

VOLKSGEIST AND THE REDEMPTION OF ASSOCIATIONS

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Otto Gierke, *Associations and Law: the Classical and Early Christian Stages*. Translated, edited, and with an interpretative introduction by George Heiman, Toronto and Buffalo: University of Toronto press, 1977, pp. 166. \$15.00 cloth.

Otto Friedrich von Gierke (1841-1921) was a noted German legal theorist and, in the latter part of the nineteenth century, was one of the leading exponents of the views of the 'Germanist' wing of the School of Historical Law. Gierke's major work, *Das Deutsche Genossenschaftsrecht* (the German Law of Fellowships) was published, in four successive volumes, in the years between 1868 and 1913. The most part of this massive work has never been translated into English but a section of volume three appeared edited, translated, and with an introduction by F. W. Maitland in 1900 under the title *Political Theories of the Middle Age*. In 1934 Ernest Barker translated some sections of volume four under the title *Natural Law and the Theory of Society, 1500-1800*. George Heiman's translation of further sections of volume three is, as he puts it, 'an attempt to close the circle by returning to Gierke's treatment of associations and corporations in classical antiquity and early Christianity'. (p. 3)

Additionally, almost half of the book consists of an interpretative introduction to the whole of Gierke's thought (sixty-five pages). Having consulted a number of Gierke's other writings his most recent editor and translator can claim with justice to have 'carried the examination to its full conclusion'. These essays and lectures were in most cases contributions to the ongoing debates about the nature and substance of the German Civil Code of 1896. While Barker in particular was not unaware of the existence and importance of at least one of these essays, (see Barker pp. xxix-xxxiv) the introductory essay in this, the most recent study of Gierke, breaks new ground at least within the English-speaking world. Gierke's theoretical postulates and their sources in the discussions of his time have been somewhat more clearly delineated.

The German School of Historical Law was an important part of the nineteenth century reaction against what was seen as the rationalism, universalism,

and individualism of the natural law tradition. Legal scholars like Hugo, Eichhorn, and Savigny argued that law was the product of an organic communal life that was expressed in the 'spirit of the people' (*Volksgeist*). This spirit was composed of the consciousness of a people as it had developed through history. From this position, 'Germanists' like Eichhorn and Gierke went on to claim that the German 'reception' of Roman law during the Renaissance had introduced legal conceptions that had frustrated and distorted the spirit of the German people. In this view, it was not only the theory of natural law that should be abandoned. Roman law also was seen as individualistic and absolutist and its adoption had led to the enforcement of severe restrictions on the autonomy of 'intermediate groups' such as associations, corporations, and 'fellowships'. The very right of association had been repressed. Roman law, it was argued, had promoted a form of 'absolute sovereignty' that was opposed to the mixed and constitutional form of government that had been the true German tradition. A more 'diffuse' form of sovereignty was advocated. The Germanists therefore saw themselves as political liberals in opposition to the centralising and potentially authoritarian implications of the legal doctrines of the 'Romanists'. Gierke's massive work of legal-historical scholarship in effect pursued this conflict, as he viewed it, through the legal codes and doctrines of two millenia. Only with such a polemical purpose, perhaps, could Gierke have taken such a path which, he once admitted, had led, 'in part, at any rate, through utterly desert regions' (Barker, p. x).

The work of the School of Historical Law is best understood in the broad context of the German Romantic movement and, in particular, with reference to the political doctrines of Hegel. It is one of the many merits of Heiman's essay that a useful comparison is made between Hegel's doctrines and those of Gierke (p. 53-54). More specifically, it is in the context of the Hegelian cast of aspects of nineteenth century German thought that Gierke's well-known concept of the 'personality of groups' can be situated. If 'the state is the march of God through the world' represents, as Charles Taylor has claimed, a mistranslation that distorts Hegel's real meaning, nevertheless Hegel's theory of the state attributes a certain 'divinity' to the institutions of political authority (Charles Taylor, *Hegel*, Cambridge, 1975, p. 366-7). For Hegel, the integration of individual living beings into the universal life of the state was necessary for the progress of 'spirit'. Encouraged by Hegel's view that in intermediate groups lay the 'proper strength of the state', Gierke asserted that these groups were 'real persons' as opposed to the *personae ficta* of Roman law. Gierke wanted not only to protect and promote the autonomy of such associations, but in addition, he wanted to claim for them an 'organic' and natural status, as had Hegel for the state. One overblown theory, in other words, led to another. Gierke's construction was at least relatively more modest than that of Hegel.

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Heiman presents a more balanced picture of Gierke's enterprise, for more sympathetically than Barker, he identifies the source of Gierke's organicism. Gierke is explained, as it were, from within his own tradition. For Gierke, both fantasy and faith played an essential part in establishing a doctrine whose 'real nature' remained undiscovered in any natural or empirical sense. So it is that 'faith, bolstered by metaphysical speculations, accounts for the inner life and unity of the group' (p. 10). The 'reality' as opposed to the 'fiction' of group personality can only be understood within a conception of the 'real' that, 'includes the transcendental realm where empirical speculation yields to Hegelian idealism' (p. 16). The analysis is therefore in one sense, more sympathetic, and in another, more telling.

But Heiman goes on to offer a qualified defence of Gierke's organicism. He notes that 'to advocate the view that law is the result of social relationships as they develop over history is far from being a fantasy'. Gierke's 'faith' is also supported by a 'substantial dose of juristic sobriety'. Any conception of law must presuppose ideas of justice but these can only be derived from some form of 'ideals' and not from the empirical world. In other words, if a society is to function without coercion alone as the basis of order, some form of confidence or faith in an ideal of justice must be widespread. This form of faith is indeed one that all 'normative' political theorists must share. One point Heiman fails to make is that Gierke himself saw this 'sovereign independence of the idea of justice' as having been historically secured by the 'old conception of natural law' and in this sense, despite his criticisms of the theory of natural law, Gierke continued to adhere to the 'core' and 'undying spirit' of the natural law tradition (Barker, p. 1). But, to continue with Heiman's line of argument, for those whose interests are metaphysical the assumption of the existence of an organic whole may be but one small step further than a belief in some ideals of justice. More specifically, however, one might note that there are less rarified arguments for the autonomy of groups than that which assumes their 'real personality'. And as Heiman observes, 'whether it is possible to build a valid juristic system on such an assumption is a matter of conjecture' (p. 66).

One could, perhaps, take issue with Heiman's characterisation of Gierke as taking 'a position between' the two models of monism and pluralism. This is because Gierke 'does not subscribe to the pluralist rejection of the concept of sovereignty' and therefore cannot be 'ranked with the pluralists' (p. 52). First, the monist/pluralist debate is no longer a live one — arguably, it was misconceived in the first place — and modern 'pluralism' is a different and more contestable concept than its early twentieth century relation. Modern pluralists no longer reject the concept of sovereignty but either ignore it or simply assign it symbolic status. Like Gierke, a generation of North American political scientists saw in the humble intermediate group a symbol of their democratic ideals in empirical form. Somewhat facetiously, one might assert

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that pluralism was the *volksgeist* of North American political science. But more to the point, even the pluralism of 'discreditors of the state' such as Figgis or Laski owed considerable debts to Gierke. At the very least one can argue, with David Nicholls, that 'there is certainly a sense in which Gierke was a pluralist' (David Nicholls, *The Pluralist State*, London, 1975, p. 5). And if Gierke took an 'intermediate' position between the two extremes, then it was one that was considerably closer to pluralism especially as modern pluralist thought has, in a significant sense, moved closer to Gierke.

Gierke's section of the book has been divided into three chapters. All are focused on the concept of 'association' and successively relate its development, first, in the ancient philosophy of Greece, second, in Roman jurisprudence, and, finally, in early Christian thought. Gierke's own position obviously militates against a positive appraisal of Roman corporatism, and we are warned by the editor that our reading of Gierke must here be tinged with reservations. Nevertheless, Gierke's treatment of the legal and political history of the concept of association in the early centuries of western civilisation is not without considerable interest to the legal and political theorist. Perhaps sociologists and political scientists might also benefit from a reading of this small section of a major work of legal-historical anthropology. In particular, Gierke's work further illuminates our understanding of the origins of the concept of pluralism. The meaning of the currently more fashionable term 'corporatism' might also be a little better understood with the aid of the rich historical perspective to be found in Otto Gierke's *Association and Law*.

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