

Otto von Gierke and His Early Corporatism

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Abstract

This article presents the corporatism described in the works of Otto von Gierke. This German scholar, active at the turn of nineteenth and twentieth centuries, created an elaborate concept of social reconstruction based on historical, social and legal studies. In his works, central government and associations are in constant conflict. Both are dominant in certain eras, creating a cycle crucial to development of state and society. Gierke concluded that the next century would be an age of associations. Corporations, the sovereign and self-governed unions, would be fundamental to creation of a new federal state. His concept bore many similarities to the idea of civil society and, in fact, influenced many social activists and early pluralists all over Europe. The article presents Gierke's ideas in the context of his life and intellectual formation. Moreover, it provides some information on reception of his ideas.

Keywords

Otto von Gierke, corporatism, legal theory

Introduction

Corporatism, the idea of self-governance based on unions of both workers and employers, gained widespread recognition in the interwar period. Its popularity has risen in reaction to the Great Depression, but the concept has been rooted strongly in the social thought of the nineteenth century. One of the most venerable early corporatist intellectuals was Otto von Gierke, a jurist, historian, politician and scholar of the Second German Empire. His fame peaked at the turn of centuries,

with his criticism of individualistic institutions of German Civil Code (BGB) of 1900. In the early twentieth century, he was seen as ‘the last leader of the historical school in jurisprudence’ and his corporatist works were translated into French and English. Von Gierke’s ideas were studied by lawyers and sociologists all over Europe even after his death in 1921. His idea was, as Paul Hirst puts it, ‘a central stimulus in English pluralism’¹. In the later part of the century though, von Gierke faded into obscurity².

In his works, von Gierke presented an idealistic approach to vision of history and future as well as organistic outlook on society and precise legal thinking. He was the author of a ‘real legal person’ theory, which is still impactful in the pluralist discourse. Most importantly, his works normalised the corporatist approach presenting it as natural and historically valid. This influential scholar presented the vision of history in which associations and central government were in eternal conflict. Dominance of one over the other were achieved in certain eras. This theory convinced him that times of corporative self-government and pluralist society are ahead.

In this article, the vital parts of von Gierke’s corporatism will be presented in the context of his life, intellectual formation, and the times he lived in. The words ‘association’ and ‘corporation’ will be used in place of German ‘Genossenschaft’ and ‘Korporation’.

German legal thought in the second half of the 19th century

The first thing that must be considered when analysing the works of the thinker is his background. Otto von Gierke’s corporatism was a creative continuation of German jurisprudence of the nineteenth century. Built on strong foundations of philosophy and history of law, German school of jurisprudence had a lasting impact on most of continental Europe. Both romantic and positivistic perspective on society and power had a place in its development. Works of von Gierke were a product of this process. In a way, they can be considered a conclusion of so-called ‘German approach to jurisprudence’.

German law scholars of the late nineteenth and early twentieth centuries were intellectually shaped by two great philosophers: Immanuel Kant and Georg Hegel. Von Gierke incorporated some of their conclusions into his philosophy of history, criticising them at the same time.

Kant’s revolutionary humanistic legal theories opened a new chapter in jurisprudence. He considered law in the broad context of the rules of conduct. As such, any regulation could be either a natural consequence of human behaviour or an abstract decision of authority. But it was works of Hegel, not Kant, that became true foundations of von Gierke’s works. Three ideas were crucial: the

¹ Paul Hirst, “Introduction,” in *The pluralist theory of the state. Selected writings of G. D. H. Cole, J. N. Figgis, and H. J. Laski* (London–New York: Routledge, 1993), 10.

² Wolfgang Pöggeler, “Introduction,” in Otto von Gierke, *Aufsätze und kleinere Monographien* (Heldesheim–Zurich–New York: Olms-Weidmann, 2001), 3.

concept of civil society, the idea of state and the Hegelian triad way of reasoning. For Hegel, civil society was distinct from the state. He saw some associations, like family, as natural and in some ways in opposition to the central power. It was a legacy of so-called early 'romantic corporatism'.³ The state in Hegel's thought was all-encompassing 'higher being'. The individuality should be lost in favour of conformity and common good. This idea was especially important to von Gierke, although he was a strong opponent of the absolute state. He was also using the Hegelian triad, finding the endless cycle of synthesis and change in history of societies.

In the German jurisprudence of the nineteenth century, the German Historical School rose to prominence. Scholars representing this approach argued, following Carl von Savigny, that all changes in the law had to be grounded in tradition of the nation⁴. Georg Puchta proposed that custom is the most important source for the lawmakers. For those scholars, there was no linear advancement in law, but only constant change. In their works, society had an organic nature. Generally, they were also in opposition to positivist outlook on the law, although to a varied degree.

This school had two major branches. The older one argued that Roman law was the most appropriate for Germany. In opposition to this concept came an idea that custom of Germanic tribes and communities is much more fitting and should be studied. Von Gierke synthesised those ideas, claiming that in history, central state law was 'Romanistic' and law of communities and associations – 'Germanistic'. He was a proponent of the latter.

Otto von Gierke was a student of two great scholars of the historical school, Carl Gustav Homeyer and Georg Bessler. From the latter, he borrowed the idea of 'Genossenschaft' (association) as a general term for all ways of self-organisation, including both civil communities and companies. From the former, he took interest in the Middle Ages. In time, he himself became a prime representative of the school.

With the historical school representing more 'romantic' or socially inclined approach to jurisprudence, positivism was dominant in the latter half of the century. Its proponents dominated the reforms of the German unification.

Otto von Gierke and Germany

Otto von Gierke was born on January 11, 1841 in Stettin in Pomerania, a province of the Kingdom of Prussia. His father Julius was an official, a Member of Parliament in the time of the German Revolution of 1848–49, and then a president of the appellation court. His mother Teresa was a part of an important family of lawyers in Stettin. They both died in 1855 in the cholera outbreak. From

³ Tetsushi Harada, *Politische Ökonomie des Idealismus und der Romantik: Korporatismus von Fichte, Möller und Hegel* (Berlin: Duncker & Humblot, 1989), 110.

⁴ Fundamental for this approach was Savigny's work titled *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, published in 1814.

the young age, Otto was preparing to become a lawyer. He started studying law in 1857 at the University of Berlin (at the time Frederick Wilhelm's University, now Humboldt University). For three semesters, von Gierke studied in Heidelberg and became Doctor of Law in 1860, at the age of 19.

For a time, von Gierke was working as a lawyer and performed military service in the wars of 1866 and 1870. Nevertheless, he was first and foremost an academic. He worked at the universities of Zurich, Breslau, Heidelberg and finally back in Berlin (since 1887), where he stayed for the rest of his life. In 1873, he married Marie Teresa Loening, a daughter of a well-known publisher, with whom he had four children. In 1911, von Gierke was nobilitated for his accomplishments in scholarly pursuit gaining the 'von' in his surname.

Otto von Gierke had an impact on the unification of German law in the Second German Empire. He worked on the German Dictionary of Law and presented many papers and books on reform of civil law. Furthermore, he was strongly against putting too much emphasis on individualism and was a strong proponent of associations. Von Gierke was a German conservative patriot with some nationalistic tendencies in the later part of his life. After the Great War, though personally moved by the fall of the country he had helped to build, he argued for more pluralistic society and state⁵. Many of his students, who shared the sentiment, helped in the formation of the Weimar Republic. Among them was Hugo Preuss, author of the draft of the federal constitution. Gierke died on October 10, 1921 at the age of 80⁶.

Otto von Gierke's life was strongly influenced by the history of Germany. He was born to a family active in the Spring of the Nations period. He fought in the wars for unification of Germany, taking part in the bloody Battle of Königgrätz. His contributions were important for two German states he lived in. On his death he believed that his homeland was becoming a republican federation. In this context, it is not surprising his work concentrated on national history and possible future.

Although von Gierke was born and educated in the nineteenth century, time of the greatest prominence of his work came in the first two decades of the following century. His commentaries to civil law and historical works were at the time read all over Europe and translated into many languages. Moreover, his works were cited by lawyers, sociologists, economists, politicians, and historians. Most of them are pluralists⁷.

History of associations

The vision of the history presented by von Gierke was crucial to his corporatism. In his works, the past was a key to the future. This interpretation

⁵ Otto von Gierke, *Aufsätze und kleinere Monographien* (Heldesheim–Zurich–New York: Olms-Weidmann, 2001), 1063–1092.

⁶ Pöggeler, "Introduction," 16–17.

⁷ Ibidem, 10.

of the history was presented mainly in his four-part magnum opus *Das deutsche Genossenschaftsrecht*. In this concept, there was place for both an organic evolution and cycles of returning ideas. Von Gierke concentrated on the history of Germany from antiquity to the nineteenth century and proposed a vision of future that was a logical consequence of the described process.

In the works of von Gierke, the history of associations is divided into five periods. In each of them, dominance of either central government or organisations brought a conflict with the other. Five 'eras' of the history according to von Gierke were: the antiquity to 800 (before the state), from 800 to 1200s (early German emperors), from 1200s to 1525 (feudal fragmentation), from 1525 to 1806 (rise of absolutism) and from 1806 to 1870s (rebuilding of German society). As Gierke started writing his historical account in late 1860s and ended in 1913, the last epoch was still taking shape while he was working on his vision. This periodisation was, in fact, a recapitulation of an idea popular among historians of the era, to name Leopold Ranke among the others⁸. It seemed logical to frame the history of conflict between associations and rulers in the context of political history.

At the centre of philosophy of the history presented by Otto von Gierke lies a conflict between unity and multitude: the central government and associations. This strife is beneficial to the society. It brings life and dynamic to political and social life. Furthermore, it makes it change and evolve. There are many sides of the conflict: associations, local governments, the pope, the emperor, and others. No side can win completely. Some form of unity and multitude always survives and in time regains strength. The cycles of destruction and rebuilding are the backbone of the historical process. After a centralist phase, there must be a federative one. The laws follow the same cycle, with domination of administrative and penal law proceeded by triumph of civil law. History and the theory of state and associations was dynamic. With new times, new opportunities arose to perfect the society and the spirit of it. For von Gierke, the highest form of associations was a corporation (e.g. a guild or self-governing community). In his vision, a rise of the central government is always putting the associations to the test, giving them a chance to grow and evolve. The successive eras of history illustrated it in detail.

The first period of Gierke's timeline represented the advance from tribal chieftains to central government⁹. He argued that an association was a natural state of humanity, or at least the Germanic peoples. Every person was a part of one of them, from family to tribe¹⁰. In the ancient times, one individual was unable to survive without the others. That was the state of nature represented in ancient Greek and Roman sources. The change was inevitable and new institution of state arose built on the foundation of myth and tradition of the Roman Empire¹¹. State subjugated associations and by year 800 new universal empire took hold over huge sways of Europe¹².

⁸ Leopold von Ranke, *Dzieje Papieżstwa w XVI–XIX wieku* (Warszawa: PIW, 1981), 53–55.

⁹ Otto von Gierke, *Das deutsche Genossenschaftsrecht*, Band 1, *Rechtsgeschichte der deutschen Genossenschaft* (Graz: Akademische Druck- und Verlagsanstalt, 1954 [reprint from 1868]), 150.

¹⁰ Ibidem, 16–17.

¹¹ Ibidem, 144.

¹² Ibidem, 150.