them impervious to change. "Laws" and "government" in our modern meaning of the terms are non-existent. Age-old usages exact blind obedience, hold captive the use of direction, and arrest any opportunity for prudential initiative. From the moment of birth to his death, the individual is bounded on all sides by a rigidly fixed pattern of behavior toward others. Traditions become archaic, frozen first beginnings—for want of the virtue of progress and the absence of prudential inventive judgments. Admittedly, consultative conferences convened from time to time; but these occurred under the stress and necessities of war and of hunting. The decision proceeded solely from the elders who speak with supernal authority and irrevocably.

The primitive office of kingship and priesthood suggest vaguely the representative *idea* but these in no way embody the representative *principle*. The idea itself, an expedient one easily suggested by the context of human affairs, simply expresses the necessity that one or more persons stand or act in behalf of others and, at least, for the purpose at hand, an identity of interests is assumed. Such an idea applied to private enterprise constitutes a trust. Not till it is transferred to the public domain, the City, and is enlarged by the consent of the governed does it become a *political* principle. In the measure that not only responsibility for the interests of the group but also as accountability to the group increases does the political principle of representative governance attain institutional maturity.

Ancient Oriental sovereignty was personalized in the royal despot. Enlightened monarchs would generally surround themselves with sages and counsellors but the ultimate decision rested solely with the crown. The practice of consultations was significant for the stress they placed on the weight of evidence and the prudential advantages of the prevailing counsel of the wise men of the realm. But these consultations are devoid of any legal force nor do we find a hint of determination by numerical majority. Practices of popular deliberative assemblies were not infrequently extant in antiquity. However, we would be mistaken to read into them the substance of representative democracy. In the Homeric assemblages, for example, the theory of decision by numerical majority was in practice thwarted by the restrictions placed upon free debate. Besides, the unquestioned prerogative of the president of the assembly to adjudge the numerical force by the tonality of acclamation often disguised the actual manifestation. In the early Teu-



tonic assemblies, whoever persisted against the decision of the majority was not held bound by their commitment nor was he thereby considered an outlaw. It was a customary right of self-assertion. The Athenian *ecclesia* regulated itself by an accurate registry of the numerical vote and the majority decision was definitive and ultimate for all. Ordinarily, in instances of obvious disparity, the vote was recognized by the show of hands; in a close contest they took actual count. But if we examine Athenian representation closely we observe how much it failed to be a genuine principle of governance. First of all, the Greek City was too compact and small for the exigencies of representation; second, its political egalitarianism ill comported with the requisites for the representative office, particularly the responsibilities of competence (as Plato and Aristotle so bitterly complained); third, the absolute discretionary power of the *ecclesia* both as to law as well as to fact negated an essential objective of representation, namely, the supremacy of law not merely as a juridically self-imposed limitation but also as a directive force in the prosecution of the public benefit. The Greeks had the form of *pure* democracy, that is to say, all the citizens in rotation directly participated in the office of government. It was for reasons dictated by daily expedience, social and economic, that a designated number actually served in public offices. It was not so much on the principle of representation that some, or rather more accurately, *many* (witness the large number in the *ecclesia*) governed in the name of popular sovereignty; it was a temporizing convenience. The representative idea, of action by proxy, was, of course, frequently expressed in the designation of ambassadorial delegates for the conclusion of treaties or for the purpose of raising a loan. But there were no permanent officials or groups who were empowered to act regularly and responsibly for the City as a whole. The City in a very peculiar sense governed itself.

The Roman Empire was a monarchically governed commonwealth, a *respublica* which had succeeded what the moderns designate as the Roman Republic and what the Romans of the imperial reign were fond of calling the Old Republic. In the *Vetus Respublica*, supreme and plenary legislative power belonged to the Roman people in their sovereign assemblies. The Senate was invested with *auctoritas* to serve as a permanent council for the chief annual magistrates to consult. It was composed of illustrious Romans and exercised a regulative influence upon the assemblies for the operation and survival of the Roman Constitution. This equilibrium of power and harmony of interest collapsed when, in a series of vehement disputes amongst the Italian people over the spoils and opportunities of the Empire, the Senate could no longer control

effectively the action of magistrates who had the right to initiate legislation in the popular assemblies. It was in such turbulent times that great military commands were created by the laws of the people for Pompey and for Caesar. However, the staunch Roman fidelity to tradition endured through the revolutionary upheavals and restored stability to the Roman State by grafting monarchy to the Republican Constitution. In the early imperial age the legislative sovereignty of the Roman people was scarcely more than a fiction; nonetheless a formal *lex populi* was still requisite to confirm the decree by which the Senate invested a new Emperor with his powers. Thus a later Roman jurist could say that what was in his time the absolute power of the emperor was the power of the Roman people, which the people had conferred to its prince. *Quod principi placuit, legis vigorem habuit* was in ancient and in medieval times cited in defence of absolutism but in its full context it was also a reminder of the popular basis of authority. In its entirety, it reads: What has pleased the prince has the force of law, since by a royal law, enacted concerning his authority, the people have conceded to and conferred upon him the whole of their *imperium* and *potestas*. And so at least the theory of ultimate popular consent was maintained.

The great territorial expansion of Rome did not make representation (in the ordinary political sense of the term) part of the Roman constitution. The Roman governing class was never effectively subjected to the pressure of the external provinces as to induce it to replace the popular assemblies and the Senate of the Old Roman city-state by an all-inclusive body of representatives elected by the outlying communities of the Italian peninsula much less of all peoples of the imperial conquest. Besides, the Roman *conception* of the *imperium* would never admit of actual constitutional definition in the modern sense of a publicly self-imposed, i.e., *legal*, limit to power. Roman constitutionalism consisted in the distribution and legitimate delegation of power; never in its limitation. It was absolute as well as plenary. Roman power, like the Roman arch, was justified in the equilibrium it maintained and supported. Its constitutionalism was simply the political description of its actual governance, viz., the *constitutio rei*. Roman representation was accordingly scarcely more than public service; surely, not a juridic institution for the insurance of a defined public law and its empowerments.

#### ROMAN PRIVATE LAW AND CANON LAW

Roman public law provided neither constitutionalism in the modern use of the term nor representative governance. Roman private law, i.e., civil law, did provide certain ingredients of stable trusteeship which the rulers of the Christian era, lay and ecclesiastical, were to expand into

a principle for representative government. From private and proprietary, it would be transferred and made applicable to the public, corporate and, therefore, political domain. We will endeavor to ascertain the measure of this indebtedness and the extent of the Christian interpolation of the original meaning and intent.

The legists and decretalists of the thirteenth century found in the *Digest* and the Justinian *Code* premises and precedents for vicarious responsible agency. This rested directly upon authorization, *plena potestas agendi*, and the commission, *mandatum*, which enabled the proctor to act as if the principal or his constituent himself were present and, unless otherwise restricted by the necessity of referendum or by special limited trust, to act in all eventualities in the capacity of a steward in transactions with a legal import. *Plena potestas* and *mandatum* are clearly two distinct empowerments. The prior is the extent of the authorization that qualifies an action as responsibly vicarious, the latter is the commission to be transacted. Nonetheless, because the two frequently appeared conjointly one may easily and inaccurately see simply a tautology for the purpose of reinforced emphasis or in the commission of a general mandate, a seemingly blank equivalence. This misconception was scarcely possible with a special mandate which was restricted to a particular business to be transacted on a designated date with the *ad hoc* consent of the constituent to a special proctor. The general mandate was a comprehensive commission which empowered the agent to attend to a collectivity of suits or to act in all suits with the reservation that he must refer back to his principal and obtain added instructions or further approval in such instances as might operate to the latter's damage or loss. However, if *plena potestas* or its customary equivalent, *libera administratio*, were annexed to the general mandate, the representative agent could attend to all business of his *dominus* relieved of any restriction and act as if the principal were present in person. In this latter instance we have the fullest expression of real representation; for the responsibility of discretionary judgment and of action devolves upon a stable office of the agent and the resultant consequences bind the principal as effectively as if he had acted directly. These legal significances were common to the Roman private practices in civilian suits and reappear in the thirteenth century revival of Roman law among the civilian legists and the ecclesiastical canonists both in their theory and in their actual practices.

The earliest Christian use of the Roman proctorial mandate was a continuance of the Roman practice for representation in courts and in ordinary business transactions. Gradually with the revival of Roman Law in the thirteenth century in Italy the imperial and papal chanceries

adopted it to express the commissions entrusted to ambassadors who at times functioned as plenipotentiaries and at other times more like proctors in a litigation. This differentiation derived from the matter to be transacted—be it the establishment of peace or the vindication and restoration of a right or claim. Ambassadorial offices were also availed of by princes and cities to negotiate truces, treaties, and other contractual agreements, and even extended to cover the duties of royal procurators and papal legates as administrators.

"For almost every kind of agency and representation, therefore, the Roman formulas were in daily use by the middle of the thirteenth century. *Plena potestas* gave the agent *carte blanche*, within the limits set by the principal's welfare and knowledge of the issue, to conclude the business; and his conclusion of it had the consent of his constituent. This consent, however, was given in the terms of the mandate before the negotiation started."<sup>18</sup>

Summarily then, an early and important usage of *plena potestas* was in the *mandatum* given to *nuntii* or *procuratores* as ambassadors of princes and cities. In pre-Christian Roman law and later among the glossators of the thirteenth century revival, any kind of *pactum* or *conventio* was a contract between two or more consenting parties, who could be represented by agents. One kind of *conventio* was a public one, namely, treaties of peace, alliances, which like private contracts could be transacted by proctors. Proctorial commissions, in conclusion, were either private or of public character, either of personal or corporate representation. If the affair was between equals (e.g., kings) or between autonomous communes and princes, the agents were ambassadors. But if it was between ruler and subjects or subject communities, the agents of the latter were proctors representing their constituents before a superior authority. The *mandatum* could be either general or specific and the *potestas* either partial or plenary.

How this Roman-Canonical process contributed to the evolution and development of representative government in secular and ecclesiastical assemblies and, secondly, the measure in which the civil commonwealth was influenced toward this political maturity by its immediacy with the Church and Her religious Orders, will constitute the major design of the remaining portion of this treatise. Until now we have seen how responsible representative agency was at its best fulfilled in the proctorial mandate of Roman private law and in the public domain both in Roman and early Christian period restricted to representative transactions between distinct empowerments or associations alien to each other *ad extra* i.e., to foreign affairs. We have yet to see how from these usages the representative, responsible agency will evolve within (*ad intra*) the same associative community, ecclesiastical and secular.

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18. Post, *Plena Potestas and Consent in Medieval Assemblies*, 1 *Traditio* 368 (1943).

## REPRESENTATION IN CHRISTENDOM

The constant repetition of the obvious has not dulled the impact of the significance of the interpenetration of the Catholic Church in the temporalities of medieval history. Invested with the divine mission for the salvation of souls and for the propagation of the Faith, She strove with the zeal of saints and with the supernal power of the sacraments to achieve the kingdom of God without as well as within the souls of men. Christian lives spelt out a Christian society and it was the Catholic Faith which gave coherence as well as cohesion to Western Christendom. Civilization was Catholic and Catholicism was civilization. As depositor of the Divine Faith which recognized no restricted area of human activity and endeavor, there was nothing beyond her theology. Art, education, literature, philosophy, and science glowed with a divine intention. For centuries the Catholic Church gave to Western Europe a culture common to royal courts, to universities, and to monasteries. Divine in its establishment, the Catholic Church was the most tangible temporal institution in existence, and its immersion in private lives and public offices was but a historic response to St. Paul's *Civis Romanus sum*.

The study of the institutional development of the Middle Ages is an organic whole in which leadership by example and promotion must be ascribed to the Church. Institutionally the Church was the most advanced organization in existence and from Her radiated the all-pervading influence for order. Centralized in the Vatican at Rome, with a magnificent civil service and obedient emissary in every village, the Church strove through *sacerdotium* and *regnum* to consolidate the heterogeneous and anarchical elements that succeeded the downfall of the Roman Empire by the bond of Christian unity that transcends the divisions of barbarian and Roman and by a moral tie that is superior to armed force; by softening slavery into serfdom, and preparing the way for the ultimate enfranchisement of the human person in the civil and political order.

The Catholic Church was bound intimately with medieval society. In the feudal hierarchical structure minor and major prelates held fiefs of kings and were invested with grave seignorial responsibilities. They served as royal counsellors and conjointly with lay barons and tenants-in-chief comprised the *curia regis* and *magnum concilium*. It is not to be wondered that Canon Law helped formulate custom and common law in accordance with reason and equity. Moreover, the clergy were involved in the taxes that were levied and their uncompromising position of no taxation without consent (at the instance of Rome) contributed largely to the corresponding claims of the laity. As the most solvent class in medieval society, the clerics were frequently called upon for

what was euphemistically called "gracious aids"; but such a polite label did cover a sound basis in virtue of which a financial "take" without legal warrant or consent was to be sharply called a "cut," a *maltote*. Laymen and ecclesiastics were often involved in the same problems and actions, and the practice of episcopal and baronial opposition was no brief experiment limited to a regency or a minority. But still more pertinently, the creative political thought of the Middle Ages was almost wholly clerical and from the atmosphere of her thought evolved that constitutionalism which Bracton so aptly epitomized, *lex te fecit regem*. The *Magna Charta*, the Song of Lewes, and the Bractonian *dicta* mark the doctrinal groping toward institutional guarantees of the constitutionalism of the Carolingian *capitularia*. This it sought to achieve by the king's dependence upon the counsel and consent of the "governed." The historic process and the influences under which this development was promoted through the representative system is the central argument of this paper. We attribute it to distinctly Catholic principles and practices, ecclesiastical and laical.

The doctrinal influence and practical contributions of the Catholic Church to the promotion and evolution of the representative system looms larger with every additional scientific research. The extremely valuable works of Ernest Barker, Holdsworth, F. M. Powicke, Dr. Lunt, and Maude V. Clarke have brought to light significant materials on the ecclesiastical avenue to the history of the English Parliament. Their works, however, have been confined either to the general question of early representation or to particular problems of clerical taxation. Research has not yet extended to the frontier lines where lay and ecclesiastical activity meet. Scarcely more than cursory notice has been taken, for example, of Edward's relations with the clergy and the Pope. In this study, we narrow our study to the Christian conversion of the Roman proctorial mandate of private law into the enlarged principle of corporate representation as exemplified in ecclesiastical practices, oecumenical, religious, and synodal, and through their vogue and influence, in the evolution of the English Parliament.

From the earliest days of the Church, beginning in fact, with the Council of Jerusalem,<sup>19</sup> recorded in the Acts of the Apostles, ecclesiastical convocations were summoned for the supervision and custody of the faith of Her members. Consultative arrangements from the lowest to the highest regional units helped integrate into organizational union the fast expanding boundaries of Her apostolic fruitfulness. Diocesan synods, summoned by bishops, metropolitan convocation of provincial bishops, national congregations and oecumenical councils regulated, by

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19. Acts of the Apostles c. xv., vv. 1-29.

a hierarchy of obediences, the unity of the Church under the papal supremacy.

The organic unity adumbrating in theory two distinct, albeit in practice rather vaguely divided, jurisdictions or governments, the *regnum* and *sacerdotium*, uniquely constituting the historic phenomenon of Christendom, the *respublica cristiana*, and the interdependent cooperation and mutually complementary activity of ecclesiastics and laymen, would obviously suggest the inclusion of royal powers at the larger assemblies. Let us note here that these synods were representative only in a very rudimentary and imperfect sense. The summons was personal and not to a corporate group; the transactions of the synods were at most consultative and never infringed upon the spiritual authority of the bishop, much less of the Pope; Christian peace and justice, the propagation of the Faith, and the custody of the moral discipline in high and low places were the general objectives of their deliberations. The representative idea differed essentially in the episcopal and temporal empowerments. Amongst the laity, this idea was expressed in the symbolic personification of the community in the figure of the ruler and as their viceregent he appeared as *their* vicar. Amongst the ecclesiastics, the bishops represented their diocese by reason of their sacred office as vicars of Christ and accordingly were endowed with powers from above without contingency upon a popular mandate.

In the thirteenth century the Church gave a great impetus to the institutional development of representation. Three oecumenical Councils convened in that century. The Fourth Lateran Council was summoned by Innocent III in 1215; the First Council of Lyons assembled by Innocent IV in 1245; and the Second Council of Lyons was convoked by Gregory X in 1274. The Fourth Lateran Council put the representative principle into operation on a scale with a prestige which made it known throughout the whole of western Europe. Not only archbishops and bishops, but abbots and priors and all the monarchs of Western Christendom were cited to appear. Many others were represented by proctors. The proctor representing an individual was not an innovation, but a novel addition to conciliar convocations occurred when Innocent III requested the bishops to enjoin the chapters of the churches, not only cathedral but others as well, to designate of their own accord a provost or dean or some other suitable men to act on behalf of the whole body. He gave as his reason for this new departure that business relating to chapters would be brought before the whole council, and on that basis, actual and not merely virtual, representation was required. Thus, for the first time in an oecumenical council representatives of the community of chapters are present. We are yet far from representation of the

community of the diocese. This was to be the unique English achievement and, we think, in likely imitation of the Dominican Convocation which included in its composition proctors of local chapters. The reason given by Innocent III for this inclusion is significant because it will prove to be the motor argument for the gradual extension and increasing power of the representative system in the secular order, namely, the exaction of money. It was part of the Pope's design of reform to compel the chapters to allot one prebend for the support of a school-master and, in commanding attendance of their representatives, he was acting on the principle already expressed in his canons—*quod omnes tangit, ab omnibus approbetur*.<sup>20</sup> This was a maxim embedded in the private law of Rome<sup>21</sup> and the Church had transferred its application to the public domain. It had appeared early in the legislation of the ninth century—the *Edictum Pistense*<sup>22</sup> and again in the legal work of Edward I of England in the thirteenth century. The principle gradually became the basis for majority decision, as it was explained and developed by the canonists in the light of a fundamentally rational principle, the *sanior et maior pars*, which was first used by Pope Alexander III in the twelfth century. The underlying reason justifying this procedure was given by Innocent IV in the thirteenth century, *quia per plures melius veritas inquiritur*. In this wise, a Roman law maxim, which the ancients used only in the guardianship of private property was applied by the Church to the public domain of corporate groups.

But we are yet far from this mature achievement. We must not think that the papal premises worked with the inevitable logic of abstract thought. But when the immediacy of responsibility and the sensitive motives of sound self-interest (such as possessions) touch upon human conduct, recourse is had to first principles as the basis of justification of a title in a conflict of claims, be it moral, legal, or political. The two oecumenical Councils at Lyons in 1245 and 1274 were summoned by Innocent IV and Gregory IX respectively by the same procedure and representatives are requested from chapters of churches, both cathedral and others. The great significance of the Fourth Lateran Council is equally highlighted by two canons which served to generalize the idea and process of representation by enjoining it upon all religious orders and reviving the traditional synodal activity which by the end of the twelfth century had become almost extinct amongst the provincials. The sixth canon enforced an old canonical custom which enjoined annual

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20. Barker, *Dominican Order and Convocation* 32 (1913), citing Labbe and Cossart, *Concilia*, XI, I, 124.

21. Justinian, *Code V*, Tit. 59, 5, cap. 3.

22. *Monumenta Germaniae Historica*, Karoli II *Edictum Pistense* 490.



meeting of provincial and diocesan synods for purposes of legislation; the twelfth canon ordered triennial chapters in each national province by those religious orders by whom the practice had not already been adopted. Henceforth, the composition of provincial synods are no longer restricted to bishops and abbots; it is enlarged by the insertion of the cathedral clergy and then—*but only in England*—by the inclusion of the diocesan clergy. In France the provincial organization developed further than elsewhere on the Continent; but it never descended below the representation of the cathedral clergy. When, in the beginning of the fourteenth century, royal letters requested the chapters to send proctorial representatives to the States General the parochial clergy were not summoned either in person or through proctors. They possessed neither temporalities nor jurisdiction. The chapters, collective seignories as well as collective prelaties, attend the States General as the provincial synod; the ordinary clergy participate in neither.

Scarcely ten years after the Lateran Council, evidence of an irreversible process of development is manifest at the legatine Council Bourges in 1225. At this Council, the legate put forth the papal request for prebends in all the conventual churches. When he gave the proctors present leave to depart, retaining only bishops and abbots, the proctors protested with a fixed determination that attests to the clarity and strength of the Leonine precedent. Since this business touches the chapters, the legate should have submitted the papal proposal to them *in presentia*; and they admonished him in the words of Innocent III as they were especially concerned, and if some consented, they would not be bound unless what concerned all was determined with all in common. Their arguments illustrated the gathering strength and advance made by the papal conjunction of the principle of consent with that of representation in matters touching upon persons and property. Historically, this Council of Bourges is noteworthy. It is the first instance after the Lateran Council to use proctors and, in turn, it served as the model for the English assembly summoned by Archbishop Langton, the following year, 1226, to answer the same papal demand. Langton was copying the procedure and principle used at the Fourth Lateran Council and at Bourges. In England too this was the first ecclesiastical assembly to which proctors came with a mandate from their electors. The English clerics refused the papal demand in language literally copied from that given at Bourges the year before, just as Archbishop Langton had copied the summons of proctors to the Lateran Council and to the legatine Council of 1225. The historical process is unmistakable. The significance of the composition and proceeding of the representative assembly which Langton convened at London on May 2, 1226, is underscored by

the fact that it was consequent to the one in which the canons of Salisbury earlier that summer had refused to agree to a subsidy until the proctors of chapters had been similarly summoned.

In the subsequent<sup>23</sup> and concluding part of this study we will observe how the papal instructions and conciliar precedents in the conjunction of the principle of consent and the principle of representation in the limited matter of proprietary interests and especially the sixth and twelfth canons of the Fourth Lateran Council which enjoined the universal practice of representative assemblies amongst the metropolitans and the religious orders will take root with peculiar felicitous providence in England. Consequent to the arrival of the Dominican Friars in England in 1221, a gradual expansion of representation in the English provincial synod develops till it ultimately comprises the proctors of diocesan clergy. Concurrently with this latter development, a parallel expansion takes place in the political domain and with similar motivations and on the basis of identical principles. Therein we will measure in general dimensions the historic environmental influence of the Dominican Friars and of the English Synodal Convocations upon the gradual development of the national parliament.

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23. To be continued and completed in the December 1954 issue.