

Harold Berman,  
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## 2 | The Origin of the Western Legal Tradition in the Papal Revolution

AMONG THE PEOPLES of western Europe in the period prior to the eleventh century, law did not exist as a distinct system of regulation or as a distinct system of thought. Each people had, to be sure, its own legal order, which included occasional legal enactments by central authorities as well as innumerable unwritten legal rules and institutions, both secular and ecclesiastical. A considerable number of individual legal terms and rules had been inherited from the earlier Roman law and could be found in the canons and decrees of local ecclesiastical councils and of individual bishops as well as in some royal legislation and in customary law. Lacking, however, in both the secular and the ecclesiastical spheres, was a clear separation of law from other processes of social control and from other types of intellectual concern. Secular law as a whole was not "disembedded" from general tribal, local, and feudal custom or from the general custom of royal and imperial households. Similarly, the law of the church was largely diffused throughout the life of the church—throughout its structures of authority as well as its theology, its moral precepts, its liturgy—and it, too, was primarily local and regional and primarily customary rather than centralized or enacted. There were no professional judges or lawyers. There were no hierarchies of courts.

Also lacking was a perception of law as a distinct "body" of rules and concepts. There were no law schools. There were no great legal texts dealing with basic legal categories such as jurisdiction, procedure, crime, contract, property, and the other subjects which eventually came to form structural elements in Western legal systems. There were no developed theories of the sources of law, of the relation of divine and natural law to human law, of ecclesiastical law to secular law, of enacted law to customary law, or of the various kinds of secular law—feudal, royal, urban—to one another.

The relatively unsystematized character of legal regulation and the relatively undeveloped state of legal science were closely connected with the prevailing political, economic, and social conditions. These included the predominantly local character of tribal, village, and feudal communities; their relatively high degree of economic self-sufficiency; the fusion of authorities within each; the relative weakness of the political and economic control exercised by the central imperial and royal authorities; the essentially military and religious character of the control exercised by the imperial and royal authorities; and the relative strength of informal community bonds of kinship and soil and of military comradeship.

In the late eleventh, the twelfth, and the early thirteenth centuries a fundamental change took place in western Europe in the very nature of law both as a political institution and as an intellectual concept. Law became disembedded. Politically, there emerged for the first time strong central authorities, both ecclesiastical and secular, whose control reached down, through delegated officials, from the center to the localities. Partly in connection with that, there emerged a class of professional jurists, including professional judges and practicing lawyers. Intellectually, western Europe experienced at the same time the creation of its first law schools, the writing of its first legal treatises, the conscious ordering of the huge mass of inherited legal materials, and the development of the concept of law as an autonomous, integrated, developing body of legal principles and procedures.

The combination of these two factors, the political and the intellectual, helped to produce modern Western legal systems, of which the first was the new system of canon law of the Roman Catholic Church (then regularly called for the first time *jus canonicum*). It was also at that time divided into "old law" (*jus antiquum*), consisting of earlier texts and canons, and "new law" (*jus novum*), consisting of contemporary legislation and decisions as well as contemporary interpretations of the earlier texts and canons. Against the background of the new system of canon law, and often in rivalry with it, the European kingdoms and other polities began to create their own secular legal systems. At the same time there emerged in most parts of Europe free cities, each with its own governmental and legal institutions, forming a new type of urban law. In addition, feudal (lord-vassal) and manorial (lord-peasant) legal institutions underwent systematization, and a new system of mercantile law was developed to meet the needs of merchants engaged in intercity, interregional, and international trade. The emergence of these systems of feudal law, manorial law, mercantile law, and urban law clearly indicates that not only political and intellectual but also social and economic factors were at work in producing what can only be called a revolutionary development of legal institutions. In other words, the creation of modern legal systems in the late eleventh, twelfth, and

early thirteenth centuries was not only an implementation of policies and theories of central elites, but also a response to social and economic changes "on the ground."

Religious factors were at work, as well. The creation of modern legal systems was, in the first instance, a response to a revolutionary change within the church and in the relation of the church to the secular authorities. And here the word "revolutionary" has all the modern connotations of class struggle and violence. In 1075, after some twenty-five years of agitation and propaganda by the papal party, Pope Gregory VII declared the political and legal supremacy of the papacy over the entire church and the independence of the clergy from secular control. Gregory also asserted the ultimate supremacy of the pope in secular matters, including the authority to depose emperors and kings. The emperor—Henry IV of Saxony—responded with military action. Civil war between the papal and imperial parties raged sporadically throughout Europe until 1122, when a final compromise was reached by a concordat signed in the German city of Worms. In England and Normandy, the Concordat of Bec in 1107 had provided a temporary respite, but the matter was not finally resolved there until the martyrdom of Archbishop Thomas Becket in 1170.

The great changes that took place in the life of the Western Church and in the relations between the ecclesiastical and the secular authorities during the latter part of the eleventh and the first part of the twelfth centuries have traditionally been called the Hildebrand Reform, or the Gregorian Reform, after the German monk Hildebrand, who was a leader of the papal party in the period after 1050 and who ruled as Pope Gregory VII from 1073 to 1085. However, the term "Reform" is a serious understatement, reflecting in part the desire of the papal party itself—and of later Roman Catholic historians—to play down the magnitude of the discontinuity between what had gone before and what came after. The original Latin term, *reformatio*, may suggest a more substantial break in continuity by recalling the sixteenth-century Protestant Reformation. Another term used to denote the same era, namely, the Investiture Struggle, is not so much an understatement as an oblique statement: by pointing to the struggle of the papacy to wrest from emperor and kings the power to "invest" bishops with the symbols of their authority, the phrase connects the conflict between the papal and imperial (or royal) parties with the principal slogan of the papal reformers: "the freedom of the church." But even this dramatic slogan does not adequately convey the full dimensions of the revolutionary transformation, which many leading historians have considered to be the first major turning point in European history, and which some have recognized as the beginning of the modern age.<sup>1</sup> What was involved ultimately was, in Peter Brown's words, "the disengagement of the two

spheres of the sacred and the profane," from which there stemmed a release of energy and creativity analogous to a process of nuclear fission.<sup>2</sup>

### Church and Empire: The Cluniac Reform

Prior to the late eleventh century, the clergy of Western Christendom—bishops, priests, and monks—were, as a rule, much more under the authority of emperors, kings, and leading feudal lords than of popes. For one thing, most church property belonged to those very emperors, kings, and feudal lords. As lay proprietors, they not only controlled church lands and incomes but also appointed persons—often selected from among their close relatives—to the bishoprics and other ecclesiastical offices which were part of their property. Such power of appointment to ecclesiastical offices ("benefices") was often very lucrative, since those offices usually carried the obligation to provide revenue and services from the lands which went with them. Thus a bishopric was usually a large feudal estate, with manorial lords to administer the agricultural economy and to carry out military duties, and with peasants to provide the labor. A lesser church office within the bishopric—an ordinary village parsonage, for example—might also be a lucrative property; the patron would be entitled to a share of the agricultural produce and of the income from various kinds of economic services.

In addition to its political-economic subordination, the church was also subject in its internal structure to the control of leading laymen. Emperors and kings called church councils and promulgated church law. At the same time, bishops and other prominent clergy sat in governmental bodies—local, baronial, and royal or imperial. The bishopric was often a principal agency of civil administration. Bishops were important members of the feudal hierarchy. Marriage of priests, which was very widespread, brought them into important kinship ties with local rulers. Emperors and kings invested bishops not only with their civil and feudal authority but also with their ecclesiastical authority. Thus there was a fusion of the religious and political spheres. A dispute over the jurisdiction of a bishop might end up at Rome or in a regional synod, but it might also end up in the court of a king or of the emperor.

The system was similar to that which prevailed in the Eastern Roman Empire, and which was later denounced in the West as Caesaropapism.

It is not strictly correct, however, to speak of the kings and emperors of western Europe in the sixth to eleventh centuries as "laymen." That is what the pope called them after 1075, but before then they had had undisputed religious functions. It is true that they were not clergy; that is, they were not ordained priests. Nevertheless, they were "deputies of Christ," sacral figures, who were considered to be the religious leaders of their people. They were often said to be men made holy by their anointment and to have healing powers. The emperor, especially, claimed to

be the supreme spiritual leader of Christendom, whom no man could judge, but who himself judged all men and would be responsible for all men at the Last Judgment.<sup>3</sup>

The empire of Charlemagne or of Henry IV is not to be confused with the earlier Roman Empire of Caesar Augustus or of Constantine. Although an illusion of continuity with ancient Rome was maintained, the Carolingian term "empire" (*imperium*) referred not to a territory or a federation of peoples but rather to the nature of the emperor's authority, which was in fact very different from that of the earlier Roman emperors. Unlike Caesar, Charlemagne and his successors did not rule their subjects through an imperial bureaucracy. There was no capital city comparable to Rome or Constantinople—indeed, in sharp contrast to Caesar's city-studded empire, Charlemagne and his successors had hardly any cities at all. Instead, the emperor and his household traveled through his vast realm from one principal locality to another. He was constantly on the move, traveling in France, Burgundy, Italy, Hungary, as well as in his Frankish-German homeland. In an economy which was almost entirely local, and in a political structure which gave supreme power to tribal and regional leaders, the emperor had both the military task of maintaining a coalition of tribal armies which would defend the empire against enemies from without and the spiritual task of maintaining the Christian faith of the empire against a reversion to paganism. He ruled by holding court. He was first and foremost the judge of his people. When he arrived in a place he would hear complaints and do justice; he was also the protector of the poor and weak, the widows, the orphans.

The empire was not a geographical entity, but a military and spiritual authority. It was not called the Roman Empire until 1034, and it was not called the Holy Roman Empire until 1254.

In the tenth and early eleventh centuries there was a strong movement to purge the church of feudal and local influences and of the corruption that inevitably accompanied them. A leading part in this movement was played by the Abbey of Cluny, whose headquarters were in the town of that name in southern France. Cluny is of special interest from a legal point of view because it was the first monastic order in which all the monasteries, scattered throughout Europe, were subordinate to a single head. Prior to the founding of Cluny in 910, each Benedictine monastery had been an independent unit ruled by an abbot; usually under the jurisdiction of the local bishop, with only a loose federal connection with other Benedictine monasteries. The Cluniac monasteries, on the other hand, which may have numbered well over a thousand within a century after the order was founded, were all ruled by priors under the jurisdiction of the Abbot of Cluny. For this reason Cluny has been called the first translocal corporation;<sup>4</sup> ultimately it served in this respect as a model for the Roman Catholic Church as a whole.

Cluny's importance as a model of translocal, hierarchical, corporate government was matched by its importance in supporting the first peace movement in Europe. In a number of synods held in different parts of southern and central France near the end of the tenth century, the idea of a Peace of God was given official sanction not only by the clergy but by secular rulers. The peace decrees of the various synods differed in detail, but in general they all forbade, under pain of excommunication, any act of warfare or vengeance against clerics, pilgrims, merchants, Jews, women, and peasants, as well as against ecclesiastical and agricultural property. Moreover, they generally made use of the device of the oath to secure support; that is, people were asked to swear collectively to support the peace. At the Council of Bourges in 1038, for example, it was decreed that every adult Christian of the archdiocese should take such an oath and should enter a special militia to enforce the peace. In addition to the protection of noncombatants, the peace movement, which spread throughout most of western Europe, came to include a prohibition of warfare on certain days. Authored by Abbot Odilo of Cluny (994-1049), the Truce of God suspended warfare at first from Saturday noon until early Monday morning, and later from Wednesday evening until Monday morning as well as during Lent and Advent and on various saints' days.

The efforts of Cluny and the church generally to exempt certain classes of people from military service and from attack on their person or property, and to restrict fighting to certain times, could be only partly successful in an age of violence and anarchy such as the tenth and eleventh centuries. The importance of the peace movement for the future, however, and especially for the future of the Western legal tradition, was enormous, for the experience of collective oath-taking by groups in the name of peace played a crucial role in the founding of cities in the late eleventh century and thereafter, in the formation of guilds within cities, and in the promulgation of legislation by dukes, kings, and emperors through the so-called ducal or royal peace and through the "land peace" (*pax terrae*, *Landfriede*).

Above all, the Cluniacs and other reforming houses sought to raise the level of religious life by attacking the ecclesiastical power of feudal and local rulers, which was manifested particularly in the buying and selling of church offices (called "simony") and also in the related practices of clerical marriages and clerical concubinage (called "nicolaism"), through which bishops and priests were involved in local and clan politics. For these efforts to succeed, however, the support of a strong central power was needed. The papacy would have been far too weak for this purpose; at this time popes were, in fact, subordinate to the nobility of the city of Rome. The Cluniacs successfully sought the support of the emperors, Charlemagne's successors, who governed the area including what is now

western Germany, eastern France, Switzerland, and northern Italy. The emperors, in turn, were glad to have Cluny's support, as well as that of other reform movements; with such support, in time, they wrested from the nobles of Rome the power to appoint the pope.

Contrary to modern ideas of the separateness of the church and the state, the church in the year 1000 was not conceived as a visible, corporate, legal structure standing opposite the political authority. Instead, the church, the *ecclesia*, was conceived as the Christian people, *populus christianus*, which was governed by both secular and priestly rulers (*regnum* and *sacerdotium*). Long before Charlemagne consented to be crowned emperor by the pope in 800, his devoted servant Alcuin, the English scholar and ecclesiastic, had referred to him as ruler of the *imperium christianum* ("Christian empire"), and Charlemagne himself in 794 had called a "universal" church council at Frankfurt at which he promulgated important changes in theological doctrine and ecclesiastical law. Some historians argue that Pope Leo III made Charlemagne emperor, but it is closer to the truth to say that Charlemagne made Leo pope; and in 813 Charlemagne crowned his own son emperor without benefit of clergy.<sup>5</sup> In fact, later German emperors required the pope, on his election, to swear an oath of loyalty to the emperor. Of the twenty-five popes who held office during the hundred years prior to 1059 (when a church synod for the first time prohibited lay investiture), twenty-one were directly appointed by emperors and five were dismissed by emperors. Moreover, it was not only the German emperors who controlled bishops within their domain. The other rulers of Christendom did the same. In 1067 William the Conqueror issued a famous decree asserting that the king had the power to determine whether or not a pope should be acknowledged by the church in Normandy and England, that the king made ecclesiastical law through church synods convened by him, and that the king had a veto power over ecclesiastical penalties imposed on his barons and officials.

Imperial and royal control of the church was needed to emancipate it from the corrupting influences of baronial and local politics and economics. However, this basic aim of the Cluniac Reform faced an insuperable obstacle: the clergy were so thoroughly enmeshed in the political and economic structure at all levels that they could not be extracted from it. Under the aegis of the great reforming emperors of the tenth and eleventh centuries, the monastic orders could be cleansed and the papacy could be strengthened, but the church as a whole could not be radically reformed because it was not independent. Simony and nicolaism remained burning issues.

Nicolaism (clerical marriage) was not only a moral issue, in the narrow sense, but also a social and political and economic issue. Marriage brought the priesthood within the clan and feudal structure. It also in-

volved the inheritance of some church offices by priests' sons and other relatives. This, at least, placed some limits upon simony (sale of ecclesiastical benefices). If no church offices were to be heritable, could appointment (investiture) continue to be left in lay hands? More fundamentally, were emperors and kings spiritually qualified to make the large number of new appointments to high clerical offices that would be required if priests could no longer marry and have heirs to succeed them? And what about lower clerical offices that were to be filled at the behest of feudal lords?

There had always been a certain tension associated with the subordination of the clergy, and especially the papacy, to persons who, however dignified and even sacred their offices, were not themselves ordained priests. At the end of the fourth century, St. Ambrose, Bishop of Milan, had said, "Palaces belong to the emperor, churches to the priesthood"; and he had excommunicated Emperor Theodosius, lifting the curse of anathema only after the emperor had done penance. A century later Pope Gelasius I had written to the Emperor Anastasius: "Two [swords] there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power . . . If the bishops themselves, recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned . . . with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred mysteries [in matters of religion]?"<sup>92</sup> This was the original "two swords" doctrine: the priesthood administered the sacred mysteries, but the emperors made the laws, including the ecclesiastical laws. Among the Franks, kings and emperors had often depended on the support of popes and had acknowledged their superiority, and that of bishops generally, in matters of faith. The idea of ecclesiastical autonomy had deep roots in scriptural authority as well. Yet in fact Frankish emperors, and in the tenth and eleventh centuries German emperors as well as French and English kings—plus Spanish, Norse, Danish, Polish, Bohemian, Hungarian, and other rulers—governed bishops even in matters of religious doctrine, just as the Byzantine emperors had done. Moreover, they invested clergy with the insignia of their clerical offices: Frankish emperors and kings bestowed upon bishops the ring and pastoral staff that symbolized their episcopal authority, and uttered the words, "Accipe ecclesiam!" ("Receive the church!"). This placed both the secular sword and the spiritual sword in the same hand. The justification was that emperors and kings were consecrated, sacral rulers, "deputies of Christ." There were many bishops, of whom the Bishop of Rome was primate (first among equals), but there was only one emperor, and within each kingdom only one king.

The Bishop of Rome had the title "deputy of St. Peter." Only in the twelfth century did he acquire the title "deputy of Christ." Only then was

the emperor compelled to relinquish that title. As deputy of Christ, the pope claimed to wield both swords—one directly, the other indirectly. Now there were many secular rulers but only one pope.

The primacy of the Bishop of Rome among the other bishops of the church had been asserted as early as the fourth, and possibly even the third, century, and had occasionally—though by no means always—been acknowledged by other leading bishops. Primacy, however, could mean many different things. As long as the church in the West remained largely decentralized and under the control of local lay rulers, papal authority was inevitably weak and was closely linked with imperial authority, which was also weak. The occasional struggle of local bishops and local churches to emancipate themselves from local lords might thus take the form of appeal to either imperial authority or papal authority or both. Only rarely did conflict escalate to higher levels. A striking example was the great forgery of the mid-ninth century known as the Pseudo-Isidore, or False Decretals. This was a huge collection of letters and decrees, falsely attributed to popes and councils from the fourth century on; it was directed against the efforts of the Archbishop of Rheims, supported by the emperor, to prevent his clergy from having recourse to Rome to decide disputes. The fact that for this purpose the author had to concoct a multitude of documents tells something of the nature of episcopal authority in the church at that time and before. In fact, the Pseudo-Isidore was not composed in Rome and was not generally accepted by the popes until over two hundred years later, when the papal party used it to justify aims quite different from those of the original text. In the latter part of the ninth century Pope Nicholas I (856-867) did assert papal authority not only over archbishops and bishops, declaring that their sees could not be filled without his consent, but also over emperors, declaring that kings were not entitled to sit in judgment over priests and that priests were exempt from the jurisdiction of kings. Again, however, such assertions were more important for the future than for their own time. They did not change the reality of imperial, royal, and local lay lordship over the church. Indeed, in the latter ninth, the tenth, and the early eleventh centuries, the prestige of the papacy was at its lowest ebb, and it was the emperors who attempted to raise it.

The primacy of the Bishop of Rome among other bishops also gave the king of the Germans a reason to take his armies down across the Alps every few years to reassert his imperial claim to be protector of Rome against the Lombard and Tuscan and Roman nobility.

The spiritual authority of the emperors became increasingly anomalous in the eleventh century, as simony and nicolaism proved too deeply rooted for them to overcome. In 1046 the subordination of the bishops of Rome to the emperor became not only anomalous but scandalous when Henry III, upon arrival in Rome to celebrate his imperial

coronation, saw to it that three rival popes were deposed and a fourth elected. His appointee died after a few months in office, and a second appointee died a few weeks later—both said to have been poisoned by factions in Rome that resented imperial intervention in the affairs of the city.<sup>7</sup> A third appointee, Leo IX (1049-1053), though a close kinsman and friend of Henry III, rejected the concept of the papacy as a bishopric of the emperor, and asserted not only his own independence but also his power over all other bishops and clergy, even outside the empire.

During Leo's reign a group of his protégés—led by Hildebrand—formed a party which proposed and promoted the idea of papal supremacy over the church. Among its techniques was widespread publicity for the papal program. Eventually a large polemical literature which included many hundreds of pamphlets, was circulated by partisans of various sides. One historian has called this period "the first great age of propaganda in world history."<sup>8</sup> The papal pamphlets urged Christians to refuse to take the sacraments from priests living in concubinage or marriage, contested the validity of clerical appointments made in return for money payments, and demanded the "freedom of the church"—that is, the freedom of the clergy, under the pope, from emperor, kings, and feudal lords. Finally, in 1059 a council in Rome called by Pope Nicholas II declared for the first time the right of the Roman cardinals to elect the pope.

### The Dictates of the Pope

It was Hildebrand who in the 1070s, as Pope Gregory VII, turned the reform movement of the church against the very imperial authority which had led the Cluniac reformers during the tenth and early eleventh centuries. Gregory went much farther than his predecessors. He proclaimed the legal supremacy of the pope over all Christians and the legal supremacy of the clergy, under the pope, over all secular authorities. Popes, he said, could depose emperors—and he proceeded to depose Emperor Henry IV. Moreover, Gregory proclaimed that all bishops were to be appointed by the pope and were to be subordinate ultimately to him and not to secular authority.

Gregory had been well prepared to ascend the papal throne. He had been the dominant force in the reigns of the popes Nicholas II (1058-1061) and Alexander II (1061-1073). Also, in 1073 at the age of fifty, he was ready to exercise the enormous will and pride and personal authority for which he was notorious. Peter Damian (1007-1072), who had been associated with him in the struggle for papal supremacy since the 1050s, once addressed him as "my holy Satan," and said: "Thy will has ever been a command to me—evil but lawful. Would that I had always served God and Saint Peter as faithfully as I have served thee."<sup>9</sup> A modern scholar has described Gregory as a man with an overpowering

sense of mission, who pressed his ideas with "frightening severity and heroic persistence . . . regardless of the consequences to himself or to others [and who] had, to say the least, the temper of a revolutionary."<sup>10</sup>

Once he became pope, Gregory did not hesitate to use revolutionary tactics to accomplish his objectives. In 1075, for example, he ordered all Christians to boycott priests who were living in concubinage or marriage, and not to accept their offices for the sacraments or other purposes. Thus priests were required to choose between their responsibilities to their wives and children and their responsibilities to their parishioners. As a result of opposition to this decree, there were open riots in churches and beating and stoning of those who opposed clerical marriage. One writer, in a pamphlet entitled "Apology against Those who Challenge the Masses of Priests," stated that Christianity was being "trampled underfoot." "What else is talked about even in the women's spinning-rooms and the artisans' workshops," he asked, "than the confusion of all human laws . . . sudden unrest among the populace, new treacheries of servants against their masters and masters' mistrust of their servants, abject breaches of faith among friends and equals, conspiracies against the power ordained by God? . . . and all this backed by authority, by those who are called the leaders of Christendom."<sup>11</sup>

Lacking armies of its own, how was the papacy to make good its claims? How was it to overcome the armies of those who would oppose papal supremacy? And apart from the problem of meeting forceful opposition, how was the papacy to exercise the universal jurisdiction it had asserted? How was it effectively to impress its will on the entire Western Christian world, let alone Eastern Christendom, over which some claims of jurisdiction were also made?

An important aspect of the answers to these questions was the potential role of law as a source of authority and a means of control. During the last decades of the eleventh century, the papal party began to search the written record of church history for legal authority to support papal supremacy over the entire clergy as well as clerical independence of, and possible supremacy over, the entire secular branch of society. The papal party encouraged scholars to develop a science of law which would provide a working basis for carrying out these major policies. At the same time, the imperial party also began to search for ancient texts that would support its cause against papal usurpation.

There was, however, no legal forum to which either the papacy or the imperial authority could take its case—except to the pope or the emperor himself. This, indeed, was the principal revolutionary element in the situation. In 1075 Pope Gregory VII responded to it by "looking within his own breast" and writing a document—the *Dictatus Papae* (*Dictates of the Pope*)—consisting of twenty-seven terse propositions, apparently addressed to no one but himself, including the following:

1. That the Roman church is founded by the Lord alone.
2. That the Roman bishop alone is by right called universal.
3. That he alone may depose and reinstate bishops.
4. That his legate, even if of lower grade, takes precedence, in a council, over all bishops and may render a sentence of deposition against them.
7. That to him alone is it permitted to make new laws according to the needs of the times.
9. That the pope alone is the one whose feet are to be kissed by all princes.
10. That his name alone is to be recited in churches.
11. That he may depose emperors.
16. That no synod should be called general without his order.
17. That no chapter or book may be regarded as canonical without his authority.
18. That no judgment of his may be revised by anyone, and that he alone may revise [the judgments] of all.
21. That the more important cases of every church may be referred to the Apostolic See.
27. That he may absolve subjects of unjust men from their [oath of] fealty."<sup>12</sup>

This document was revolutionary—although Gregory ultimately managed to find some legal authority for every one of its provisions.<sup>13</sup>

In December 1075 Gregory made known the contents of his Papal Manifesto, as it might be called today, in a letter to Emperor Henry IV in which he demanded the subordination of the emperor and of the imperial bishops to Rome. Henry replied, as did twenty-six of his bishops, in letters of January 24, 1076. Henry's letter begins: "Henry, king not through usurpation but through the holy ordination of God, to Hildebrand, at present not pope but false monk." It ends, "You, therefore, damned by this curse and by the judgment of all our bishops and by our own, go down and relinquish the apostolic chair which you have usurped. Let another go up to the throne of St. Peter. I, Henry, king by the grace of God, do say unto you, together with all our bishops: Go down, go down [*Descende, descende*], to be damned throughout the ages." The letter of the bishops is in a similar vein, ending: "And since, as you did publicly proclaim, no one of us has been to you thus far a bishop, so also shall you henceforth be pope for none of us."<sup>14</sup>

In response, Gregory excommunicated and deposed Henry, who in January 1077 journeyed as a humble penitent to Canossa, where the pope was staying, and waited three days for the opportunity to present himself barefoot in the snow and to confess his sins and declare his con-

trition. Thus appealed to in his spiritual capacity, the pope absolved Henry and removed the excommunication and deposition. This gave Henry a chance to reassert his authority over the German magnates, both ecclesiastical and secular, who had been in rebellion against him. The struggle with the pope, however, was only postponed for a short time. In 1078 the pope issued a decree in which he said: "We decree that no one of the clergy shall receive the investiture with a bishopric or abbey or church from the hand of an emperor or king or of any lay person, male or female. But if he shall presume to do so he shall clearly know that such investiture is bereft of apostolic authority, and that he himself shall lie under excommunication until fitting satisfaction shall have been rendered."<sup>15</sup> The conflict between pope and emperor broke out again and the Wars of Investiture resulted.

The first casualties of the Wars of Investiture were in the German territories, where the emperor's enemies took advantage of his controversy with the pope to elect a rival king, whom Gregory eventually supported. However, Henry defeated his rival in 1080 and moved south across the Alps to besiege and occupy Rome (1084). Gregory appealed for help to his allies, the Norman rulers of southern Italy—Apulia, Calabria, Capua, and Sicily. The Normans' mercenaries drove the imperial forces from Rome, but then proceeded to loot and sack it with the savagery for which they were notorious. Henry continued to face revolts from the German princes; and when he died in 1106, his own son was leading a rebellion against him. That son, as Emperor Henry V, occupied Rome in 1111 and captured the pope.

The immediate political issue of the Wars of Investiture was that of the power of emperors and kings to invest bishops and other clergy with the insignia of their offices, uttering the words, "Accipe ecclesiam!" Behind this issue lay the question of loyalty and discipline of clergy after election and investiture. These issues were of fundamental political importance. Since the empire and the kingdoms were administered chiefly by clergy, they affected the very nature of both the ecclesiastical authority and the imperial or royal authority. Yet even more was involved—something deeper than politics—namely, the salvation of souls. Previously, the emperor (or king) had been called the deputy ("vicar") of Christ; it was he who was to answer for the souls of all men at the Last Judgment. Now the pope, who had previously called himself the deputy of St. Peter, claimed to be the sole deputy of Christ with responsibility to answer for the souls of all men at the Last Judgment. Emperor Henry IV had written to Pope Gregory VII that according to the church fathers the emperor can be judged by no man; he alone on earth is "judge of all men"; there is only one emperor, whereas the Bishop of Rome is only the first among bishops. This indeed was orthodox doctrine that had pre-



vailed for centuries. Gregory, however, saw the emperor as first among kings, a layman, whose election as emperor was subject to confirmation by the pope and who could be deposed by the pope for insubordination.<sup>16</sup> The argument was put in typical scholastic form: "the king is either a layman or a cleric," and since he is not ordained he is obviously a layman and hence can have no office in "the church." This claim left emperors and kings with no basis for legitimacy, for the idea of a secular state, that is, a state without ecclesiastical functions, had not yet been—indeed, was only then just being—born. It also arrogated to popes theocratic powers, for the division of ecclesiastical functions into spiritual and temporal had not yet been—indeed, was only then just being—born.

Ultimately, neither popes nor emperors could maintain their original claims. Under the Concordat of Worms in 1122, the emperor guaranteed that bishops and abbots would be freely elected by the church alone, and he renounced his right to invest them with the spiritual symbols of ring and staff, which implied the power to care for souls. The pope, for his part, conceded the emperor's right to be present at elections and, where elections were disputed, to intervene. Moreover, German prelates were not to be consecrated by the church until the emperor had invested them, by scepter, with what were called the "regalia," that is, feudal rights of property, justice, and secular government, which carried the reciprocal duty to render homage and fealty to the emperor. (Homage and fealty included the rendering of feudal services and dues on the large landed estates that went with high church offices.) Prelates of Italy and Burgundy, however, were not to be invested by the scepter and to undertake to render their homage and fealty to the emperor until six months after their consecration by the church. The fact that the power of appointment had to be shared—that either pope or emperor could, in effect, exercise a veto—made the question of ceremony, the question of procedure, crucial.

In England and Normandy, under the earlier settlement reached at Bec in 1107, King Henry I had also agreed to free elections, though in his presence, and had renounced investiture by staff and ring. Also, as later in Germany, he was to receive homage and fealty before, and not after, consecration.

The concordats left the pope with extremely wide authority over the clergy, and with considerable authority over the laity as well. Without his approval clergy could not be ordained. He established the functions and powers of bishops, priests, deacons, and other clerical officials. He could create new bishoprics, divide or suppress old ones, transfer or depose bishops. His authorization was needed to institute a new monastic order or to change the rule of an existing order. Moreover, the

pope was called the "principal dispenser" of all church property, which was conceived to be the "patrimony of Christ." The pope also was supreme in matters of worship and of religious belief; and he alone could grant absolution from certain grave sins (such as assault upon a clerk), canonize saints, and distribute indulgences (relief from divine punishment after death). None of these powers had existed before 1075.

"The Pope," in the words of Gabriel LeBras, "ruled over the whole church. He was the universal legislator, his power being limited only by natural [law] and positive divine law [that is, divine law laid down in the Bible and in similar documents of revelation]. He summoned general councils, presided over them, and his confirmation was necessary for the putting into force of their decisions. He put an end to controversy on many points by means of decretals, he was the interpreter of the law and granted privileges and dispensations. He was also the supreme judge and administrator. Cases of importance—*maiores causae*—of which there never was a final enumeration, were reserved for his judgment."<sup>17</sup> None of these powers had existed before 1075.

Gregory declared the papal court to be "the court of the whole of Christendom."<sup>18</sup> From then on, the pope had general jurisdiction over cases submitted to him by anyone—he was "judge ordinary of all persons." This was wholly new.

Over the laity the pope ruled in matters of faith and morals as well as in various civil matters such as marriage and inheritance. In some respects, his rule in these matters was absolute; in other respects, it was shared with the secular authority. Also, in still other matters which were considered to belong to the secular jurisdiction, the papal authority often became involved. Prior to 1075 the pope's jurisdiction over the laity had been subordinate to that of emperors and kings and generally had not been greater than that of other leading bishops.

The separation, concurrence, and interaction of the spiritual and secular jurisdictions was a principal source of the Western legal tradition.

### The Revolutionary Character of the Papal Revolution

The term revolution, as applied to the great revolutions of European history, has four main characteristics which, taken together, distinguish it from reform or evolution, on the one hand, and from mere rebellions, coups d'etat, and counterrevolutions and dictatorships, on the other. These are its *totality*, that is, its character as a total transformation in which political, religious, economic, legal, cultural, linguistic, artistic, philosophical, and other basic categories of social change are interlocked; its *rapidity*, that is, the speed or suddenness with which drastic changes take place from day to day, year to year, decade to

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decade as the revolution runs its course; its *violence*, which takes the form not only of class struggle and civil war but also of foreign wars of expansion; and its *duration* over two or three generations, during which the underlying principles of the revolution are reconfirmed and reestablished in the face of necessary compromises with its initial utopianism, until the grandchildren of the founding fathers themselves acknowledge devotion to their grandparents' cause. Then evolution can take place at its own pace, without fear of either counterrevolution from the right or the radicalism of a new left.<sup>19</sup>

#### THE TOTALITY OF THE PAPAL REVOLUTION

The search for a basic cause of historical change, and the very division of causes into basic causes and secondary causes, may obscure the fact that great revolutions do not occur without the coincidence of a great many different factors. The classification of these factors into political, economic, cultural, and other categories is a matter of convenience of exposition. To give a true picture, however, the exposition must show the necessary interconnections among the factors. Otherwise, the most important point is missed, namely, that such revolutions are experienced as total events.

Thus the Papal Revolution may be viewed in political terms, as a massive shift in power and authority both within the church and in the relations between the church and the secular politics; also it was accompanied by decisive political changes in the relations between western Europe and neighboring powers. The Papal Revolution may also be viewed in socioeconomic terms as both a response and a stimulus to an enormous expansion of production and of trade and to the emergence of thousands of new cities and towns. From a cultural and intellectual perspective, the Papal Revolution may be viewed as a motive force in the creation of the first European universities, in the emergence of theology and jurisprudence and philosophy as systematic disciplines, in the creation of new literary and artistic styles, and in the development of a new social consciousness. These diverse political, economic, and cultural movements may be analyzed separately; yet they must also be shown to have been linked with one another, for it was the linking of them all that constituted the revolutionary element in the situation.

*Political changes.* The major political shifts in power and authority within the church and in its relations with secular rulers have been described in preceding pages. It is necessary here, however, to state briefly some of the political changes that took place at the same time in relations between western Europe and neighboring powers.

For centuries there had been constant military incursions into Europe from the north and west by the Norsemen, from the south by the Arabs, and from the east by the Slavs and Magyars. The whole of Western

Christendom "was a beleaguered citadel which only survived because its greatest enemy, Islam, had reached the end of its lines of communication, and its lesser enemies (the Slavs, the Hungarians, and the Vikings) were organized only for raids and for plunder."<sup>20</sup> It was the role of the emperor to mobilize soldiers, especially knights, from among the various peoples of the empire, to resist by military force these pressures from the outside. He also had enemies within—to the west the French kings were not always friendly, and across the Alps the princes of northern Italy were openly hostile. Thus Europe was turned in upon itself, with its main axis running from north to south. At the end of the eleventh century, however, the papacy, which for at least two decades had been urging secular rulers to liberate Byzantium from the infidels, finally succeeded in organizing the First Crusade (1096-1099). A second crusade was launched in 1147 and a third crusade in 1189. These first crusades were the foreign wars of the Papal Revolution. They not only increased the power and authority of the papacy but also opened a new axis eastward to the outside world and turned the Mediterranean Sea from a natural defensive barrier against invasion from without into a route for western Europe's own military and commercial expansion.<sup>21</sup>

The crusades had a counterpart in the extensive migration into northern and eastern European territories (the Netherlands, Scandinavia, Poland, Hungary, and other regions) which took place in the late eleventh and the twelfth centuries. Here, too, the papacy played a leading part, especially through the Cistercian monastic order, founded in 1098. The Cistercians, who were ardent supporters of papal policy, were known for their agricultural expertise, managerial skill, and colonizing zeal. They were particularly adept in the development of implements useful in clearing wilderness areas.

*Socioeconomic changes.* Political changes of such magnitude could not have occurred without comparable changes in the economy and in the social structure connected with the economy. Such changes did take place, but it is difficult to determine their relationship to the political changes. In some instances they appear to have been causes, in others conditions, and in still others effects.

The late eleventh and the twelfth centuries were a period of great acceleration of economic development in western Europe. As R.W. Southern has put it, "That moment of self-generating expansion for which economists now look so anxiously in underdeveloped countries came to Western Europe in the late eleventh century."<sup>22</sup> New technological developments and new methods of cultivation contributed to a rapid increase in agricultural productivity and to a consequent expansion of trade in agricultural surpluses in the countryside.<sup>23</sup> These factors, in turn, facilitated a very rapid increase in population; although reliable figures are scarce, it seems likely that the population of western

Europe as a whole increased by more than half, and possibly doubled, in the century between 1050 and 1150, whereas in the preceding centuries, under conditions of subsistence agriculture and military invasions, it had remained virtually stationary and at times had even declined. The expanding population spilled over into many hundreds and even thousands of cities and towns that emerged in western Europe for the first time since the decline of the Roman Empire in the fourth and fifth centuries.

The emergence of cities and towns is perhaps the most striking socioeconomic change of the late eleventh and the twelfth and thirteenth centuries. In the year 1050 there were probably only two settlements in western Europe—Venice and London—with a population of more than ten thousand, and perhaps two dozen others with a population of more than two thousand (see map 1). (In 1050 Constantinople, in contrast, had hundreds of thousands of inhabitants.) Almost all settled places were either villages or else fortified places with or without an adjoining market. The term *civitas* ("city") was reserved for the seats of bishoprics. The cities of Sicily and southern Italy were still Byzantine and Arab, not Western. Rome was exceptional—less for its size, which was not much greater than that of other major bishoprics, than for the numerous noble families congregated there. In the following two centuries great trading and manufacturing centers sprang up all over western Europe, some with populations over 100,000, dozens with populations over 30,000, hundreds with populations over 10,000. By 1250 some 5 to 10 percent of the population of western Europe—perhaps three or four million people—lived in cities and towns (see map 3).

The merchant class, which in 1050 had consisted of a relatively few itinerant peddlers, increased sharply in numbers and changed drastically in character in the late eleventh and the twelfth centuries, first in the countryside and then in the cities and towns. Commerce overland and overseas became an important aspect of western European economic and social life (as it had been in the eastern Mediterranean, continuously, for over a thousand years). Fairs and markets became important economic and social institutions. Credit, banking, and insurance developed, especially in long-distance trade. Concomitant with the growth of commerce was the growth of manufacture of handicrafts, and this was accompanied by the widespread formation of craft guilds. Often the guilds played a major role in city or town government.

The expansion of commerce and the growth of cities in the eleventh and twelfth centuries have led many twentieth-century economic and social historians, among them Henri Pirenne, to place the origins of Western capitalism in that period. Yet the same period is also considered by many to be the high point of feudalism. In fact it was in that period—especially the twelfth and thirteenth centuries—that the

manorial system became almost universal in western European agriculture; before then, a substantial percentage of peasants were living in villages as autonomous landholders, working their own land. Also in that period the character of the feudal bond between lord and vassal was substantially changed by the introduction of the practice of substituting monetary payments for military and other feudal obligations.

*Cultural and intellectual changes.* In the late eleventh and the twelfth centuries western Europe experienced not only political and economic explosions but also a cultural and intellectual explosion. This was the time when the first universities were created, when the scholastic method (as it later came to be called) was first developed, when theology and jurisprudence and philosophy were first subjected to rigorous systematization. This period marked the beginning of modern scientific thought.<sup>24</sup>

It was also the period of transition first to Romanesque and then to Gothic architecture; it was the age when the first great European cathedrals were started—St. Denis and Notre Dame de Paris, Canterbury and Durham.

This was the age when Latin as a scholarly language was modernized and when vernacular languages and literature began to take their modern form. It was the period of great epic poetry (the *Song of Roland*, the Arthurian epics) and of courtly lyrics and romances (the writings of Bernard de Ventadour).<sup>25</sup> It was a time of remarkable growth of literacy among the laity, and of the earliest development of national cultural sentiments in most of the countries of western Europe.

Three other basic changes in social consciousness contributed to the transformation of the cultural and intellectual life of the peoples of western Europe in the late eleventh and the twelfth centuries: first, the growth of the sense of corporate identity of the clergy, its self-consciousness as a group, and the sharp opposition, for the first time, between the clergy and the laity; second, the change to a dynamic concept of the responsibility of the church (considered primarily as the clergy) to reform the world, the *saeculum* (considered primarily as the lay world); and third, the development of a new sense of historical time, including the concepts of modernity and progress.

#### THE RAPIDITY AND VIOLENCE OF THE PAPAL REVOLUTION

In trying to comprehend the full dimensions of the changes that took place during the eleventh and twelfth centuries, one may lose sight of the cataclysmic character of the events that were at the heart of the Papal Revolution. These events may be explained, ultimately, only by the totality of the transformation; but they must be seen initially as the immediate consequence of the effort to achieve a political purpose, namely, what the papal party called "the freedom of the church"—the liberation

of the clergy from imperial, royal, and feudal domination and their unification under papal authority. By placing that political purpose, and the events that followed immediately from the effort to realize it, in the context of the total transformation, one can see that what was involved was far more than a struggle for power. It was an apocalyptic struggle for a new order of things, for "a new heaven and a new earth." But at the same time, the political manifestation of that struggle, where power and conviction, the material and the spiritual, coincided, is what gave it its tempo and its passion.

Rapidity is, of course, a relative matter. It may seem that a transformation which began in the middle of the eleventh century and was not secured until the latter part of the twelfth century, or possibly the early part of the thirteenth century, should be called gradual. However, the length of time which it takes a revolution to run its course is not necessarily the measure of its rapidity. The concept of rapid change refers to the pace at which drastic changes occur from day to day or year to year or decade to decade. In a revolution of the magnitude of the Papal Revolution, life is speeded up; things happen very quickly; great changes take place overnight. First, at the start of the revolution—in the *Dictatus Papae* of 1075—the previous political and legal order was declared to be abolished. Emperors were to kiss the feet of popes. The pope was to be "the sole judge of all" and to have the sole power "to make new laws to meet the needs of the times." The fact that many of the features of the old society persisted and refused to disappear did not change the suddenness of the effort to abolish them or the shock produced by that effort. Second, new institutions and policies were introduced almost as suddenly as old ones were abolished. The fact that it took a long time—several generations—for the revolution to establish its goals did not make the process a gradual one.

For example, it was part of Pope Gregory VII's program, at least from 1074 on, that the papacy should organize a crusade to defend the Christians of the East against the Turkish infidels. Until his death in 1085 he promoted that idea throughout Europe, although he was never able to get sufficient support to bring it about. Only in 1095 did his successor and devoted follower, Pope Urban II, succeed in launching the First Crusade. One may say, then, that it took a long time—over twenty years—to accomplish this change, which literally turned Europe around and united it in a collective military and missionary expedition to the East. But in another sense, the change from a precrusading Europe to a crusading Europe came with shocking rapidity. From the first moment the crusade became a declared objective of the papacy, the reorientation proceeded, continually producing new hopes, new fears, new plans, new associations. Once the First Crusade was undertaken the pace of change accelerated. The mobilization of knights from virtually every part of

Western Christendom, their journeys across land and sea and, finally, the innumerable military encounters, were a compression of events into a time span that came and went with extraordinary speed. Moreover, it was not only on the ground, so to speak, that the crusades represented an acceleration of the pace of events. It was also so in the realm of high politics. For example, the papacy tried to use the crusades as a means of exporting the Papal Revolution to Eastern Christendom. The pope declared his supremacy over the entire Christian world. The schism between the Eastern and Western churches, which had reached a climax in 1054 in the famous theological controversy over the *filioque* clause in the creed,<sup>26</sup> took the form of violence and conquest. Also in 1099 Western knights entered Jerusalem and founded there a new kingdom, the Kingdom of Jerusalem, subordinate, at least in theory, to the papacy. History was moving very fast indeed! Although almost fifty years elapsed before the Second Crusade was launched, and another forty years from the end of the Second Crusade to the Third, these time spans, too, must be considered in the light of the continual agitation that was generated both by anticipation of them and by the remembrance of them. Throughout the twelfth century there was a widespread feeling that a crusade might come at any time.

And so with the principal aim of the revolution, expressed in the slogan, "the freedom of the church": it was not something that could be achieved overnight—indeed, in its deepest significance it was not something that could be achieved ever—yet the very depth of the idea, its combination of great simplicity and great complexity, was a guarantee that the struggle to achieve it would be, on the one hand, a prolonged one, over decades and generations and even centuries, and on the other hand, a cataclysmic one, with drastic and often violent changes occurring in rapid succession. For freedom of the church meant different things to different people. To some it meant a theocratic state. To others it meant that the church should renounce all its feudal lands, all its wealth, all its worldly power; this, indeed, was proposed by Pope Paschal II in the early 1100s, but was quickly rejected both by the Roman cardinals and by the German bishops who supported the emperor. Or it might mean something quite different from either of these extreme alternatives. The fact that its meaning kept changing from 1075 to 1122 was one of the marks of the revolutionary character of the times.

Apart from the crusades, the violence of the Papal Revolution took the form of a series of wars and rebellions. The papal and the imperial or royal sides used both mercenaries and feudal armies. There were many violent popular rebellions, especially in cities, against the existing authorities—against ruling bishops, for example, who might be appointees and supporters of either the emperor or the pope.

It is doubtful that the rapidity of the Papal Revolution can be separated from its violence. This is not to say that if the struggle could have been carried on without civil war—if Henry IV could have been persuaded not to resist Gregory by armed force, or Gregory not to summon his Norman allies in defense—the events would have lost their rapid tempo. Nevertheless, in the Papal Revolution, as in the great revolutions of Western history that succeeded it, the resort to violence was closely related to the speed with which changes were pressed as well as to their total or fundamental character. It was partly because of the rapidity of the changes and partly because of their totality that the preexisting order was unwilling and unable to make room for them; and so force, in Karl Marx's words, became "the necessary midwife" of the new era.

Force, however, could not give a final victory either to the revolutionary party or to its opponents. The Papal Revolution ended in compromise between the new and old. If force was the midwife, law was the teacher that ultimately brought the child to maturity. Gregory VII died in exile. Henry IV was deposed. The eventual settlement in Germany, France, England, and elsewhere was reached by hard negotiations in which all sides renounced their most radical claims. What can be said for force is that it took the experience of civil war in Europe to produce the willingness of both sides to compromise. The balance was struck, ultimately, by law.

#### THE DURATION OF THE PAPAL REVOLUTION

The totality of the transformation of Western Christendom in the late eleventh and the twelfth centuries, its rapidity, and its violence would not in themselves justify its characterization as the first of the great revolutions of Western history, if the revolutionary movement had not endured for several generations.

At first, the long duration of a revolution may seem to contradict its speed and violence; in fact, however, it is partly because of the speed and violence of the changes, as well as their totality, that their underlying principles must be reconfirmed and reestablished by successive generations. Moreover, the basic goals of the revolution must be preserved in the face of necessary compromises with its initial utopianism. Just as the totality of the transformation distinguishes a revolution from reform, and just as the rapidity and violence distinguish it from evolution, so the transgenerational character of the great revolutions of Western history distinguishes them from mere rebellions, coups d'état, and shifts in policy, as well as from counterrevolutions and military dictatorships.

The Papal Revolution was the first transgenerational movement of a programmatic character in Western history. It took almost a generation, from about 1050 to 1075, for the papal party to proclaim the program to

be a reality. Then followed forty-seven years of struggle before another pope could reach an agreement with another emperor on the single question of papal versus imperial investiture of bishops and abbots. It took even longer for the respective criminal and civil jurisdictions of the ecclesiastical and secular powers within each of the major western European kingdoms to be defined. In England it was not until 1170, the year of Becket's martyrdom—ninety-five years after Gregory's *Dictatus* and sixty-three years after Henry I, the English king, had yielded on the investiture issue—that the Crown finally renounced its pretension to be the supreme ruler of the English clergy. Ultimately compromises were reached on a whole range of issues involving not only the interrelationship of church and state but also the interrelationship of communities within the secular order—the manorial system, the lord-vassal unit, the merchant guilds, the chartered cities and towns, the territorial duchies and kingdoms, the secularized empire. The children and grandchildren of the revolution enacted its underlying principles into governmental and legal institutions. Only then was it more or less secure for succeeding centuries. Indeed, it was never wholly secure; there were always disputes at the boundaries of the ecclesiastical and secular powers.

#### Social-Psychological Causes and Consequences of the Papal Revolution

Mention has been made of three aspects of the new social consciousness that emerged during the eleventh and twelfth centuries—a new sense of corporate identity on the part of the clergy, a new sense of the responsibility of the clergy for the reformation of the secular world, and a new sense of historical time, including the concepts of modernity and progress. These all had a strong influence on the development of the Western legal tradition.

The first aspect, the corporate self-consciousness of the clergy (it would be called *class* consciousness today) was essential to the revolution, both as cause and as consequence. Of course, the clergy had always had some sense of their own group identity; yet it was at best a sense of spiritual unity, a unity of belief and of calling, and not a sense of political or legal unity. Politically and legally, the clergy prior to the eleventh century had been dispersed locally, with very few links to central ecclesiastical authorities. Even the sense of spiritual unity was flawed by the sharp division between the "regular" clergy and the "secular" clergy; the regular clergy were the "religious" ones, the monks and nuns, who having died to "this world," lived out their membership in the Eternal City; the secular clergy were the priests and bishops, who were almost wholly involved in the political, economic, and social life of the localities where they lived.

More than any other single factor, the Cluniac Reform laid the found-

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dation for the new sense of corporate political unity among the clergy of Western Christendom. The zeal of the reformers helped to give a new consciousness of common historical destiny to both the regular and the secular clergy. In addition, Cluny provided a model for uniting the clergy in a single translocal organization, since all Cluniac houses were subject to the jurisdiction of the central abbey.

In adopting the principal aims of the Cluniac Reform, including the celibacy of the priesthood and the elimination of the purchase and sale of church offices, the papal party in the 1050s and 1060s appropriated the moral capital of the earlier movement, including the clerical class consciousness that it had helped to develop. To those older aims was joined the new cry for "the freedom of the church"—that is, its freedom from control by "the laity." This was both an appeal to clerical class consciousness and a stimulation of it. Moreover, by the very act of denouncing imperial control of the church, Gregory shattered the old Carolingian ideal. The clergy were confronted with a choice between political unity under the papacy and political disunity among new national churches, which would have inevitably arisen in the various polities of Europe if the papacy had lost the battle. The investiture struggle made that clear. Ultimately the question of investiture was settled by separate negotiations between each of the principal secular rulers, representing his secular polity, and the papacy, representing the entire clergy of Western Christendom. The Papal Revolution itself thus helped to establish the clerical class consciousness on which it was based.

The clergy became the first translocal, transtribal, transfeudal, transnational class in Europe to achieve political and legal unity. It became so by demonstrating that it was able to stand up against, and defeat, the one preexisting universal authority, the emperor. The emperor had no such universal class to support him. From the twelfth century to the sixteenth the unity of the clerical hierarchy in the West could only be broken by a few powerful kings. Even the Norman kings of Sicily, who in the twelfth and thirteenth centuries were able to exclude papal control over a clergy nominally subordinate to Rome, agreed to submit to the pope any disputed elections of bishops.

The term "class" has been used here to describe the clergy partly to emphasize that the Papal Revolution, like the German (Protestant) Revolution, the English Revolution, the French and American revolutions, and the Russian Revolution, involved the interactions not only of individuals or elites but also of large social groups that performed major functions in the society. The validity of the Marxian insight that a revolution involves class struggle, and the rise of a new ruling class, need not commit one to the narrow Marxian definition of class in terms of its relation to the means of production of economic wealth. The clergy in western Europe in the late eleventh and twelfth centuries did, in fact,

play an important role in the production of economic wealth, since the church owned between one-fourth and one-third of the land; bishops and abbots were lords of manors with the same economic interests as their nonecclesiastical counterparts; the struggle against lay investiture was in part a struggle to wrest economic power from lay lords and to transfer it to the church. However, it was not primarily the economic interests of the clergy that gave them their class character. It was, rather, their role as producers of spiritual goods—as father confessors, as performers of marriage ceremonies, as baptizers of infants, as ministers of last rites, as preachers of sermons, and also as expounders not only of the theology of Western society but also of its basic political and legal doctrines.

The growth of the class consciousness of the clergy was associated with the second aspect of the new social consciousness of the eleventh and twelfth centuries—the development of a new sense of the clergy's mission to reform the secular world. On the one hand, the new tendency to identify the church primarily with the clergy, the "hierarchy," led to a sharp distinction between the clergy and the laity. On the other hand, this distinction carried the implication that the clergy were not only superior to, but also responsible for, the laity. In other words, the class consciousness of the clergy was at the same time a social consciousness in the modern sense, a conscientiousness with respect to the future of society.

This was reflected in a sharp change in the meaning of the word "secular." In classical Latin, *saeculum* meant "an age," "a time," "a generation," or "the people of a given time" (as in "the younger generation"); it also came to mean "a century." The church fathers in the second, third, and fourth centuries used *saeculum* to refer to the world of time—the "temporal" world—as contrasted with the eternal kingdom of God. (The world of space, *mundus*, was another thing.) In the writings of St. Augustine, for example, as Peter Brown has pointed out, *saeculum* meant "existence," that is, the sum total of transitory human existence, past, present, and future, from the fall of Adam to the Last Judgment. Professor Brown has written: "For St. Augustine, this *saeculum* is a profoundly sinister thing. It is a penal existence . . . it wobbles up and down without rhyme or reason . . . There are no verbs of historical movement in the City of God, no sense of progress to aims that may be achieved in history. The Christians are members of a far country . . . they are registered aliens, existing, on sufferance, in *hoc maligno saeculo*."<sup>27</sup>

Contrary to what is sometimes supposed, St. Augustine did not identify the City of God with the Christian Church as such, nor did he identify the Earthly City with the Roman Empire or with the state in general. For him both the Church and the Empire were living in evil

times, the saeculum. The Christian, however, was distinguished by the fact that he yearned ardently—again in Brown's words—"for a country that is always distant but made ever present by the quality of his love and hope."<sup>28</sup> Thus for St. Augustine the true Christian, whether priest or layman, lived in both "cities," that is, in both the earthly and the heavenly society.<sup>29</sup>

The negative view of the saeculum reflected in the writings of St. Augustine and, indeed, of most Christian thinkers in the first thousand years of the church's history, contributed to a sharp division between the regular clergy and the secular clergy. The former lived farther away from the saeculum and closer to the City of God. That may be why, in the late eleventh and early twelfth centuries, the papal party, which championed the secular as well as the regular clergy, often preferred to speak of the "temporal" rule of emperors and kings, and of "temporal" law, rather than of "secular" rule and "secular" law, although the two terms were synonymous. Temporal, or secular, was a pejorative term; it meant time-bound, the product of the decay and corruption of human existence, especially in the sphere of political rule; it was now made applicable to all laymen. The antonym of temporal (or secular) was "spiritual." All clergy were now called *spirituales* ("spiritual ones"). In a famous letter Gregory VII wrote:

Who does not know that kings and princes derive their origin from men ignorant of God who raised themselves above their fellows by pride, plunder, treachery, murder—in short by every kind of crime—at the instigation of the Devil, the prince of this world, men blind with greed and intolerable in their audacity? . . . Kings and princes of the earth, seduced by empty glory, prefer their own interests to the things of the spirit, whereas pious pontiffs, despising vainglory, set the things of God above the things of the flesh . . . The former, far too much given to worldly affairs, think little of spiritual things, the latter, dwelling eagerly upon heavenly subjects, despise the things of this world.<sup>30</sup>

The imperial authority, according to its enemies, lacked spiritual, that is, holy or "heavenly," qualities. One of Gregory's propagandists addressed the emperor as follows: "you say that your authority has stood unchallenged for seven hundred years, and so you would have a right to it by prescription? But no more than a thief is able to transfer title to stolen goods can the devil transfer property rights to an unjust power."<sup>31</sup>

And again: "The least in the kingdom of the spiritual sword is greater than the Emperor himself, who wields [only] the secular sword."<sup>32</sup>

The Papal Revolution started with this attempt by the papacy to reduce the Holy and Most Christian Emperor—who for centuries had played the leading role in the life of the church—to the status of a simple

layman, lower than the lowest priest. The fact that emperors and kings, being laymen, wielded only the secular sword, that is, were responsible only for temporal affairs, the things of this world, placed them in subordination to those who wielded the spiritual sword and were responsible for spiritual affairs, and who "dwell eagerly upon heavenly subjects"; for the laity were inferior to the clergy in matters of faith and morals, and the secular was less valuable than the spiritual.

Yet Gregory VII and his supporters never doubted that secular government, though subordinate to the church in spiritual matters and even—though only indirectly—in secular matters, represented divine authority, that the power of the secular ruler was established by God, and that secular law flowed ultimately from reason and conscience and must be obeyed. Despite his harsh denunciation of secular rulers, Gregory was full of hope for the future of secular society—under papal tutelage. In this, he and his followers were poles apart from St. Augustine.

Indeed, the most radical of the papal claims, namely, that not only the spiritual sword but the temporal sword, too, belongs ultimately to the church, which confers it on the secular ruler, contains a paradox. In the words of John of Salisbury, the king "is a minister of the priestly power, and one who exercises that side of the sacred offices which seems unworthy of the hands of the priesthood."<sup>33</sup> Unworthy—nevertheless, sacred. The very division between the spiritual and the secular—which the church ardently maintained when claiming its freedom, but often violated when seeking to expand its power—provided defenses against the papal attempt to assert jurisdiction over the sinfulness attributed to secular rulers pursuing secular policies.

Ultimately, compromises were reached in the struggle between the papalists and their opponents. It was out of that struggle and those compromises that Western political science—and especially the first modern Western theories of the state and secular law—were born. As K.J. Leyser has written, "Political ideas in the classical sense only appear in the polemics of the eleventh and early twelfth centuries incoherently, in flashes . . . There [was at that time] no theory of the secular state as such, but as a result of the great crisis it was all ready to be born."<sup>34</sup>

The new meanings of secular were derived from the struggle between supporters of the secular and spiritual authorities, respectively. Those who denied altogether the papacy's distinction between secular and spiritual, and who insisted on maintaining the sacral character of imperial or royal rule, were generally defeated. But the actual boundaries between the two realms—the specific allocations of functions—were worked out by reconciliation and compromise between opposing forces. They could not, by the very nature of the problem, be defined abstractly.

Closely related to both the clergy's sense of corporate identity and its sense of mission to reform the world was a third aspect of the new social consciousness that emerged in the eleventh and twelfth centuries, namely, a new sense of historical time, including the concepts of modernity and of progress. This, too, was both a cause and a consequence of the Papal Revolution.

A new sense of time was implicit in the shift in the meaning of *saeculum* and in the new sense of mission to reform the world. A relatively static view of political society was replaced by a more dynamic view; there was a new concern with the future of social institutions. But there was also a fundamental revaluation of history, a new orientation toward the past as well as the future, and a new sense of the relationship of the future to the past. The distinction between "ancient" and "modern" times, which had occasionally been made in previous centuries, became common in the literature of the papal party. In the twelfth century there appeared the first European historians who saw the history of the West as moving from the past, through stages, into a new future—men such as Hugo of St. Victor, Otto of Freising, Anselm of Havelberg, Joachim of Floris, and others. These men saw history as moving forward in stages, culminating in their own time, which some referred to as modern times or modernity (*modernitas*). Joachim of Floris and his disciples considered that a new age of the Holy Spirit was about to replace the age of the Son, which had come to an end. Otto of Freising wrote that secular history had entered into sacred history and was intertwined with it.<sup>35</sup>

Like the English Revolution of the seventeenth century, the Papal Revolution pretended to be not a revolution but a restoration. Gregory VII, like Cromwell, claimed that he was not innovating, but restoring ancient freedoms that had been abrogated in the immediately preceding centuries. As the English Puritans and their successors found precedents in the common law of the thirteenth and fourteenth centuries, largely passing over the century or more of Tudor-Stuart absolutism, so the Gregorian reformers found precedents in the patristic writings of the early centuries of the church, largely passing over the Carolingian and post-Carolingian era in the West. The ideological emphasis was on tradition, but the tradition could only be established by suppressing the immediate past and returning to an earlier one. Writings of leading Frankish and German canonists and theologians of the ninth and tenth centuries were simply ignored. In addition, the patristic writings were interpreted to conform to the political program of the papal party, and when particular patristic texts stood in the way of that program they were rejected. Faced with an obnoxious custom, the Gregorian reformers would appeal over it to truth, quoting the aphorism of Tertullian and St. Cyprian, "Christ said, 'I am the truth.' He did not say 'I am the custom.'" Gregory VII quoted this against Emperor Henry IV.

Becket quoted it against King Henry II. It had special force at a time when almost all the prevailing law was customary law.

It is the hallmark of the great revolutions of Western history, starting with the Papal Revolution, that they clothe their vision of the radically new in the garments of a remote past, whether those of ancient legal authorities (as in the case of the Papal Revolution), or of an ancient religious text, the Bible (as in the case of the German Reformation), or of an ancient civilization, classical Greece (as in the case of the French Revolution), or of a prehistoric classless society (as in the case of the Russian Revolution). In all of these great upheavals the idea of a restoration—a return, and in that sense a revolution, to an earlier starting point—was connected with a dynamic concept of the future.

It is easy enough to criticize the historiography of the revolutions as politically biased and, indeed, purely ideological. This, however, is to impose on revolutionaries the standards of objectivity asserted by modern historical scholarship, which is itself a product of its times and has its own biases. Moreover, it is important to recognize that the revolutionaries were perfectly aware that they were reinterpreting the past and adapting historical memories to new circumstances. What is significant is that at the most crucial turning points of Western history a projection into the distant past has been needed to match the projection into the distant future. Both the past and the future have been summoned, so to speak, to fight against the evils of the present.

### The Rise of the Modern State

The Papal Revolution gave birth to the modern Western state—the first example of which, paradoxically, was the church itself.

As Maitland said a century ago, it is impossible to frame any acceptable definition of the state which would not include the medieval church. By that he meant the church after Pope Gregory VII, since before his reign the church had been merged with the secular society and had lacked the concepts of sovereignty and of independent lawmaking power which are fundamental to modern statehood. After Gregory VII, however, the church took on most of the distinctive characteristics of the modern state. It claimed to be an independent, hierarchical, public authority. Its head, the pope, had the right to legislate, and in fact Pope Gregory's successors issued a steady stream of new laws, sometimes by their own authority, sometimes with the aid of church councils summoned by them. The church also executed its laws through an administrative hierarchy, through which the pope ruled as a modern sovereign rules through his or her representatives. Further, the church interpreted its laws, and applied them, through a judicial hierarchy culminating in the papal curia in Rome. Thus the church exercised the legislative, administrative, and judicial powers of a modern state. In ad-



dition, it adhered to a rational system of jurisprudence, the canon law. It imposed taxes on its subjects in the form of tithes and other levies. Through baptismal and death certificates it kept what was in effect a kind of civil register. Baptism conferred a kind of citizenship, which was further maintained by the requirement—formalized in 1215—that every Christian confess his or her sins and take Holy Communion at least once a year at Easter. One could be deprived of citizenship, in effect, by excommunication. Occasionally, the church even raised armies.

Yet it is a paradox to call the church a modern state, since the principal feature by which the modern state is distinguished from the ancient state, as well as from the Germanic or Frankish state, is its secular character. The ancient state and the Germanic-Frankish state were religious states, in which the supreme political ruler was also responsible for maintaining the religious dogmas as well as the religious rites and was often himself considered to be a divine or semidivine figure. The elimination of the religious function and character of the supreme political authority was one of the principal objectives of the Papal Revolution. Thereafter, emperors and kings were considered—by those who followed Roman Catholic doctrine—to be laymen, and hence wholly without competence in spiritual matters. According to papal theory, only the clergy, headed by the pope, had competence in spiritual matters. Nevertheless, for several reasons this was not a “separation of church and state” in the modern sense.

First, the state in the full modern sense—that is, the secular state existing in a system of secular states—had not yet come into being, although a few countries (especially the Norman Kingdom of Sicily and Norman England) were beginning to create modern political and legal institutions. Instead, there were various types of secular power, including feudal lordships and autonomous municipal governments as well as emerging national territorial states, and their interrelationships were strongly affected by the fact that all of their members, including their rulers, were also subject in many respects to an overarching ecclesiastical state.

Second, although emperor, kings, and other lay rulers were deprived of their ecclesiastical authority, they nevertheless continued to play a very important part—through the dual system of investiture—in the appointment of bishops, abbots, and other clerics and, indeed, in church politics generally. And conversely, members of the clergy continued to play an important part in secular politics, serving as advisers to secular rulers and also often as high secular officials. The Chancellor of England, for example, who was second in importance to the King, was virtually always a high ecclesiastic—often the Archbishop of Canterbury or of York—until the sixteenth century.

Third, the church retained important secular powers. Bishops con-

tinued to be lords of their feudal vassals and serfs and to be managers of their estates. Beyond that, the papacy asserted its power to influence secular politics in all countries; indeed, the pope claimed the supremacy of the spiritual sword over the temporal, although he only claimed to exercise temporal supremacy indirectly, chiefly through secular rulers.<sup>36</sup>

Thus the statement that the church was the first modern Western state must be qualified. The Papal Revolution did lay the foundation for the subsequent emergence of the modern secular state by withdrawing from emperors and kings the spiritual competence which they had previously exercised. Moreover, when the secular state did emerge, it had a constitution similar to that of the papal church—minus, however, the church's spiritual function as a community of souls concerned with eternal life. The church had the paradoxical character of a church-state, a *Kirchenstaat*: it was a spiritual community which also exercised temporal functions and whose constitution was in the form of a modern state. The secular state, on the other hand, had the paradoxical character of a state without ecclesiastical functions, a secular polity, all of whose subjects also constituted a spiritual community living under a separate spiritual authority.

Thus the Papal Revolution left a legacy of tensions between secular and spiritual values within the church, within the state, and within a society that was neither wholly church nor wholly state. It also, however, left a legacy of governmental and legal institutions, both ecclesiastical and secular, for resolving the tensions and maintaining an equilibrium throughout the system.

### The Rise of Modern Legal Systems

As the Papal Revolution gave birth to the modern Western state, so it gave birth also to modern Western legal systems, the first of which was the modern system of canon law.

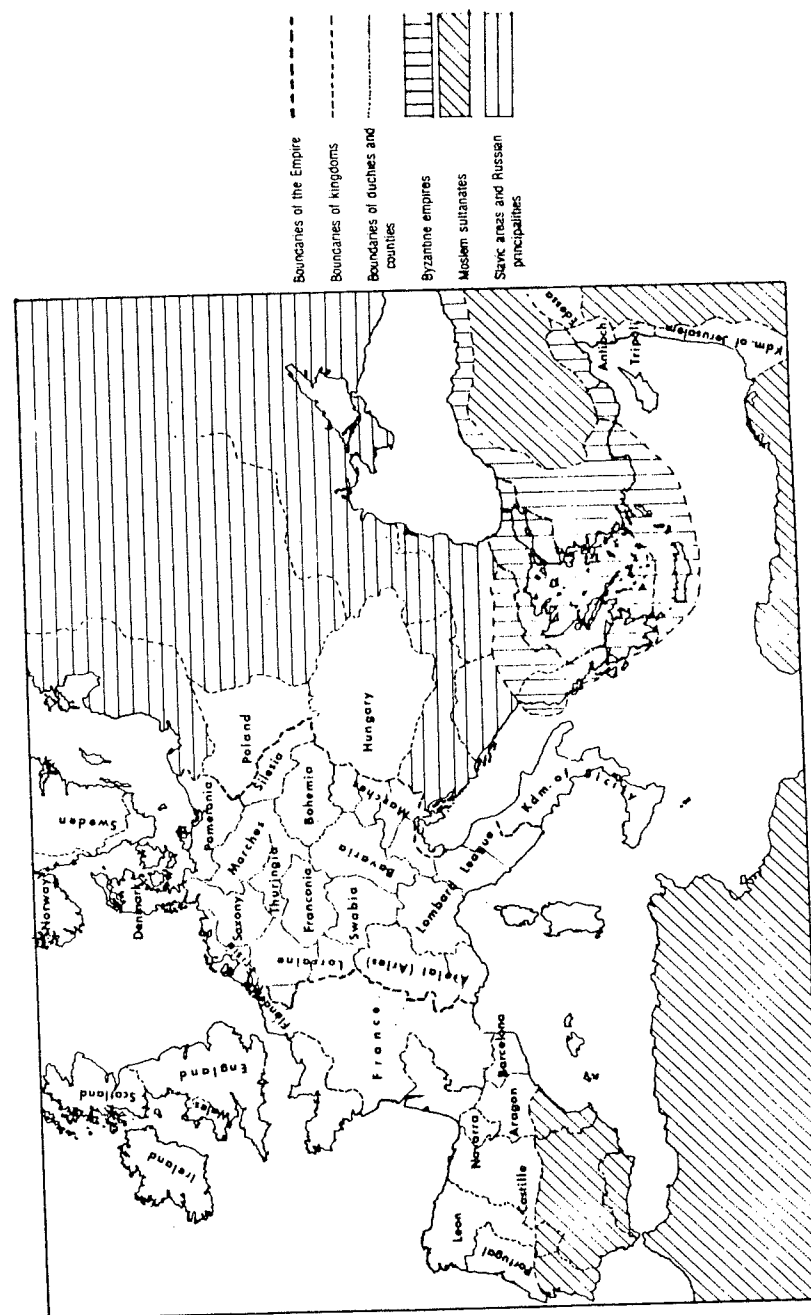
From early centuries on, the church accumulated a great many laws—canons (that is, rules) and decrees of church councils and synods, decrees and decisions of individual bishops (including the Roman pontiff), and laws of Christian emperors and kings concerning the church. The church in the West also produced many Penitentials (handbooks for priests), containing descriptions of various sins and the penalties attached to them. All these laws were considered to be subordinate to the precepts contained in the Bible (both the Old and New Testaments) and in the writings of the early church fathers—men such as Polycarp of Smyrna, Tertullian of Carthage, Gregory of Nyssa, and Augustine of Hippo.

These authoritative writings, in which the canons were merged, had contributed to the gradual establishment throughout Western Christendom, between the sixth and tenth centuries, of a common body of

theological doctrine, a common worship service (in Latin), a common set of rules concerning major sins (such as killing, breaking oaths, stealing), and a common ecclesiastical discipline and structure. Everywhere priests heard confessions and dispensed the sacraments to their flocks; everywhere bishops ruled priests, consecrated churches, and arbitrated disputes within their respective dioceses; everywhere bishops were responsible to their primates (metropolitan bishops of provinces and regions), and all bishops owed loyalty to the Bishop of Rome as first among equals. There was, however, no book or series of books in existence in the year 1000 which attempted to present the whole body of ecclesiastical law or, indeed, systematically to summarize any part of it. There were, to be sure, a considerable number of collections of canons, and particularly canons of church councils and decrees of leading bishops. Usually these collections were simply arranged chronologically within broad categories of sources (canons of councils, letters of popes, sayings of the fathers), but in some collections there was also a division into a number of topics (Ordination, Church Courts, Liturgy, Marriage, Heresy, Idolatry). Hardly any of these collections were recognized as valid everywhere; almost all of them had only regional significance.

The decentralized character of ecclesiastical law prior to the late eleventh century was closely related to the decentralized character of the political life of the church. As a rule, bishops were more under the authority of emperors, kings, and leading lords than of popes; and even in those spiritual matters in which secular authorities did not intervene, a bishop usually had a considerable autonomy within his own diocese.<sup>37</sup> The universality of the church did not rest primarily on a political or legal unity but on a common spiritual heritage, common doctrine and worship, and a common liturgy. Such political and legal unity as it had was connected, above all, with the preservation of its spiritual universality. In this respect the Western Church was like the Eastern Church. Its law, being largely interwoven with theological doctrine and with the liturgy and the sacraments, was concerned only secondarily with organizational matters and the authority of bishops, and hardly at all with rules of property law, crime and tort, procedure, inheritance, and the like. In these secondary and tertiary concerns the law of the church was often wholly merged with secular law, and secular law was itself largely diffused in political, economic, and social custom.

In the wake of the Papal Revolution there emerged a new system of canon law and new secular legal systems, together with a class of professional lawyers and judges, hierarchies of courts, law schools, law treatises, and a concept of law as an autonomous, integrated, developing body of principles and procedures. The Western legal tradition was formed in the context of a total revolution, which was fought to establish



"the right order of things," or "right order in the world."<sup>30</sup> "Right order" signified a new division of society into separate ecclesiastical and secular authorities, the institutionalization of the ecclesiastical authority as a political and legal entity, and the belief in the responsibility of the ecclesiastical authority to transform secular society.

The dualism of ecclesiastical and secular legal systems led in turn to a pluralism of secular legal systems within the ecclesiastical legal order and, more specifically, to the concurrent jurisdiction of ecclesiastical and secular courts. Further, the systematization and rationalization of law were necessary in order to maintain the complex equilibrium of plural competing legal systems. Finally, the right order of things introduced by the Papal Revolution signified the kind of systematization and rationalization of law that would permit reconciliation of conflicting authorities on the basis of synthesizing principles: wherever possible, the contradictions were to be resolved without destruction of the elements they comprised.

To summarize, the new sense of law and the new types of law that emerged in western Europe in the wake of the Papal Revolution were needed as means: (1) to control by central authorities a widely dispersed population with diverse group loyalties; (2) to maintain the separate corporate identity of the clergy and add a new legal dimension to their class consciousness; (3) to regulate relations between competing ecclesiastical and secular politics; (4) to enable secular authorities to implement in a deliberate and programmatic way their proclaimed mission of imposing peace and justice within their respective jurisdictions; and (5) to enable the church to implement in a deliberate and programmatic way its proclaimed mission to reform the world.

The most important consequence of the Papal Revolution was that it introduced into Western history the experience of revolution itself. In contrast to the older view of secular history as a process of decay, there was introduced a dynamic quality, a sense of progress in time, a belief in the reformation of the world. No longer was it assumed that "temporal life" must inevitably deteriorate until the Last Judgment. On the contrary, it was now assumed—for the first time—that progress could be made in this world toward achieving some of the preconditions for salvation in the next.

Perhaps the most dramatic illustration of the new sense of time, and of the future, was provided by the new Gothic architecture. The great cathedrals expressed, in their soaring spires and flying buttresses and elongated vaulted arches, a dynamic spirit of movement upward, a sense of achieving, of incarnation of ultimate values. It is also noteworthy that they were often planned to be built over generations and centuries.

Less dramatic but even more significant as a symbol of the new belief in progress toward salvation were the great legal monuments that were

built in the same period. In contrast not only to the earlier Western folklaw but also to Roman law both before and after Justinian, law in the West in the late eleventh and twelfth centuries, and thereafter, was conceived to be an organically developing system, an ongoing, growing body of principles and procedures, constructed—like the cathedrals—over generations and centuries.

Bc 118 - Bc 119

## 8 | The Concept of Secular Law

THE PAPAL REVOLUTION brought into being, for the first time, a separate, autonomous ecclesiastical state and a separate, autonomous body of ecclesiastical law, the canon law of the church. By the same action it brought into being, for the first time, political entities without ecclesiastical functions and nonecclesiastical legal orders. The papal party gave the names "temporal" (time-bound) and "secular" (worldly) to these other political entities and their law.

The reduction of the sacral quality of secular government was linked to the concept of the nonecclesiastical polities and their legal orders as being many and diverse, rather than one. The new canon law was one, even as the new ecclesiastical polity was one; but the secular law was manifold, corresponding to the various types of secular polities: imperial, royal, feudal, manorial, mercantile, urban. These new types of polities required new types of law, if only because their religious functions, their "spiritual" aspects, had fallen into the hands of a separate and independent organization which existed universally and whose head was in Rome.

The use of the word spiritual to characterize the law of the church was intended to signify a dimension of sanctity which was lacking in the time-bound or worldly law of the nonecclesiastical realms. Nevertheless, the secular order, including secular law, was no longer considered to be *fundamentally* chaotic or aimless. It was unredeemed; but it was redeemable. It was capable of being regenerated. Like ecclesiastical law, secular law was considered to be a reflection, however imperfect, of natural law and, ultimately, of divine law. It was subject to reason and conscience. It was rooted in divine revelation. Indeed, the very division between the ecclesiastical and the secular presupposed the mission of the church to reform the world, and consequently the mission of all Christians (but especially those in holy orders) to help make imperfect secular law conform to its ultimate purpose of justice and truth.

Secular law was supposed to emulate the canon law. All the various secular legal systems—feudal, manorial, mercantile, urban, royal—adapted to their own uses many basic ideas and techniques of the canon law, if only because the canon law was more highly developed and was available for imitation. This was inevitable, since in the twelfth and thirteenth centuries most lawyers, judges, and other professional advisers and officers of secular legal institutions were clerics and either had been trained in canon law or were generally familiar with its basic features. At the same time, the secular authorities resisted the encroachments of the ecclesiastical authorities upon the secular jurisdiction; and for that reason, too, they sought to achieve for secular law the cohesion and sophistication of the canon law.

Developing partly in emulation of and partly in rivalry with the canon law, each of the various types of secular law eventually came to be treated—though in widely varying degrees—as a legal system, that is, as an integrated and organically developing body of legal institutions and concepts. Yet in comparison with the canon law, the new secular legal systems were much less directly connected with the major political and intellectual events and movements of the time and much more directly connected with diffuse social and economic changes. Feudal law and manorial law, to a somewhat lesser extent mercantile and urban law, and to a still lesser extent royal law were more rooted in custom, and therefore emerged more gradually, than the canon law of the church. The development of the class consciousness of the feudal nobility, and the legalization of its relations with the peasantry, proceeded much more slowly and invisibly than the development of the class consciousness of the clergy and the legalization of its relations with the secular authorities. In addition, the emergence of such “institutions” as commercial markets and urban self-government differed in character from the emergence of such “institutions” as universities and ecclesiastical courts. The differences had to do in part with the kinds and numbers of people who were directly affected. Secular law emerged “on the ground.” It was less programmatic. Partly for that reason its growth was much less clearly marked. By the time university-trained jurists began to “summarize” feudal law or urban law or royal law, it was already there.

Indeed, the first systems of secular law did not *need* to be portrayed in textbooks or taught in university courses in order to be accepted as integrated, ongoing, autonomous bodies of law. Scholarly books on the various branches of secular law helped, to be sure, and they were forthcoming, although not in anything like the quantity and quality of the legal literature produced by the canonists and Romanists. Also, problems that arose in the various types of secular law often found their way into university law courses, although none of those types of law ever at-

tained the dignity of being taught as an independent subject in the university curriculum. By contrast, legal scholarship was indispensable to the creation of the modern system of canon law; without textbooks and courses it was unimaginable, since an articulated theory was a necessary part of its subject matter and an academically trained profession was essential to its practice.

Thus the concept of secular law, as it developed in the late eleventh and twelfth centuries, was a concept of various emerging legal systems, each limited in scope to particular types of temporal affairs, growing out of custom, imperfect, yet divinely guided and subject to correction in the light of reason and conscience.

### The Emergence of New Theories of Secular Government and Secular Law

It is the thesis of this chapter that modern Western political science, including modern Western theories of the state and of law, are rooted in the struggle between the opposing forces of the Papal Revolution. This runs counter to the conventional view—still held, despite the contrary evidence of specialized scholarly literature on the events of the eleventh and twelfth centuries—that modern Western political science originated, in the first instance, in classical Greek thought, especially that of Plato and Aristotle, and in the second instance, in the revival of classical Greek thought during the so-called Renaissance, that is, in the fifteenth and sixteenth centuries, when (it is said) secular states first came into being.

Between ancient times and the fifteenth century, according to the conventional view, political thought was dominated by Stoic and patristic theory, as modified by medieval theology; and both Stoic-patristic political theory and medieval theology are thought to be too much concerned with Christian doctrine to qualify as “modern.” To be sure, in the late thirteenth century, especially with the first Latin translation of Aristotle’s *Politics* (1260), there were some foreshadowings (it is said) of modern political science, although political thought remained basically theological and “scholastic.” Only in the next century were there a few writers who are counted as important precursors of modern ideas and methods of analyzing politics. In particular, Marsilius of Padua (about 1275-1342) stressed the principle of popular consent as the basis of all legitimate government, whether secular or ecclesiastical, and from that drew the conclusion that the secular ruler could be supreme over the church (the papacy being merely an executive ecclesiastical office established by the community). The first really modern political thinker, however, is usually said to have been Niccolò Machiavelli (1469-1527), who is often given the credit not only for inventing the

word "state" to refer to the secular polity but also for founding the modern science of politics based on empirical observation and rational analysis of political institutions.

It is the conventional view that no systematic theory, or science, of the state could have been developed before the late fifteenth or sixteenth century, because prior to that time there existed no fully developed state, in the modern sense, although some individual attributes of statehood may have appeared in the late thirteenth and fourteenth centuries. It is further argued that the very concept of the state, in the modern sense, is alien to the "Middle Ages" since it is contrary to the existence of papal supremacy or claims of supremacy over the whole of Christendom, contrary to the feudal system of decentralized political power, and contrary to the Christian idea that the king should be under God and the natural law.

It has been shown here, however, that the first state in the West was that which was established *in the church* by the papacy in the late eleventh and the twelfth centuries. This, of course, will not satisfy the objection that—for some reason not fully articulated—the discussion should be limited to secular states. But even if this limitation is accepted, it is not difficult to find examples of modern European secular states that were first formed at the height of papal power, at the height of the feudal regime, and at the height of belief in the supremacy of divine and natural law. The Norman Kingdom of Sicily under the rule of Roger II (1112-1154), England under Henry II (1154-1189), France under Philip Augustus (1180-1223), Flanders under Count Philip (1169-1191), and Swabia and Bavaria in the time of Frederick Barbarossa (1152-1190), would qualify, as would many independent city-states which had elaborate systems of secular law and government as early as the middle of the twelfth century—cities such as Genoa, Pisa, Freiburg, Cologne, Ghent, Bruges, and dozens of others. Each of these was a state in the sense of a unified, independent, territorial polity under the authority of a sovereign ruler empowered to raise armies and fight wars as well as to make and enforce laws. Furthermore, during the twelfth and thirteenth centuries theories of secular government and secular law were developed by political and legal thinkers to explain and justify the existence of those states.

### John of Salisbury, Founder of Western Political Science

The first Western treatise on government that went beyond Stoic and patristic models was the *Polycraticus* of John of Salisbury, written in 1159,<sup>1</sup> which created an immediate sensation throughout Europe. Its significance can best be shown by comparing it with an earlier work, perhaps the last important pre-Western (that is, premodern) treatise on government, the so-called *Norman Anonymous* of 1100.<sup>2</sup>

Written at the height of the Papal Revolution, the *Norman Anonymous* presented the case for sacral kingship and against the claims of the papal party. The author contended that both Christ's kingship and his priesthood are transferred directly to kings through the sacrament of coronation. As vicar of Christ, the king is himself divine and is also the priest of his people. Indeed, he can perform sacraments; after his coronation—in accordance with Byzantine, Frankish, and Anglo-Saxon tradition—the emperor or king would go inside the sanctuary and present the bread and wine for his own communion.<sup>3</sup> The king is also the propitiator and savior of his people; therefore he can forgive sins.

According to the *Norman Anonymous*, Christ's priesthood is also transferred to all bishops, through St. Peter. The author criticized papal usurpation of the right of bishops to control monasteries within their own dioceses. Rome's uniqueness, he argued, consists merely in her ancient political and military power; St. Peter bestowed no more distinction on Rome than on Jerusalem and Antioch. The legalism of the canonists was also criticized: canon law, it was said, must always be interpreted in the spirit of the New Testament. Clerical marriage was defended: not all priests are called to celibacy. The high role of the laity in the church was defended. The sacrament of baptism was said to be fundamental to all others, including the eucharist. In all these matters the *Norman Anonymous* represented the ancien régime, the prerevolutionary order which dated from Carolingian times and before.

The style of the argument is of special interest. The *Norman Anonymous* was not a sober evaluation of the pros and cons of alternative positions; it was, instead, an impassioned plea of a dogmatic and prophetic character. It rested its major conclusion—the Christ-centered quality of kingship—not on practical experience but on scriptural symbolism, not on a logic of ends and means but on liturgy, not on legal justifications and analogies but on ecclesiastical tradition.

To a considerable extent, the stylistic qualities and the mode of analysis found in the *Norman Anonymous* were well suited to the basic political-ecclesiastical position to which the author adhered. Yet one may also find similar stylistic and methodological characteristics in many of the polemical writings of the papal party during the late eleventh and early twelfth centuries. It was only with the end of the great struggle, and after great compromises had been made by both sides, that there emerged a new style and a new mode of analysis and eventually a new science of the nature of government. The beginnings of the science are to be found in the writings of the jurists—the canonists and the Romanists—of the late eleventh and early twelfth centuries. The first systematic treatise, however, was John of Salisbury's *Polycraticus*, which built on the earlier juristic writings but went beyond them.

The *Polycraticus* was not, of course, written in the style of present-day

Western scholarship or even in the style of a John Locke or a Thomas Hobbes. Hobbes, who denounced scholasticism generally, would have had little patience with the discursive character of John of Salisbury's analysis, its apparent flitting from one subject to another, its abundant use of Biblical examples, its moralizing tendencies, and above all, its apparent inconsistencies. Many different theories of government were espoused, sometimes almost in passing. Moreover, the dominant theory of recent centuries of Western politics—that (in John Dickinson's words) "the community can organize itself for the accomplishment of its common purposes by developing institutions for pooling the ideas and harmonizing the ends of its members"—was completely lacking.<sup>4</sup>

Nevertheless, the *Policraticus* "discloses still in combination a number of separate strains of thought whose later dissociation was to form the main currents of opposing doctrine for many succeeding centuries."<sup>5</sup> Prior to the Reformation these strains of thought continued to remain largely in combination; thereafter they came apart, and it was this dissociation that most distinguished post-Reformation from pre-Reformation political thought. Thus Salisbury's derivation of the ruler's title directly from God foreshadowed the sixteenth-century theory of the divine right of kings, while his patriarchal theory of monarchy foreshadowed the seventeenth-century conception of personal absolutism; in his conception of a higher law binding the ruler he foreshadowed the doctrine of judicial supremacy advanced by Sir Edward Coke; his doctrine that insofar as men are free from sin and can live by grace alone they need no government anticipated (as Dickinson notes) the Christian communism of radical sects of the Protestant Reformation as well as modern doctrines of philosophic anarchism. So in the *Policraticus* Salisbury "discloses the more or less confused mass of contradictory ideas in which [later political theories] were originally embedded, and which served to limit and correct them."<sup>6</sup> In that sense the book may seem at first reading to be eclectic and syncretistic—a fascinating hodgepodge. But on closer study it becomes apparent that it was not Salisbury's ideas that were confused; it was the political conditions of his time which were complex and contradictory, and it was his virtue to portray the complex structure of those political conditions and to rationalize their contradictions. That is what makes *Policraticus* a scientific work and not merely a utopian or programmatic work. In contrast to classical political thought, which saw various types of political authority (monarchy, aristocracy, democracy) as mutually exclusive alternatives, Western political thought—starting with John of Salisbury—saw them as coexisting in combination with one another.

For over a century *Policraticus* was considered throughout the West to be the most authoritative work on the nature of government. Its supremacy was not challenged until Thomas Aquinas, relying on Aristotle's

Aristotle's *Politics*, published his book *On Kingship* (*De Regimine Principum*).<sup>7</sup> Even then, however, it was recognized that Aquinas built not only on Aristotle but also on John of Salisbury.

Although the *Politics* was not available in the West when Salisbury wrote, the *Policraticus* has a strong Aristotelian dimension, due in part to the author's thorough grounding in those writings of Aristotle which had been translated (some of them very recently).<sup>8</sup> There were also non-Aristotelian dimensions. Stoic and patristic influences were strong, reinforced by references to natural law, justice, equity, and reason from the lawbooks of Justinian. In addition, the *Policraticus* derived much from the Old and New Testaments, as well as from the history of the church and of the Roman Empire, including both its Byzantine and its Frankish-German counterparts. Yet none of these sources and influences were decisive; what was decisive was the way all of them were put together, and that way was characteristic of Western thought after the Papal Revolution.

This last point needs elaboration in view of the tendency of historians to explain the new by its origins in the past—and thereby to explain everything about it except its newness. Some say that medieval political thought, including that of John of Salisbury, was basically in the tradition of the Stoics and the church fathers, supplemented by the Roman lawyers; that Aristotle had little or no influence until the writings of Aquinas; and that even thereafter Aristotelianism was not taken very seriously in political theory.<sup>9</sup> Others say, per contra, that all medieval thought, including political thought, is the history of the translation of Aristotle and that John of Salisbury's political theory was essentially an application of Aristotelian logic to the political realities of his time.<sup>10</sup> Still others claim that the theory of government expressed in the *Policraticus* is essentially Platonic.<sup>11</sup> Finally, it is stated that the *Policraticus* was simply a further development in a long tradition of Christian writings on the relation of the secular power to the church, that it merely applied to new circumstances the "two swords" doctrine of Pope Gelasius I, who in the fifth century had charged Emperor Anastasius to confine himself to the exercise of royal power and to leave the exercise of sacred authority to the priesthood.<sup>12</sup>

Yet it is also said that John of Salisbury's *Policraticus* was something new—that it "contains the first political theory which breaks with the conceptions of the early middle ages and leads onwards to an era in which discussion of the rights and duties of princes takes the place of the old theory of the two swords."<sup>13</sup>

What was new in the *Policraticus*, in the first place, was the author's effort to put together in a comprehensive way theories, texts, and examples from the most diverse and contradictory sources—Plato, Aristotle, Cicero, Seneca, Vergil, Ovid, the Old Testament, the New Testa-

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ment, the church fathers, the Roman lawyers of Justinian's texts as glossed by John of Salisbury's own contemporaries, the canon lawyers, and others—and to attempt to synthesize them. All were, in one sense, authoritative; but in another sense each was subject to criticism in the light of the others. This was the first application to politics of the method (later called "scholastic") which had already been applied—much more rigorously—to Roman law by Irnerius and his successors, to theology by Abelard (under whom John of Salisbury had studied), and to canon law by Gratian (with whose *Decretum* John of Salisbury was familiar).

In the second place, in addition to the effort to synthesize, John found a method of actually achieving synthesis through the use of concepts which combined contradictory norms by abstracting their common qualities. Perhaps the most important example of this was his use of the Latin word *princeps* ("the prince") to refer not to a particular ruler or a particular office but to any ruler, that is, to rulers in general. In classical and postclassical Roman writings, *princeps* had been used to signify the Roman emperor. Not any ruler, not even more than one ruler, but only the holder of the office of emperor was the prince. In later centuries the title was usurped by the Frankish emperor, and still later by other kings, and eventually by the papacy, but it was always used to refer to one person or one office alone; in other words, *princeps* meant the supreme ruler, or office of the supreme ruler, of a particular polity. That is why, in the struggle between the papacy and the emperor, it was important for each side to appropriate the title *princeps* and the texts of Roman law that went with it. Moreover, the polity of the *princeps*—prior to the Papal Revolution—was not considered to be territorial in character but rather, as Gerhart Ladner has put it, functional;<sup>14</sup> that is, his powers and duties were examined in terms of the relation of a lord to his vassals, or a master to his servants, or a priest to his flock—or of Christ to his followers—without regard to the character of the polity as a community of people attached to a given territory, a given country. John of Salisbury, in contrast, set out to analyze the general subject of political and legal relationships between a ruler and his subjects in a territorial system. The prince could be emperor or king or duke or count or some other ruler. The prince's subjects formed a *res publica* (a "republic" or "commonwealth") in the territory which he ruled. Thus in the *Policraticus* the term prince meant something very similar to, though not identical with, what writers in later centuries called the state. It meant "a form of public power . . . constituting the supreme political authority within a certain defined territory."<sup>15</sup> Indeed, in the *Policraticus* the prince is expressly defined as "the public power."<sup>16</sup> What it did not mean, in contrast to what the state came to mean in the sixteenth century, was "a form of public power separate from the ruler and the ruled."<sup>17</sup> In the *Policraticus*, *princeps* was a general concept, but it had not yet become an abstract

concept: the prince as public power was still seen as the "head" whose task was to maintain the "state" (*status*) of the *res publica*, which was seen as the "body." The significant linguistic change in the sixteenth century was to identify that "state of the commonwealth," which hitherto the ruler had had the duty to direct and to serve, with the supreme political authority, the form of public power itself.<sup>18</sup>

Having converted the term prince into a general concept, John of Salisbury was able to develop a theory of government based on a distinction between two general types of princes which were contradictory to each other, although each was a species of the same genus. Princes of the first type ruled according to law, equity, and the "principle of the common welfare." Princes of the second type ruled by force, serving only their own wicked ends; they were "tyrants . . . [by whom] the laws are brought to nought and the people are reduced to slavery."<sup>19</sup>

A similar distinction between a law-abiding king and a tyrant may be found in the writings of the church fathers and in ancient Greek political thought. But John of Salisbury's theory was far more complex than the earlier theories, since it accepted—and drew conclusions from—both the unity and the contradictory nature of the two types of rulership. Like the law-abiding king, the tyrant holds his power from God, since "all power is from the Lord God." "[When the ruler's] will is turned to cruelty against his subjects . . . it is the dispensation of God for His good pleasure to punish or chasten them . . . for good men thus regard power as worthy of veneration even when it comes as a plague upon the elect."<sup>20</sup> The tyrant's laws must be obeyed. Even if they are evil laws, God's will is nevertheless accomplished through them. God "uses our evil for His own good purposes. Therefore, even the rule of a tyrant, too, is good, although nothing is worse than tyranny."<sup>21</sup>

But this more or less traditional argument gradually shifted. An evil ruler, it was said, can no more escape the judgment of God than an evil people; if his people are patient, and if they turn from their own wickedness, God will at last free them from the oppressor. The history of oppression shows that evil rulers are usually punished. But more than that, if the tyrant commands a subject to act contrary to his faith, the subject must disobey. "Some things are . . . so detestable that no command will possibly justify them or render them permissible."<sup>22</sup> For example, if a military commander commands a soldier to deny God, or to commit adultery, the soldier must refuse.<sup>23</sup> More generally, "if [the prince] resists and opposes the divine commandments, and wishes to make me share in his war against God, then with unrestrained voice I must answer back that God must be preferred before any man on earth."<sup>24</sup>

Thus the reader is confronted with two contradictory norms: the tyrant's laws must be obeyed, for the tyrant rules by God's will; yet the



tyrant's laws must be disobeyed when they conflict with God's laws. At first the second norm appears as an exception to the first, only applicable in the case of the most evil commands. Yet the very tyranny itself may conflict with God's laws. The contradictions are carried further and further. Ultimately, the reader is confronted with the startling conclusion that a person may have a right and even a duty not only to disobey a tyrant but even to kill him—the famous right and duty of tyrannicide, which John of Salisbury was the first Western writer to elaborate as a doctrine and to defend with reasoned arguments. He starts with passive resistance: "If princes have departed little by little from the true way, even so it is not well to overthrow them utterly at once, but rather to rebuke injustice with patient reproof until finally it becomes obvious that they are stiff-necked in evil-doing".<sup>25</sup> In the last analysis, however, every person is under a duty to enforce the law by killing a tyrant who has put himself outside the law:

To kill a tyrant is not merely lawful, but right and just. For whosoever takes up the sword deserves to perish by the sword. And he is understood to take up the sword who usurps it by his own temerity and who does not receive the power of using it from God. Therefore the law rightly takes arms against him who disarms the laws, and the public power rages in fury against him who strives to bring to nought the public force. And while there are many acts which amount to lèse majesté, none is a graver crime than that which is against the body of Justice herself. Tyranny therefore is not merely a public crime, but, if there could be such a thing, a crime more than public. And if in the crime of lèse majesté all men are admitted to be prosecutors, how much more should this be true in the case of the crime of subverting the laws which should rule even over emperors? Truly no one will avenge a public enemy, but rather whoever does not seek to bring him to punishment commits an offence against himself and the whole body of the earthly commonwealth.<sup>26</sup>

John's acceptance of the fundamental unity of two contradictory norms—government by law and government by force, both of which were attributed to divine will—served as a foundation for later theories of Western political science. The complexity and modernity of such theories were enhanced by the fact that the contradictory norms which John postulated corresponded to the contradictory political realities of his age. Yet he never specifically identified those contemporary realities, nor did he ever refer to them. Despite—or more likely, because of—the fact that he was intimately acquainted with the leading figures of his time, including popes and antipopes, kings and tyrants, John avoided naming names and left his readers to apply his analysis to contemporary heroes and villains. No doubt it would have been politically risky for him to have done otherwise. It also would have been a distraction from his

main purpose, which was to explore the basic theoretical dilemmas of power and justice which confronted the newly emerging secular states. But how was it possible to analyze political and constitutional norms realistically without giving actual cases?

This question was resolved in the *Policraticus* in a manner characteristic of the new scientific method of the twelfth century. A great many actual cases were put, but they were drawn from ancient Greek and Roman history, from the Old Testament, from the history of the Roman Empire, and so forth. The problems that determined the selection of these cases were not, however, the problems that had vexed ancient Greeks and Romans, Hebrews, or other predecessors of John and his contemporaries. They were the underlying political problems of the twelfth century, which were being debated in the universities, in the papal curia, and in the centers of political and cultural life in England, Normandy, southern Italy, Lombardy, Saxony, Swabia, France, Flanders, Hungary, Poland, Spain, and elsewhere in Europe. To be sure, the numerous cases—the fact situations which were analyzed, often at some length—were found in the literary record of earlier civilizations. But this was by no means so unsatisfactory as it may at first seem. An empirical-inductive quality was introduced, a concern with actual experience, a casuistry, even though the cases were clothed in biblical, Graeco-Roman, or other costumes from older times. The result was a book which was not the portrayal of a utopia or ideal republic, on the one hand, and not a chronicle of decaying times, on the other, though it contained some elements of both. The mixture of empirical-inductive and ethical-normative qualities constituted, in fact, a third innovation of style and method introduced by the *Policraticus*.

One example of the way in which the ethical-normative method and the empirical-inductive method were combined in the *Policraticus* is the treatment of the fundamental problem of the selection of a new prince when a throne becomes vacant. Generally speaking, tribal, feudal, and imperial tradition had all emphasized two basic principles of succession: heredity and election. The ideal solution was for the leading men to elect the oldest son of the dead ruler. However, when the oldest son did not command sufficient support among the leading men, there was trouble. Some might favor another son or a brother or cousin or another relative. The closer his relationship to the dead king by blood or marriage, the easier it was for a candidate to gain support from those who had the power to elect, unless there was an uprising against the entire dynasty.

Prior to the Papal Revolution, the role of ecclesiastical leaders in the choice of a successor was not apt to be essentially different from the role of lay magnates. Bishops and other leading churchmen were themselves imperial and royal councillors, feudal lords, and even clan or dynastic figures. With the centralization of clerical control in the hands of the

papacy, however, and with the separation of the ecclesiastical from the secular authority, the church began to play a distinct and independent role in influencing royal elections. Thus an additional complicating factor was added to the great uncertainty which often surrounded the succession.

In 1159, when John of Salisbury wrote the *Policraticus*, a new dynasty had recently been founded in Norman England by a powerful monarch who was most anxious to secure the succession for his descendants. (In 1170 Henry II had his oldest son, Henry, crowned in advance, and in 1172 he had him crowned again, with his wife.) John was thoroughly familiar with similar tendencies to strengthen the hereditary principle in other states, including Norman Sicily (southern Italy) and Capetian France. He was also aware of the problems connected with the election of the emperor: a system had been developing, especially since 1125, whereby the imperial succession was determined principally by vote of a certain number of the princes of the various (mostly German) duchies; eventually the number of "electors" was fixed at seven, including three archbishops, those of Mainz, Cologne, and Trier. However, the election was usually strongly influenced in favor of the reigning imperial dynasty; in fact, the imperial crown tended to descend to the eldest son or to some other close relative of the deceased emperor.

In the twelfth century and thereafter, the lawyers—Romanists and canonists alike—had a great deal to say about these matters. They tended to analyze them in terms of a wide variety of fairly narrow topics, such as the rules of hereditary succession through male and female lines, the question of the source of power to elect a king or emperor, the validity of election procedures, and the effect of papal excommunication on the legitimacy of the ruler. Such questions were discussed by the jurists in the light of various authoritative texts and legal doctrines, in the light of customs and decrees, and in the light of actual historical cases.<sup>27</sup>

The *Policraticus* did not go deeply into the legal aspects of the question of royal succession; instead, it sought to establish a theoretical resolution of the conflict between the principle of heredity and the principle of election, and to justify ecclesiastical intervention. The "cases" selected for illustration or support were not drawn from the history of Europe. There was a discussion of the selection of Joshua to succeed Moses: "Moses called together the whole synagogue to the end that he might be chosen in the presence of the people, so that afterwards no man might remain to cloud his title." On the other hand, it was God Himself who told Moses to name Joshua the ruler. John commented: "Here is plainly no acclamation by the people, no argument or title founded upon ties of blood, no consideration accorded to family relationship."<sup>28</sup> Then another story from the Bible was mentioned: the daughters of Salphaat came before Moses to claim their father's inheritance. Their petition "was a just one,

for a man's inheritance of lands and estates is to be left to his relatives, and so far as possible, his public office likewise. But governance of the people is to be handed over to him whom God has chosen, to wit such a man as has in him the spirit of God . . . [and who has] walked in the judgments of the Lord."<sup>29</sup>

Thus John of Salisbury concluded that to become a prince one must be chosen by God—which meant that one must have the approval of the ecclesiastical authority. Since the prince is subject to God, he is subject also to the priesthood, "who represent God upon earth."<sup>30</sup> He is a "minister of the priestly power," which has handed over to him the temporal sword, "the sword of blood," which the priesthood itself is too pure to wield directly.<sup>31</sup>

It was not denied that heredity is an important factor in the succession to princely power: "It is not right," John stated, "to pass over, in favor of new men, the blood of princes, who are entitled by the divine promise and the right of family to be succeeded by their own children."<sup>32</sup> Election is also an important factor: John cited a famous passage in Justinian's Digest which refers to the transfer of power to the emperor by the Roman people, and argued that the prince is therefore "representative" or "vicar" of the people.<sup>33</sup> Yet he rejected each of these principles as an absolute. Heredity creates a presumptive claim to the throne, which must be confirmed by election, but the priesthood—that is, the papacy—has a decisive voice when it is in the overriding interest of the church to exercise it. The theory on which this is based is that royal title is derived from God *either* through heredity *or* through election *or* through such other means as God in a given instance chooses to apply.<sup>34</sup>

This example illustrates the synthesis of opposites which was characteristic of scholastic thought in the twelfth century. More specifically, it exemplifies the combining of ethical-normative reasoning with empirical-inductive reasoning. The ethical-normative aspect is obvious: first, the prince should follow the judgments of God and should attempt to obey the divine commandments; second, if the pope, who is charged with supreme responsibility for interpreting the divine will, determines that a candidate for the throne is a heretic or schismatic or otherwise an enemy of the church, such a candidate will not be qualified despite any claims he may have by virtue of heredity or election. The empirical and inductive aspect is less obvious, but it is there. In the first place, the entire exposition is concerned with the realities that determined succession to European thrones in the twelfth century and afterwards: heredity, election, and papal intervention.<sup>35</sup> In the second place, John's recourse to the Bible and to Greek and Roman literature for concrete examples gave the *Policraticus* a broad empirical basis from which to draw conclusions. Contemporary European cases were too close to home to be analyzed objectively in terms of political theory; they

could only be analyzed objectively in terms of *legal* theory, because there the terms of analysis were narrower and were ultimately limited by textual authorities. Contemporary cases were also too complicated; that is, too much was known about them, and hence they were much more difficult to simplify. Examples from antiquity were, for John of Salisbury and his contemporaries, rather like the examples from other cultures used by modern political theorists. They provided a kind of universal anthropological context.

Closely connected with (1) the effort to synthesize opposite norms, (2) by use of general concepts, (3) which corresponded to empirical realities, was a fourth innovation of the scholastic method, which John of Salisbury was the first to apply to the study of secular political institutions. That was the effort to grasp the entire subject matter under consideration as a single whole, an integrated system, and characteristically, to portray the whole in organic terms, as a body.

The *Policraticus* introduced into European thought, for the first time, an organic theory of the secular political order: it was the first European work to elaborate the metaphor that every principality, that is, every territorial polity headed by a ruler, is a body. The prince is compared with the head, the senate with the heart, the judges and provincial rulers with the eyes, ears, and tongue, the soldiers with the hands, the tillers of the soil with the feet. The analogy is carried so far as to liken the financial officers and keepers of the king's treasure to the stomach and intestines, "which, if they become congested through excessive avidity, and retain too tenaciously their accumulations, generate innumerable and incurable diseases, so that through their ailment the whole body is threatened with destruction."<sup>36</sup> Similar metaphors may be found in ancient Greek political thought, and John of Salisbury was familiar with at least Plutarch's use of them and drew on it; nevertheless, the organic metaphor in the *Policraticus* had distinctive features. One is reminded of modern systems theory, with its concepts of flows, subordination, and hierarchy, feedback, controller, and program.

The organic metaphor implies that government, that is, political rule, is natural to man. It is not something which is necessarily imposed on society by force, nor does it originate in a compact or convention. These two alternatives—the coercive theory and the contractual theory—had been elaborated by the Stoics and the church fathers, and had dominated Western political thought prior to the eleventh and twelfth centuries.<sup>37</sup> Both rested on an essentially static view of human nature. Stoic and patristic thought postulated that originally man had lived in a state of virtue, either in paradise or else, in Israel, under the patriarchs, Moses, and the judges. Through his inherent sinfulness, however, man had forfeited rule by charity or higher law. Positive regulation had been forcibly imposed upon him by coercive monarchical government; or else

civil strife had induced him to consent willingly, by a kind of social contract, to monarchical government. Whether introduced by force or by compact, political controls were viewed as a response to man's wickedness rather than to his fundamental desire to live in peace and harmony.

The organic concept of political rule and the concept of its naturalness, which are found in the *Policraticus*, are more akin to Aristotelian thought than to Stoic or patristic thought. Although Aristotle's *Politics* was not available to John of Salisbury, he shared with Aristotle the view that the political community is subject to the law of nature, which is reason, and that nature or reason requires the king to rule according to justice and equity. This view is explicit in the *Policraticus*; it is also implicit in the metaphor of the "body politic."

The metaphor of the body politic also supported a territorial view of the political community. This, too was congenial to classical Greek concepts of organic unity and of a natural division of labor between rulers and ruled. Such concepts became more relevant as Western society moved rapidly from tribal, local, feudal, and sacral-imperial modes of ordering to large, consolidated territorial polities with fairly strong central governments.

Yet it is a mistake to suppose that Aristotelian and other ancient Greek concepts meant the same thing to John of Salisbury and his contemporaries as they had meant to the ancient Greeks. The very premise of Aristotle's political theory, expressed in the first paragraph of the *Politics*—namely, that the highest end of human life is the common good of the political community<sup>38</sup>—was acceptable to medieval Christian thought only by a series of reinterpretations which would have seemed very strange to Aristotle. In the *Policraticus* it is taken for granted that the political community is subordinate to the salvation of human souls under the judgment of God. Aristotle's "nature" is understood by John of Salisbury to be an instrument of divine will. Aristotle's "reason" is taken by John to be a mode of proving divine revelation. It is only with considerable difficulty, and only at a rather high level of abstraction, that such views can be reconciled with Aristotelian thought. A little more than a century after John, Thomas Aquinas labored to show that secular naturalism and religious naturalism—insofar as they are both concerned with *human* nature, and especially with man's *moral* and *rational* nature—do lead to similar conclusions from different starting points. But the difference in starting points can never be obliterated, and it always returns to haunt the argument.

Another aspect of John of Salisbury's theory was not only difficult to reconcile with Greek thought but was wholly repugnant to it: that God manifests himself in two opposing communities at the same time and place, and that every Christian lives in both—the community ruled by

the temporal authority and the community ruled by the priesthood. These are two distinct political communities. Yet the temporal community—the prince and all his subjects—are also members of the ecclesiastical community, the church, and are under its authority. Moreover, the church, while it has the quality of a spiritual community which is not of this world, also has a political dimension: it, too, is a body ruled by a head, a prince (namely, the pope), and in pursuing its spiritual interests it inevitably becomes involved in temporal, that is, secular, affairs.

Thus the classical Greek metaphor of the body politic and the Aristotelian concept of the source of government in nature and reason were used by John of Salisbury in a historical context that was completely non-Greek and non-Aristotelian. The political community, which for Aristotle meant the entire social life of the people of a given place, was split into two bodies, the body of the church and the body of the secular polity, whether a kingdom, duchy, city, or empire. Indeed, Western thinkers could only conceive of the secular community as a body after the Papal Revolution had divided the West into ecclesiastical and secular polities.<sup>39</sup> Before then, the political community, headed by sacral emperors and kings, was wholly mixed up with the church; neither one was a body in the Greek sense, and both together, as the Christian community, were called a body in another mystical sense—namely, the spiritual body of Christ. Thus for St. Augustine priests and bishops lived in the same two cities—the heavenly and the earthly—like other saints and sinners, and neither city was an organic political entity. It was only with the division of Western Christendom into an ecclesiastical polity and a secular polity in the late eleventh and twelfth centuries that the Greek organic theory became applicable to Western politics for the first time—but to only half of it, the secular half.

In fact, the circumstances to which Greek modes of thought were applied by John of Salisbury and other writers of his time were so different from the circumstances in which those modes of thought had originated that it is astonishing that John and the others were able to apply them at all. John was concerned to explain—and influence—a situation which Aristotle would have found completely strange: the coexistence of a number of kingdoms, principalities, feudal territories, cities, and other autonomous secular polities within a centralized ecclesiastical state. It was John's genius to construct a theory—partly out of Aristotelian, partly out of Stoic, and partly out of other (Roman, Hebraic, patristic, Byzantine, Frankish) elements—which interpreted that situation in both normative and empirical terms.

### Theories of the Roman and Canon Lawyers

John of Salisbury was strongly influenced by the writings of the Roman and canon lawyers of his time, who were also engaged in the

same herculean effort to formulate a theory of government and law which, on the one hand, would correspond to the realities of their age, but which, on the other hand, would set limits upon the arbitrary exercise of power by rulers. The lawyers, however, worked more closely than John with authoritative texts and tended to focus more closely on issues capable of practical resolution.

The Romanists took as their field of study the classical and postclassical Roman law contained in the rediscovered works of Justinian, enriched by new concepts derived from canon law and from the newly emerging systems of feudal, urban, and royal law, as well as from theology and philosophy. The Roman texts themselves reveal little political or legal theory of any kind. What little there is consists of scattered references to reason, justice, or equity, and to the powers of the emperor and of subordinate magistrates. Occasionally, very broad principles are discussed very briefly, such as the principle that "justice is the giving to each his due," or that "what pleases the prince has the force of law." More frequently such broad references are connected with specific rules of law; for example, Gaius is quoted as saying that natural reason makes it lawful for every man to defend himself against an aggressive attack. It remained for the twelfth- and thirteenth-century students of these texts—the glossators—to put them together in such a way as to yield a system of general concepts concerning the location, character, and limits of political power.

The canon lawyers of the time engaged in the very same task, but they were less restricted in their sources of authority. Although they did not hesitate to use the Justinian texts, for theoretical matters they tended to look first in other places: the many canons issued by church councils in the twelfth and thirteenth centuries, the abundant legislative and judicial materials which proceeded from the papal curia at the time, the *jus antiquum* systematized by Gratian, the writings of Abelard, Peter Lombard, and other contemporary theologians, the writings of the church fathers, and the Old and New Testaments. The canonists could be just as technical as the Romanists, and the Romanists just as philosophical as the canonists; but on the whole the canonists tended to paint with a broader brush than the Romanists. Also, in analyzing the relations of the ecclesiastical and secular powers the canonists tended to support the ecclesiastical claims more consistently than did the Romanists, though there was rarely unanimity in either group on any controversial question.

An excellent example of the application of Roman law to political theory is the way in which the greatest Romanist of the time, Azo (1150-1230), developed the Roman law texts concerning *iurisdictio* and *imperium* into a concept of sovereignty.<sup>40</sup>

The Digest states, "*Jurisdictio* is a very broad office: for it is able to give

possession of goods and to transfer possession, to appoint guardians for orphans who do not have them, to assign judges to litigants." This is the closest the Roman law of Justinian came to a definition of *iurisdictio*. Other texts give examples of conditions under which it exists, and some indication of why it exists under those conditions. It is stated, for example, that one who judges a dispute between parties has *iurisdictio* only if he heads some tribunal or holds another jurisdiction. In other words, the agreement of private parties does not create *iurisdictio*. In another provision it is stated that one who has *iurisdictio* ought not to exercise it over his family or his companions. Still another text provides that a pro-consul has *plenissima iurisdictio* ("the fullest jurisdiction") and consequently has in his province *maius imperium* ("greatest dominion"), suited to all purposes and exceeded only by that of the emperor.<sup>41</sup>

*Imperium* ("dominion") also remains undefined in the lawbooks of Justinian. Examples of its exercise are given, in which it appears that sometimes *imperium* and *iurisdictio* may be used interchangeably and that sometimes they are to be distinguished from each other. *Imperium* is said to be of three kinds: (1) *maius imperium* ("greatest dominion"), the holder of which can give a final judgment in any matter over which he has *iurisdictio*; (2) *merum imperium* ("pure dominion"), an example of which is the power to impose the death sentence in cases of capital crimes; and (3) *mixtum imperium* ("mixed dominion"), an example of which is the dominion that is involved in jurisdiction in civil cases. All *iurisdictio* is said to involve at least moderate compulsion. Capital criminal jurisdiction is in one place equated with dominion.<sup>42</sup>

Confronted with this rather chaotic picture, Azo, citing his great predecessor Irnerius (1060-1125), the founder of Romanist legal scholarship, started by noting that the relevant provisions of the Digest fail to define *iurisdictio* and only give examples of it. He then offered a definition which would embrace all the examples: *iurisdictio*, he said, is the publicly established power and duty to pronounce judgment and establish justice. He derived his definition in part from the etymology of the word: *ditio* (*dictio*), he stated, means power (*potestas*) (that is, the power of utterance), and *ius*, *iuris* means right, "which is to say that *iurisdictio* is legitimate power."<sup>43</sup>

Then Azo proceeded to classify in four ways the various uses of *iurisdictio* in Roman law. Here he played a trick with the sources—a trick that seems wholly justified if it is assumed that the sources lay a foundation for the development of a system of general concepts and, more particularly, for a theory of political power. The trick was to classify *imperium* as a species of *iurisdictio*. Thus Azo's first division of *iurisdictio* is that of *plenissima* ("fullest") jurisdiction, which is in the prince alone, and *minus plena* ("less full") jurisdiction, which is in the remaining magistrates; however, some magistrates have *plenissima*

*iurisdictio* with respect to other magistrates inferior to them. Azo's second division is that of voluntary and contentious jurisdiction. His third division separates general jurisdiction ("ordinary" jurisdiction) from special jurisdiction, such as that of a legate entrusted with a single type of cause. Finally, Azo listed, as a fourth division of jurisdiction, pure and mixed *imperium*.

John Perrin has said that "the significance of this [classification] cannot be overemphasized . . . *Iurisdictio* is not that which belongs to both *merum* and *mixtum imperium*. But rather these elements of command, these grades of *imperium*, are divisions of *iurisdictio*. *Iurisdictio*, in essence, contains them."<sup>44</sup> The immediate significance of the classification is threefold.

First, "pure dominion," which is the power of the sword, the power of bodily punishment, the power to take life, is limited, in Azo's theory, to those who have jurisdiction, defined as the legitimate power to pronounce judgment and establish justice. (Azo also extended pure dominion to criminal procedure generally, including examination of suspects, arguing that pure refers to any cause in which there are no monetary claims.)

Second, it is implicit in Azo's classification that the ruler's right and power to legislate, which at a later time came to be considered the essence of sovereignty, is viewed as an aspect of his right and power to adjudicate. Indeed, the subordination of the power of the sword to the power of adjudication suggests a concept of sovereignty in which even the ruler's right and power to make war is derived from his right and power to render judgment and do justice.

Third, since the power of the sword is a species of jurisdiction, it is not necessarily true that it can only be exercised by the magistrate with the fullest jurisdiction, namely the emperor. Azo argued that it can also be exercised by magistrates with less full jurisdiction. In other words, Azo distinguished the power of the emperor from that of other rulers not on the basis of *imperium* but on the basis of *plenissima* and *minus plena iurisdictio*. The emperor has the greatest dominion and the fullest jurisdiction, but other magistrates may have pure dominion, including the power of the sword, and less full jurisdiction.

Involved in Azo's analysis is a recognition that the jurisdiction and dominion—the sovereignty, as a later generation would say—of kings, princes, heads of municipal governments, and other magistrates are not derived from the jurisdiction and dominion of the emperor. They have their own jurisdiction and dominion, which is less in quantity, so to speak, than his, but nevertheless independent of his. This is reflected analytically in the classification of various kinds of *imperium* as comprising one of four divisions within the genus *iurisdictio*, separate from the division *plenissima* and *minus plena*.

Behind this new legal classification stood, of course, a more fundamental conception of the source of sovereignty. Azo stated that all rulers have imperium because they have iurisdictio, the right to establish law in their respective states. But what was the source of that lawmaking right? Azo answered that the source was in the corpus, the universitas, the communitas. Jurisdiction did not descend downward from the emperor but upward from the corporate community.

### The Rule of Law

The idea of the secular state, which was implicit in the Papal Revolution from its inception, and the reality of the secular state, which emerged out of the historical struggle between ecclesiastical and secular forces that constituted the Papal Revolution, were in essence the idea and the reality of a state ruled by law, a "law state" (*Rechtsstaat*).<sup>45</sup> This meant, first, that the respective heads of each body, the ecclesiastical and the secular, would introduce and maintain their own legal systems, that is, would regularly enact laws, establish judicial systems, organize government departments, and, in general, rule *by* law. Second, it meant that the respective heads of each body would be bound by the law which they themselves had enacted; they could change it lawfully, but until they did so they must obey it—they must rule *under* law. (This was implicit in the subordination of the sovereign's legislative power to his judicial power.) It meant, third, that each jurisdiction would also be bound by the law of other jurisdictions insofar as that law was itself lawful; each state existed within a system of plural jurisdictions. This last meaning undergirded the other two meanings. If the church was to have inviolable legal rights, the state had to accept those rights as a lawful limitation upon its own supremacy. Similarly, the rights of the state constituted a lawful limitation upon the supremacy of the church. The two powers could only coexist peacefully through a shared recognition of the rule of law, its supremacy over each.

The difficulties of the concept of the supremacy of law over the state are, and were then, abundantly apparent. How can a prince have imperium (or as one would say today, how can a state have sovereignty) if his (or its) legitimate power is subordinate to the will of other sovereign rulers? That is a "contradiction" of the finest scholastic sort. Even more important, how can one speak of the rule, or supremacy, of law within a given polity when no one has been authorized to challenge the chief officer of the polity, whether the pope within the church or the king within the kingdom?

Gratian and his successors said that the pope should be deposed if he breaks the law, but there was no one higher than the pope either to say authoritatively that he broke the law or to depose him. Similarly, royal jurists such as Bracton said that the king has a duty to obey the law, that

the king is "under God and the law," that it is not the king that makes law but the law that makes the king; yet they also said that no judge may dispute the king's acts, that no writ can run against the king, that the king "ought" to obey his own laws but that he cannot be legally required to do so.<sup>46</sup>

Nevertheless, the *Saxon Mirror* (*Sachsenspiegel*), written in the early thirteenth century about the time of Bracton, stated that "a man must resist his king and his judge if he does wrong, and must hinder him in every wrong, even if he be his relative or feudal lord. And he does not thereby break his fealty."<sup>47</sup> Likewise a famous legal formula of Aragon stated that subjects will obey a king only so long as he performs his duties, "and if not, not."<sup>48</sup>

The right and duty to disobey the divinely appointed king-autocrat when he violates fundamental law was based on the belief that that fundamental law was itself divinely instituted. Popes and kings made laws, but they did so as deputies of God; not they themselves but "God is the source of all law."

Thus the concept of the rule of law was supported by the prevailing religious ideology. It was also supported by the prevailing political and economic weakness of rulers and by the pluralism of authorities and jurisdictions. Finally, the concept of the rule of law was supported by the high level of legal consciousness and legal sophistication that came to prevail throughout the West in the twelfth and thirteenth centuries. It was well understood that the preservation of legality required not merely abstract precepts of justice, equity, conscience, and reason but also specific principles and rules such as those embodied in the English Magna Carta of 1215 and the Hungarian Golden Bull of 1222. In many types of documents such as these, including the charters of liberties given to towns and cities by kings and feudal lords, various civil, political, economic, and social rights were specified.

In Magna Carta the barons and the church exacted from the crown the commitment that no scutage or aid beyond the three recognized feudal aids would be levied by the king without the consent of the "general council of our realm" (that is, the king's tenants-in-chief), that "common pleas . . . shall be held in some fixed place," that "no man shall be put on trial upon an accusation unsupported by credible witnesses," that "no free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers or the law of the land," that "to no one will we sell, to no one will we refuse or delay, right or justice," that "merchants shall have safe conduct in and out of England except in times of war and the merchants are of the enemy, in which case they and their goods will be safe if our merchants are treated the same way," that "all can freely leave and enter England except in time of war and except those who have been

outlawed and people who are at war with us," that "only those who know the law shall be appointed as justiciars, constables, sheriffs, or bailiffs," and other such commitments.<sup>49</sup>

Similarly, in the Golden Bull, King Andrew II of Hungary accepted specific limitations on the power of the crown in favor of "higher and lower nobles" (that is, free men), committing himself and his successors to hold a court at a fixed time and place every year, not to "seize any noble, nor destroy him out of favor to any powerful person, unless he shall first have been summoned and convicted according to law," to "collect no tax and exact no money payments nor visit uninvited the estates, houses, or villages of nobles," to confer no offices on foreigners who come into the kingdom "without the consent of the council," to degrade, dismiss, and require restitution from "any lord-lieutenant who shall not conduct himself in accordance with the dignity of his office or shall despoil the people under his authority." Further, hereditary lord-lieutenancies shall not be granted, new money shall not be issued at shorter intervals than twelve months, and if any one has been legally condemned, no protection of powerful persons shall avail to protect him from the consequences. The Golden Bull ends with the words: "We also ordain that if We or any of Our Successors shall at any time contravene the terms of this statute, the bishops and the higher and lower nobles of Our realm, one and all, both present and future, shall by virtue thereof have the uncontrolled right in perpetuity of resistance both by word and deed without thereby incurring any charge of treason."<sup>50</sup>

Many centuries later, the concept of the rule of law came to be identified with the separation of the legislative, administrative, and judicial powers.<sup>51</sup> The later concept shared two features with the earlier concept. First, power was divided, although in the earlier period the "checks and balances" had been provided chiefly by concurrent polities within the same territory rather than by concurrent branches of the same polity. Second, law was derived from, and rooted in, a reality that transcended the existing structure of political power. In the later period, that transcendent reality was found in human rights, democratic values, and other related beliefs. In the earlier period it had been found in divine and natural justice.

## 9 | Feudal Law

THE TERM "FEUDALISM" was only invented in the eighteenth century. Prior to that time—ever since the twelfth century, in fact—people had spoken and written not of feudalism or of "feudal society" but of "feudal law," referring primarily to the system of rights and obligations associated with lord-vassal relationships and dependent land tenures. During the eighteenth-century Enlightenment, however, the entire social order in which such lord-vassal relationships and land tenures had once existed was for the first time called feudal society, and the chief characteristics of that society were defined as a privileged nobility and a subject peasantry. This definition was broad enough to include many aspects of eighteenth-century European society, as well.

Eventually, the term feudalism came to be associated with an older phrase, dating from the time of the Reformation: "the Middle Ages." Feudalism was said to be that type of society which had existed in the West during the Middle Ages; more than that, it was said to be a type of society that had existed in non-Western cultures as well, during the "medieval" period of their history. This usage conceals an ethnocentric assumption that certain characteristics of Western social and economic history may also be taken to define the social-economic order of other societies. Moreover, many historians of the nineteenth and twentieth centuries, by neglecting the belief system, the relations between ecclesiastical and secular authorities, and above all, the legal institutions and concepts that accompanied the feudal economies of the West, have given a distorted view of the dynamics of so-called feudalism, both in the West and elsewhere. Marxist historians, in particular, who treat the mode and relations of production as the infrastructure or base of feudal society, and the politics, ideology, and law as a superstructure, have failed to show why Western feudalism produced a fundamentally

different kind of superstructure from that produced by, say, Japanese or Russian feudalism.

At the same time, many other historians who reject the Marxian categories of base and superstructure have also failed to show in any systematic way the interaction between the political, ideological, and legal institutions and concepts of the West, on the one hand, and such social and economic institutions as dependent land tenure, lord-vassal relations, and serfdom, on the other. But if the former are not merely the reflection and instrument of the latter, as Marx claimed, then what are the relations between the two? Can it be shown that, contrary to Marxist theory, "consciousness" determined "being"? Or, if these categories themselves are wrong, what categories should replace them?

The relationships between social and economic factors on one side and political and ideological factors on the other side can be clarified by proceeding from the basis of four methodological postulates.

First, legal institutions should be seen to overlap the dividing line between social-economic factors and political-ideological factors. Law must be treated as an essential part of both the material structure of Western society ("mode and relations of production") and its spiritual life ("political and social consciousness")—as both "base" and "superstructure."

Second, an analysis should be made, not of feudalism but of the different kinds of law that regulated social and economic relations in the period under consideration. This analysis must include not only *feudal law* in the technical sense of that phrase, that is, the law regulating feudal tenures (fiefs) and lord-vassal relations (fealty), but also *manorial law*, the law regulating lord-peasant relations and agricultural production and manorial life generally. The juxtaposition of feudal law and manorial law should help to overcome the objections of those social and economic historians who rightly charge certain political and legal historians with having neglected a principal feature of feudalism, the existence of a subject peasantry bound to the land. The countercharge of excessive breadth (and consequent vagueness) may be avoided by adhering to the important technical distinction between the two types of regulation: the regulation of fiefs and fealty, on the one hand, and the regulation of manorial relations, on the other. These were two distinct branches of law, just as corporation law and labor law are two distinct branches of law in the West today, although sociologically and historically they are closely interrelated.

Third, a dynamic element is added to the study of Western feudalism by examining the changes that took place in feudal and manorial law from the time of the Papal Revolution. For the tremendous convulsion of Europe which accompanied the so-called Gregorian Reform and Investiture Struggle could not have left legal regulation of the mode and

relations of production unaffected, and indeed this periodization of Western feudalism is supported by leading social and economic historians.<sup>1</sup> Marc Bloch divides feudalism into the "first feudal age," from the eighth to the mid-eleventh century, and the "second feudal age," from the mid-eleventh to the fifteenth century. "There were," he writes "in a word, two successive feudal ages, very different from one another in their essential character." Similarly, Georges Duby considers the eleventh century to be the critical period in the emergence of Western feudalism, and he calls the years from 1070 to 1180 "the century of great progress," in which feudalism as a system was established throughout Europe.

Fourth, it should be recognized that prior to the mid-eleventh century lord-vassal relations and land tenure, on the one hand, and lord-peasant relations and manorial life, on the other, were not subjected to systematic legal regulation; that although they were legally regulated by custom (including customary law), feudal and manorial custom were largely inchoate and diffused in general social and economic custom; and that a most important aspect of the crucial changes that took place in the eleventh and twelfth centuries was that both feudal law and manorial law were disembedded and substantially systematized. If the late Russian historian George Vernadsky was correct in saying that Russian feudalism was "feudalism without feudal law," it can also be said that Western feudalism before the eleventh century was "feudalism without feudal law." Of course, that is an exaggeration: there was some feudal law (and some manorial law) in both Russia and the Frankish Empire, but it was largely diffuse and unsystematized. In the century between 1050 and 1150 feudalism in the West became legalized, in the sense that feudal law and manorial law were for the first time conceived as integrated bodies of law, with a life of their own, by which all aspects of feudal and manorial relations were consciously governed.

#### Feudal Custom in the West Prior to the Eleventh Century

Before the great upheavals of the late eleventh and early twelfth centuries, the peoples of Europe were organized politically in a loose, complex, and overlapping structure of (1) local units, (2) lordship units, (3) tribal (clan) units, (4) large territorial units such as duchies or principalities, which might include a number of tribes (clans), and (5) kingdoms, of which the Frankish kingdom, from the year 800, was also called an empire. The kingdoms were conceived not as territorial units but primarily as the community of the Christian people under a king (emperor), who was considered to be Christ's deputy and supreme head of the church as well as of the nobility, the clans, and the army. The church itself was not conceived as a political unit but primarily as a spiritual community led ultimately by the king or emperor and intermediately by



bishops, of whom the Bishop of Rome was by tradition the most important.

Within this general classification, there were very wide differences from locality to locality, lordship unit to lordship unit, tribal unit to tribal unit, and so on. The economy of Europe before the eleventh century was largely local and agrarian. There was very little intercommunication; apart from monks and some others of the clergy and a small number of merchants, and except for military campaigns, only the higher nobility and kings traveled. There were practically no permanent representatives of the central authorities in the localities. Efforts to place them there were generally frustrated. Not only power but also culture was widely dispersed. The customs of one place might differ substantially from the customs of another place fifty miles away.

Nevertheless, the political organization of the peoples of Europe in the period from the sixth to the eleventh centuries reveals a common pattern of development.

The smallest local political units were generally called *villae* ("villages," or "vills"); these were grouped into *centenarii* ("hundreds"), which were grouped, in turn, into *comitatus* ("counties"). These local units first came into being when the wandering tribes from western Asia, having swallowed up what was left of the Roman Empire in the West, finally settled down in the fourth, fifth, and sixth centuries.

The second type of unit, lordship units, came into being soon thereafter. Their number increased as settlers "commended themselves" to leading personages among them and promised to render services in return for food and clothing as well as for protection against enemies. The person who commended himself became "the man" of the lord. He might live in the lord's household, or the lord might provide him with land to work for himself.

Lordship units also came into being when leading personages, and especially clan chiefs and kings, granted a benefice (*beneficium*, "benefit"), that is, land or other property, or an office or other privileges, to be held in return for services. The term "benefice," which at first connoted that the tenant was to receive the grant on relatively easy terms, was eventually confined chiefly to grants to a church; in the late eighth and ninth centuries it was largely replaced by the Germanic term *feod*. *Feod*, which was rendered *feudum* in Latin (hence the English word "feudalism" and the French word *féodalité*), originally meant cattle (as the German cognate *Vieh* still means "cow"); then it came to signify valuable moveable goods (compare the English word "chattels," derived from "cattle"); and finally it came to mean a form of land tenure, rendered "fief" or "fee" in Norman English. (Thus to speak of a lawyer's or doctor's "fee" is to perpetuate the concept of a grant of a form of tenure that carries the obligation to render services.)

In the nineteenth century, many historians traced the remote origins of the first kind of lordship unit, formed by commendation, to the *Gefolgschaft* ("following") of the Germanic tribes, which was a band of trusted soldiers surrounding the war chief. Others traced the remote origins of the second kind of lordship unit, formed by grant of a fief, to the *patrocinium* ("patronage estate") of the late Roman Empire, which was land allocated by the patron to his *clientes*, who held it with a certain degree of immunity from state authority. Debates over the Germanic as against the Roman origins of "feudalism" were conducted with extraordinary passion because important nineteenth-century political interests were at stake. The Germanists were the nationalists and the romantics. The Romanists were the cosmopolitans and the individualists. Both sides believed in a unilinear legal evolution from earliest times. And both repressed the memory of the Papal Revolution.

Today it is generally accepted that neither the *Gefolgschaft* nor the *patrocinium* survived even the Frankish period, much less the Papal Revolution. In the late eighth and ninth centuries, commendation and the granting of a fief were often merged. Moreover, in the ninth century the fief, with its obligations of service, often descended to the heirs of the tenant—then usually called by the Celtic term "vassal"—upon the renewal of their oaths of commendation.

The oaths were part of a solemn rite. The vassal, bareheaded and unarmed, went down on his knees, placed his hands together and put them (pointing upwards) between the hands of the lord, and acknowledged himself to be the lord's "man" (*homme*, *homo*). By the tenth century it had become a widespread practice for the two then to kiss each other on the mouth. By this ritual of homage the vassal became the lord's "man of mouth and hands." But with the linking of commendation and land tenure, a second part was added to the ceremony, namely, a religious oath of fidelity ("fealty") by the vassal. Laying his hand on the Bible or on relics, the vassal pledged his faith (*fides*, *fidelitas*) to his lord. Often the lord would then perform a symbolic investiture of the vassal, handing over some object, such as a flag or a cross or a key, to symbolize infeudation, that is, the granting of a fief. In time every vassal swore fealty.

The linking of vassalage with fiefs through the oath of fealty became characteristic of Frankish feudal custom, though there were wide variations in that custom, both in time and in space. The Frankish kings carried this "feudo-vassalitic" (as modern historians call it) custom to all parts of their domains, including northern Italy (down to Rome), Spain, Hungary, and Poland. Only Scandinavia, Friesland, and a part of the Netherlands that borders on the North Sea remained immune. In England, feudal custom developed along different but parallel lines: the institutions of vassalage and fiefs were known, but in a less systematized

form and without the same linkage between the two. However, the Norsemen, who had settled in the western part of the Frankish Empire in the early 900s and had absorbed Frankish feudal custom, carried it with them to England in 1066 and to Sicily and southern Italy in the 1070s and 1080s. The Crusaders carried it to Palestine in 1099, eventually founding there the Norman Kingdom of Jerusalem, whose Assizes of Jerusalem created a model system of serfdom, knighthood, lordship, and fiefs.<sup>2</sup>

Feudal lordship units and local political units (vills, hundreds, counties) could and often did exist side by side. The vill, the hundred, and the county each had its own governing body, which was a court (in England, "moot") consisting of an assembly of free men. Each assembly met at regular intervals to transact the public affairs of the vill, hundred, or county. This included (but was by no means confined to) the resolution of what would today be called criminal and civil disputes. Each lordship unit, which in the tenth century very often took the form of a manor, had its own court, consisting of the periodic assembly of all freemen and serfs of the manor, but not the slaves. The manorial court also resolved criminal and civil disputes.

In the western parts of the Frankish Empire, but not in the eastern and southern parts (especially not in Germany and Italy), local government was absorbed to a considerable extent by feudal manors in the tenth and eleventh centuries. In England, hundred government and county (shire) government continued to predominate—although manorial government also existed—until the Norman Conquest, when a majority of the hundred courts were absorbed into the feudal manors allocated by the Conqueror and when the county courts became, to a large extent, instruments of royal authority.

Above the level of the manor and the hundred or county, government in the period prior to the late eleventh century was greatly hampered by difficulties of communication. The lords of lords—clan chiefs, dukes, princes, and other leading nobility—were victims not only of the local character of the economy but also of the sparseness of settlement in Europe from the sixth to the early eleventh centuries, which was accentuated by a generally stationary or declining population throughout the period. The Roman cities had virtually disappeared; there were only a small number of important towns, and hardly any of them had more than a few thousand inhabitants. Travel was difficult; twenty to twenty-five miles a day was the normal rate of speed for a nobleman moving with his entourage from one vassal's estate to another. Such visits were necessary for the nobleman, not merely to supervise the administration of his estates but also to support himself and his household. Food had to be consumed on the spot; to transport it to a central location would have been too expensive. For the same reason, durable goods had to be pro-

cured on the spot and carried with one or left on deposit, so to speak. Such merchants as existed were chiefly peddlers, *pieds poudreux* ("men of dusty feet"), since there were generally not enough customers assembled in one place to justify selling through local representatives.

Kings and emperors also lived by travelling. In the course of the year 1033, for example, Emperor Conrad II journeyed from Burgundy to the Polish frontier, thence back again across Europe to Champagne, and eventually to his native Saxony—a distance of some 1500 miles as the crow flies!<sup>3</sup>

The empire, as well as those kingdoms (like the Anglo-Saxon kingdom) that were outside the empire, had virtually no central administration, virtually no centrally administered fiscal system, virtually no central judiciary, virtually no representatives whatsoever in the localities; emperors and kings carried their government, for the most part, with them, in their imperial or royal households, as they "rode circuit" through their domains.

The story of the peripatetic emperor or king, always on the move, and of peripatetic dukes, earls, princes, and other high noble lords, most of them on the move most of the time, with an immobilized agricultural population living in sparsely settled villages and manors, almost completes the foundation for an analysis of the transformation of feudal custom into a system of feudal law in the eleventh and twelfth centuries. What is missing is the military aspect, which in some ways was the most important.

In fact, throughout the entire period prior to the eleventh century, war was the dominant daily concern of emperors, kings, and nobility. Constantly attacking the periphery of Europe, and always ready to swoop into the central parts, were the Norsemen, the Saracens, the Magyars.<sup>4</sup> Within Europe itself there were continual wars among the clans. The Carolingian kings sought, with some success, to induce the leaders of the various clan and territorial units to send foot soldiers to form a "popular," that is, an imperial army. Similarly, the Anglo-Saxon kings relied on a general levy (*fyrð*). However, these were not standing armies but rather reserves available for a common emergency. In time, the vast majority of people came more and more to think of themselves as peasants rather than as soldiers. They resisted conscription, and eventually they were supported in this by the church; the Cluniac Reform of the tenth and eleventh centuries proclaimed the Peace of God, whereby clergy and peasantry were to be exempted from military attack. The other side of the coin was the fact that the peasantry increasingly diminished in military value as the foot soldier gave way to the heavily armed horseman.

Various explanations have been given for the fateful emergence of the armed horseman in Frankish military history. The example of the Arab

enemy in the eighth-century wars in Spain and southern France was one factor. The importation of the stirrup and the horseshoe from Eurasian tribes in the East also seems to have played an important role. There were undoubtedly other causes of a social nature. In any event, the consequences for feudal custom were momentous. It was extremely expensive to produce an armed horseman, not to mention a horse capable of carrying him. Since hitherto almost all soldiers had had to furnish their own equipment, it took a very wealthy man to provide himself with heavy armor plus a fighting horse, and it also took a man with leisure to undergo the necessary training in the use of them. In the year 1000 the price of a knight's armor alone would buy a good piece of farm land.<sup>5</sup>

Very gradually, in the eighth, ninth, and tenth centuries, a warrior class of armed horsemen, called knights (*milites* in Latin; *chevaliers* in French, from *cheval*, "horse"; *Ritter*, "riders," in German), emerged in the Frankish Empire, whose sole occupation was to serve their lords in battle. The peasants gradually came to be used only rarely for combat—chiefly for defense in emergencies—although they were often required to deliver provisions to the knights and food for the horses. In the tenth century the warrior knights were generally supported by their lords in the two-story wooden castles that came to be built on hills, surrounded by moats, for defense against marauders—and as bastions for marauding.

Thus in many parts of Europe, though not everywhere, the knight came to have a virtual monopoly of the military art. At the same time, by the practice of vassalage he was incorporated into (1) the system of land tenure and (2) the system of government. This manifested itself in various ways. The knight, having pledged fealty to a lord, might be invested with a fief, in which case he himself became a lord; if the fief included a manor and serfs, the knight was both landlord and governor. More often, the knight served in the household of his lord, keeping himself in readiness for combat. He might fight for his lord directly, or his lord might send him to his own superior lord in fulfillment of the feudal obligation of service which attached to his fief. A fief which carried the obligation to provide upkeep of one knightly family was called a knight's fee. A fief which carried the obligation to provide a superior lord with one or more knights was said to be held in knight's service. As the military significance of armed cavalry increased during the tenth and eleventh centuries, more and more land throughout Europe came to be held in knight's service.

In economic terms, it has been calculated that in the eleventh century one knightly household was worth about fifteen to thirty peasant families: that is, it took that number of peasants on the lord's estate to produce the wealth necessary to procure a horse and armor and to support a professional warrior and his family. Thus it was not accidental

that the spread of knighthood across Europe was accompanied by the spread of manorial estates in which the labor force consisted largely of a peasantry bound economically, and in many places legally, to the land.

### The Emergence of a System of Feudal Law

In the period from 1000 to 1200 A.D., and chiefly between 1050 and 1150, feudal arrangements in Europe underwent substantial changes, which may be classified under the following headings: (1) objectivity; (2) universality; (3) reciprocity of rights of lords and vassals; (4) participatory adjudications; (5) integration; and (6) growth.

#### OBJECTIVITY AND UNIVERSALITY

In this period feudal arrangements which had previously been relatively arbitrary and loose in their signification and diverse and discriminatory in their local operation became substantially more objective and precise and substantially more uniform and general.<sup>6</sup>

For example, starting in the latter part of the ninth century, especially in France and Italy, the heir of a vassal often succeeded to the vassal's position upon his death. Nevertheless, only in a very loose sense may one speak of the "heritability" of fiefs at that time. Then, however, the *usage* (pattern of behavior) developed that upon a vassal's death a new investiture would be granted by the lord to the vassal's heir if he was willing to do homage; and next, this usage became internalized as a *norm* of behavior, so that it was considered to be a violation of a customary norm (norm of customary law) for the lord to withhold such investiture from the heir. Yet the norm of customary law did not exist in all places or under all circumstances. Indeed, throughout the ninth and tenth centuries European feudal custom (including both patterns of behavior and norms of behavior, both custom as usage and customary law) was extremely diverse. By no means all homage was accompanied by investiture with a fief, and by no means all fiefs were bestowed upon "men of mouth and hands." Many fiefs were still granted in return for payments in kind and not services, under arrangements that were terminable at the will of the grantor. This was also a period when knighthood was only beginning to become of great military importance, and when consequently the emerging class of knights were pressing for recognition—and for land.

In the eleventh and twelfth centuries, however, both the military situation and the legal situation were more favorable to the knightly class and hence to the vassals upon whom lords relied to furnish knights for military service. Therefore the vassal was able to insist on the right of his heir to inherit his interest in the fief. Indeed, in the late twelfth century in England and Normandy this right came to be vindicated in the royal and ducal courts, respectively, by a special writ called "mort d'ancestor," under which the heir was awarded possession and the lord who wrong-

fully entered was a trespasser.<sup>7</sup> Also, in most places the custom of primogeniture was established, whereby the oldest son inherited the entire fief, which was thus preserved against dismemberment—although parts of the fief ("appanages") might be set aside to compensate younger sons.

Thus in the eleventh and twelfth centuries the heritability of the fief became an objective and universal norm, relatively precise in its signification and more or less uniform throughout Europe.<sup>8</sup> A similar development took place with respect to other norms of feudal customary law, such as the alienability of the fief by the vassal, the commutation of various personal feudal obligations into money payments, and suit of court.

#### RECIPROCITY OF RIGHTS OF LORDS AND VASSALS

In the same period, and chiefly between 1050 and 1150, various forms of personal subjection of vassals to lords became transformed into property obligations, and at the same time various forms of direct economic domination by lords became commuted into taxes, leaving vassals with substantially more personal freedom and economic autonomy.

Personal subjection of vassals in the ninth and tenth centuries had taken the form of the right of the lord to require the vassal to perform military service, the right of the lord in certain cases to marry (or marry off) the vassal's daughter, the right of the lord to the personal assistance of the vassal in the event of need, and various other such lordly rights. In the eleventh and twelfth centuries, the duty of military service was generally commuted into money payments (in England and Normandy, "scutage"), the right of marriage was generally commuted into a one-time tax on the marriage of a vassal's daughter, and the right to personal assistance was also generally commuted into various taxes ("aids").

Economic domination had previously taken the form, in many places, of the power of the lord to enter the fief and supervise its administration and take its products, the absence of any right on the part of the vassal to alienate the fief, and the power of the lord to have it back on the death of the vassal. In the eleventh and twelfth centuries these powers of the lord were subjected to stringent legal limitations. The concept of "seisin" was developed in the eleventh century to characterize possessory rights of persons who "held" land or goods without owning them; one who was "seised" could not be forcibly ousted by anyone, nor could his chattels be lawfully taken from him against his will—even by his lord. Also, the development of the heritability of the fief by the vassal's heirs was accompanied by the development of its alienability by the vassal. Such alienation sometimes took the form of subinfeudation, that is, the enfeoffment of a subvassal. In the event of transfer of a fief to an heir or transfer by

subinfeudation or other form of alienation, a tax was to be paid to the lord.

These legal developments in the direction of reification of rights obviously fostered the increased economic autonomy of the vassal. More and more his obligations to the lord were expressed in terms of payments, whether in kind or in money, instead of in terms of personal services as before. More and more he managed the fief without the lord's strict personal oversight.

The increasing legal protection of vassals is not to be interpreted, however, as the victory of one economic class over another. Except for the king, who was liege lord of all, every lord was also someone else's vassal; and as the result of subinfeudation every vassal who held a fief was also someone else's lord, except at the lowest rung of the ladder where the lord of the manor ruled not over vassals but over serfs and other peasants.

As Marc Bloch writes: "In a society in which so many individuals were at one and the same time commended men and masters, there was a reluctance to admit that if one of them, as a vassal, had secured some advantage for himself, he could, as a lord, refuse it to those who were bound to his person by a similar form of dependence. From the old Carolingian capitulary to the Great Charter, the classic foundation of English liberties, this sort of equality in privilege, descending smoothly from top to bottom of the scale, was to remain one of the most fertile sources of feudal custom."<sup>9</sup> Bloch's reference to the Carolingian period seems to contradict the emphasis that has been placed here on the changes that occurred in the eleventh and twelfth centuries; but only two pages later, Bloch makes the crucial distinction: "As early as the Carolingian age, custom favored the claims of descendants [of vassals to inherit] . . . During the second feudal age [that is, after the mid-eleventh century], which was everywhere marked by a sort of legal awakening, it became law."<sup>10</sup>

These developments in the direction of increased personal freedom and economic autonomy of vassals were especially manifested in the legalization of the element of reciprocity in the lord-vassal relationship. Of course, a certain degree of reciprocity was always present in the relationship; to become "the man" of a lord always required an acceptance by the lord of a lifelong relationship involving not only the man's loyalty but also the lord's loyalty, and when this was joined with enfeoffment of the vassal a reciprocal landlord-tenant relationship was also established. Yet the practice of reciprocity in these loose forms, and even the acceptance of a binding customary norm of reciprocity, was a far cry from the full-fledged contractual reciprocity that began to be associated with the lord-vassal bond in the eleventh century.

The phrase "contractual reciprocity" is subject to a qualification: the feudal contract (whether of homage or of fealty without homage) was a contract to enter into a status. In that sense it was like a marriage contract, to which in fact it was compared by the twelfth century jurists. In contrast to commercial contracts, for example, virtually all the rights and obligations of the lord-vassal contract were fixed by (customary) law and could not be altered by the will of the parties. The contractual aspect was the consent to the relationship; the legal content of the relationship, however, was ascribed. In addition, the contract of homage could not be dissolved by mutual consent because it was founded on sacred vows of lifelong commitment. On the contrary, the contract of fealty could be dissolved by mutual consent, and both the contract of fealty and the contract of homage could be dissolved by one party upon breach of its fundamental obligations by the other.

It is sometimes suggested by writers on feudalism that the homage of the vassal was reciprocated by the grant of a fief. That suggestion confuses homage and fealty. The reciprocity in homage consisted of the fact that the vassal became the lord's man in return for the lord's becoming the vassal's lord; this was the lifelong relationship, sealed by a kiss, the equivalent—almost—of a marriage.<sup>11</sup> The vassal's pledge of faith (fealty) to the lord was another matter. That was reciprocated by the lord's pledge of faith to the vassal. In addition, the lord often invested the vassal with a fief. The vassal's pledge of fealty included the duty to manage the fief faithfully. The lord's pledge of fealty included the duty not to overstep the legal limitations upon his powers as well as the duty to assist the vassal in various specific ways. The vassal could owe homage and fealty to more than one lord, just as he could hold different fiefs of different lords. A system of *ligantia* developed in the mid-eleventh century in France and elsewhere, under which a vassal reserved his obligations to one or more "liege lords." In England from the twelfth century on, the king was always a liege lord and at enfeoffment the vassal was required to say: "save my fealty due to the king." As fiefs became heritable and alienable, within broad legal limits, vassalage was once again separated from homage and became subject to its own rules of reciprocity.

Of critical importance from a theoretical standpoint, and not without substantial practical importance in unusual situations, was the right of either the vassal or the lord to dissolve a contract of homage or of fealty upon sufficient provocation. If one party violated his obligations and thereby caused the other party serious injury, the latter had the right to dissolve the relationship by a solemn gesture of defiance, called *diffidatio* ("withdrawal of faith"). In the first systematic treatise on English law, written in 1187 and attributed to Glanvill, it was stated that a vassal owed his lord no more than a lord owed his vassal, reverence alone ex-

cepted, and that if the lord broke faith the vassal was released from his obligation to serve. The *diffidatio* is a key to the legal character of the feudal relationship in the West from the eleventh century on. Moreover, as Friedrich Heer has written, the *diffidatio* "marked a cardinal point in the political, social, and legal development of Europe. The whole idea of a right of resistance is inherent in this notion of a contract between the governor and the governed, between the higher and the lower."<sup>12</sup>

#### PARTICIPATORY JUSTICE

It was a basic principle of justice throughout the West that every lord had the right to hold court, that is, to preside over his vassals—or over his tenants, whether or not they were vassals—in court proceedings. This principle was an expression of the merger of military-economic and political relations: the military-economic enterprise of administering a fief was at the same time the political enterprise of governing the community of people who were attached to the fief. And government took the form, chiefly, of exercising jurisdiction through proceedings of a broadly judicial character.

One way to view the emergence of feudal courts in the tenth and eleventh centuries is to emphasize the breakdown of centralized royal authority during the ninth century, accompanied by royal grants of immunity to great landowners. This view must be qualified, however, by the recognition that centralized royal authority had never been firmly established even in Charlemagne's empire. To be sure, Charlemagne and his successors had tried to provide in each district of their domain a permanent group of "law-finders" (*scabini*), centrally appointed, who were to decide cases under the presidency of the centrally appointed governor of the district (*Graf*, or count). Yet these lay tribunals, which usually consisted of prominent local landowners, could hardly be controlled from the center. Moreover, local justice continued to be administered to a very considerable extent by popular assemblies. It was these popular assemblies, as well as such *scabini* courts as continued to exist, that were largely replaced by feudal courts in the tenth and eleventh centuries in the Frankish Empire. Similarly, in England after the Norman Conquest it was the local popular assemblies—the hundred courts and the shire courts—that were replaced by feudal courts, though to a lesser extent than in France.

Thus the tradition of group adjudication was strong, while the tradition of professional adjudication by legally trained officials hardly existed, prior to the late eleventh century. The dominant concept of the judicial process was "suit of court": the lord presided, either in person or through his steward, but the judging was done by the "suitors," that is, the vassals or tenants. A person charged with an offense or an obligation was entitled to be judged by his fellows—his equals ( *pares*, "peers"). This

phrase—the right of a person to be tried “by judgment of his peers” (*per iudicium parium*)—was made famous in England by its inclusion in Magna Carta in 1215; it may be found, however, in similar documents issued in other countries of Europe. Thus a constitution promulgated by Emperor Conrad II in 1037 declared that no vassal should be deprived of an imperial or ecclesiastical fief “except in accordance with the law of our predecessors and the judgment of his peers.”<sup>13</sup>

Feudal courts were not merely agencies of dispute resolution or law enforcement in the narrow sense; they were assemblies for consultation and deliberation on all matters of common concern. Thus seignorial courts might be asked to fix the amount of aids to be paid by vassals to support a military campaign, or to declare rules concerning the use of common fields or forests, or to consent to the enfeoffment of a new tenant or the expulsion of a defaulting tenant. At the same time, seignorial courts might exercise what in France was called *haute justice* (“high justice”): that is, they might decide cases of capital offenses, such as murder, robbery, and other felonies. Eventually, first in the Norman kingdoms of Sicily and England and subsequently in Normandy and France and elsewhere, the king’s (or duke’s) courts acquired a large share of the jurisdiction over *haute justice*—also called “pleas of the sword”. Even in England, however, some great lords retained such jurisdiction, and in France and Germany a great many lords continued to exercise high justice up to the sixteenth century. Everywhere seignorial courts continued to have jurisdiction over petty crimes and certain types of civil actions (*basse justice*, “low justice”), as well as general jurisdiction over rights in land held of the lord whose court it was. (English seignorial courts also retained for some centuries capital jurisdiction over “hand-having thieves,” that is, thieves caught in the act.)

Either the lord himself or his steward presided over the feudal court, and the suitors gave judgment. In communal and civil cases, proof was generally by compurgation or battle or, prior to its abolition in 1215, ordeal. In addition, juries were often appointed to decide disputed matters. Procedure was oral and informal. These were characteristics of seignorial justice throughout Western Europe.

A striking feature of seignorial justice was the jurisdiction of the seignorial court over claims by a lord against a vassal. The lord used his court to sue his tenants for defaults in paying feudal dues, for trespasses on the lord’s domain, and for other breaches of obligation. Maitland writes: “As to the objection that the lord is both judge and party, that fails, for the lord is not judge; the defendant has the judgment of his peers.”<sup>14</sup> Of course, the lord could make life difficult for those who voted against him. However, the vassal could appeal from a decision of the court of his immediate lord to the court of that lord’s superior. This right of appeal was articulated in specific legal terms. For example, the French

jurist Philippe de Beaumanoir, writing at the end of the thirteenth century but describing a legal regime—that of the county of Beauvaisis—that had existed for more than a hundred years, listed the following grounds upon which a knight could appeal from a judgment of the court of his lord to the next higher seignorial court: (1) the denial of justice, (2) false judgment, (3) lack of jurisdiction, (4) authorization to appeal granted by writ of the count or of the king, (5) direct concern in the case on the part of the count, as when the knight claimed that he had recently been unjustly disseised of his freehold land.<sup>15</sup> In addition, although the vassal could not sue his lord in the lord’s own court, he could, if the lord refused a demand for justice, go to the court of the lord’s lord.

The vassal’s right of recourse to a higher seignorial court to enforce a claim against his immediate lord, though not often exercised, is a dramatic illustration of the importance both of the feudal court system and of the principle of reciprocity of rights between lords and vassals. Feudal law gave the West its first secular experience of mutuality of legal obligation between persons of superior and inferior rank.<sup>16</sup> Indeed, the entire feudal hierarchy was viewed as an integrated legal structure; the upper classes, from knights to barons to counts to dukes and earls and even kings, were considered to be subject to common legal standards. This was, in part, a manifestation of the ideal of legality. It was also, in part, a reflection of the actual experience of subinfeudation, in which the lord of one vassal was himself vassal to another lord. Both the ideal of legality and the practice of subinfeudation helped to maintain a common upper-class consciousness, in sharp contrast to the feudal structures of many non-Western cultures, in which there were sharp divisions within the aristocracy, especially between the higher nobility and the gentry. Such divisions also characterized Western society in later stages of its own development. But in the formative era of the Western legal tradition, under feudal law, the knightly class could claim a fundamental *legal* equality with all those who were politically, economically, and socially above it in the feudal hierarchy.

Mutuality of feudal legal obligation, equalization of feudal privilege, and the hierarchy of feudal jurisdictions were buttressed by a high degree of litigiousness on the part of the feudal aristocracy. This was linked with chivalry itself. “Litigation was second only to feuding and warfare as a form of conflict favored by the baronage,” writes Heer. Indeed, as he points out, “trial by battle and trial by law were both forms of single combat. ‘God and my right’: let God determine the issue, in the duel and in the ordeal.”<sup>17</sup> The litigiousness of the upper classes, like the concept of reciprocity of rights between lords and vassals, not only constituted a structural element in the system of feudal law but also marked an important contribution of feudal law to the development of Western

legal consciousness, which is distinguished from the legal consciousness of many non-Western cultures by its strong attachment to formal adjudication of rights as a mode of dispute resolution.

#### INTEGRATION

The phrase "integration of feudal law" refers to that development of Western legal consciousness which made it both possible and necessary to interpret the various rights and obligations associated with lord-vassal relations as constituting an integrated whole. It came to be understood that the concepts and institutions of homage and fealty, ligantia, the so-called feudal incidents (military service or scutage, reliefs, aids, marriage, wardship, and others), the heritability and alienability of the fief, the rules of escheat, diffidatio, suit of court, and other related concepts and institutions all formed a distinct and entire legal system.

Although the system remained for the most part a system of customary law rather than enacted law, it eventually acquired written sources as well. In the eleventh and twelfth centuries numerous charters, issued to confirm the enfeoffment of vassals by lords, recorded specific feudal customs.<sup>18</sup> Urban statutes, such as the charter of Pisa of 1142, did the same. The *Usages* of Barcelona, written in 1068, was largely a restatement of feudal law. In time, feudal customs, both unwritten and written, came to be analyzed by learned jurists, who sought to define their underlying principles. Thus at some time between 1095 and 1130 Umberto de Orto, a Milanese consul, wrote a book entitled *Consuetudines Feudorum* (*Customs of Fiefs*), later called the *Libri Feudorum* (*Books of Fiefs*), which was an attempt to set forth systematically the feudal law. This book was used as a text at Bologna, where it was glossed and expanded, and its final version of 1220 was added to Justinian's Novels. It restated both customary feudal law and particular enactments of the emperors Lothar II, Frederick I, and Henry VI. Thus it purported to analyze not only Lombard feudal law but a more universal customary law, different from canon law, different also from royal or urban or mercantile law, yet common to the West and applicable to feudal relations generally. Umberto and the jurists who followed him considered, in David Herlihy's words, "that the customary law of the fief was logically consistent and entirely amenable to scientific investigation . . . [They] assumed that the aggregate of feudal customs was more than a formless mass of regional idiosyncrasies; rather, the customs shared common principles and therefore did constitute a true legal system. But the jurists fully recognized that these customs still constituted only one part of the total body of laws by which society was governed."<sup>19</sup>

The law of feudal land tenures merged with the growing body of royal (or ducal) law in Sicily, England, Normandy, France, the German duchies, Flanders, Spain, and elsewhere. In 1187 Glanvill's treatise on

the laws and customs of England systematized most of the fundamental principles of feudal law in England under the categories of the royal judicial writs that had been issued in the preceding decades. About 1200 a Norman book of customs, the *Très ancien coutumier de Normandie*, contained a very similar body of feudal law applicable to Normandy. About 1221 there appeared the *Sachsenspiegel* (*Mirror of the Saxons*), written by the German knight Eike von Repgau; it contained two parts, one on the Saxon *Landrecht*, or common law; the other on the Saxon *Lehnrecht*, or feudal law. (The *Sachsenspiegel* was the first lawbook written in German. It was preceded by a Latin edition, now lost.)<sup>20</sup>

In addition, the three greatest Western monarchs of the last part of the twelfth century—Henry II of England and Normandy (1154-1189), Philip Augustus of France (1180-1223), and Frederick Barbarossa of Germany (1152-1190)—issued important laws regulating various feudal questions.

In the thirteenth and fourteenth centuries, treatises on feudal law were written by leading Romanists. Many books appeared that reported local customs—in Denmark, Jutland, Normandy, Vermandois, Orléans, Anjou, and elsewhere. The great summa of English law attributed to Bracton, written in the first half of the thirteenth century, contained a very detailed analysis of feudal law; and in 1283 this was followed in France by the famous *Customs of Beauvaisis* by Beaumanoir.

Marc Bloch contrasts the place of feudal law in the legal structures of France, Germany, and England after the year 1200. In France the law of fiefs and of vassalage was woven into the whole legal fabric, so that it was impossible to distinguish between feudal and nonfeudal law. In Germany, feudal law was treated as a separate system whose rules were applicable only to certain estates or certain persons and were administered by special courts; not only at the manorial level or in the towns but also among the upper classes of the countryside many types of legal relations were governed by *Landrecht* (*lex terrae*, "law of the land") and not by *Lehnrecht* ("feudal law"). England was like France in that there was no separate body of feudal law erected out of the custom of the feudal classes; *Landrecht* and *Lehnrecht* were merged. However, as in Germany, a considerable part of the English common law—that relating to rights in land—could be identified as feudal law, even though it was administered by royal courts and was technically part of the common law.<sup>21</sup> Bloch's analysis can be seen as a qualification and clarification of the thesis presented here concerning the systematization of feudal law in the eleventh and twelfth centuries. This systematization did not result in the creation of a body of law which operated independently of other bodies of law. Instead, all the secular legal systems—feudal, manorial, mercantile, urban, and royal (common)—overlapped one another. This was true even in Germany despite the division between the law of the

land and feudal law. Nevertheless, each body of law had its own character, its own logic: even though feudal and nonfeudal legal norms were interwoven in the French books of customary law and in Bracton's analysis of the law applicable in the English royal courts, feudal law still had its own coherent principles.

One of the most important integrating elements of feudal law was its combination of political and economic rights—the right of government and the right of use and disposition of land. The legal term used to express this combination was the Latin word *dominium*, which meant, on the one hand, something like lordship and, on the other hand, something like ownership. "Lordship" is the right word if it is understood to include jurisdiction, that is, the right to hold court and declare law. "Fief and justice—it is all one," said Beaumanoir.<sup>22</sup> "Ownership" is also the right word if it is not restricted to the meaning it originally had when it was first used in the seventeenth century. Then it referred to an absolute, undivided, exclusive right over the thing owned. Feudal *dominium*, in contrast, was usually limited, divided, and shared in a variety of ways. A person could have certain rights in land valid against his lord, and the lord could have certain rights in the same land valid against *his* lord, as well as other rights valid against that lord's lord, who might be the king. The conflicting rights inhered in the land itself, which was conceived as a kind of legal entity: thus one parcel of land might be considered "servient" to another in the sense that services might be required to be transferred from it to the "dominant" parcel. Land, in fact, was not "owned" by anyone; it was "held" by superiors in a ladder of "tenures" leading to the king or other supreme lord. ("Tenure," derived from the Latin word *tenere*, "to hold," itself means "a holding.")

The concept of divided property, or multiple bearers of rights in the same land, is not a uniquely Western idea. The Western system of feudal property *was* unique, however, in its conception of the interrelationships of the various competing rights. A knight, for example, might have *dominium* over a parcel of land solely for his life, with such *dominium* to revert, at his death, to the lord who had granted him such a "life estate." Or the land might have been granted to the knight "and the heirs of his body," in which case the heirs, upon birth, might have a certain kind of "future interest" in the land. Or the grant might be to Knight A for life and, on his death, to his brother, Knight B, if B survived A, but if B predeceased A then, on A's death, to his cousin, Knight C. This would create other kinds of "future interests" in the land for B and C. Such gifts of land (or of other property) designed to revert to the donor on the death of the donee, and the creation of various kinds of contingent interests in land to take effect at a future time, did not derive from either Roman law or Germanic law. The very idea of measuring property rights by their duration in time was largely an invention of the late

eleventh and twelfth centuries in the West. This idea persisted long after the decline of feudalism; indeed, it has persisted in English and American land law to this day. What is involved is not merely a set of techniques for effectuating the devolution of property on death but also the inclusion of various persons, born and unborn, in the rights of possession, use, disposition, and control of property. The conscious entailment of future generations in the property regime was a characteristic example of the time sense of the Western legal tradition in the formative era of its development.

Together with the measurement of property interests ("estates") in land by their duration in time, and the allocation of such estates for future enjoyment ("future interests"), the distinctive legal concept of *seisin*, which spread through Europe in the late eleventh and twelfth centuries, made an enduring contribution to Western legal values as well as to Western legal institutions, concepts, and rules. *Seisin* has already been mentioned in connection with the development of the legal autonomy of vassals—a vassal "seised" of the land had a right of action against anyone who "disseised" him, even his lord—and also in connection with the canon law of property, especially the law of spoliation. From the point of view of the development of the Western legal tradition as a whole, the importance of the concept of *seisin* lay in its interweaving of legal and factual elements. It did not mean simply—or even necessarily—factual occupation or physical control of the land; in this it differed from the older Roman concept of possession. Thus one could remain seised of land while one was away on a crusade or pilgrimage. Yet *seisin* did not mean simply—or even necessarily—a right of ownership. Thus the heir or grantee who had not yet entered upon the land did not yet have *seisin* of it. *Seisin* was, in effect, a legal right to continue in a factual situation, which right was derived from previously having been in that factual situation.<sup>23</sup> It was a right of possession independent both of ownership and of contract—a concept unknown either to Germanic law or to the older Roman law. This idea of "possessory right"—not possession but right of possession—has persisted in all Western legal systems to this day. It is particularly strong in English and American law.

The concept of *seisin* was a product partly of the feudal concept of divided ownership and partly of the canonist concept of due process of law, with its antipathy to force and self-help. A person seised of land, goods, or rights could not be ousted by force even by the true owners. This, too, not only formed a structural element of feudal law but also made an important and enduring contribution to Western legal consciousness.

Finally, feudal law was characterized by its conception of tort, or legal wrong, as a breach of a relationship. From an early time, it had been a



rule of customary feudal law that if a vassal "broke faith" with his lord, the fief reverted ("escheated") to the lord, just as it escheated on the vassal's death or, at a later period, when there were no heirs. The Norman word for such a breach of faith was "felony." In England after the Norman Conquest the most serious crimes came to be called felonies because they were considered to be breaches of the fealty owed by all people to the king as guardian of the peace of the realm. (The felon's land escheated to his lord, however, and only his chattels to the crown.) Apart from felonies, other criminal and civil wrongs—in England called "trespasses" (Norman French for the Latin *transgressiones*, "sins")—were also conceived generally as breaches of relationships: for example, relationships between landlords and tenants, between masters and servants, between bailors and bailees of goods.

#### GROWTH

Once feudal law became systematized in the eleventh and twelfth centuries, it developed rapidly. The specificity of its norms increased; the uniformity of its principles gradually swallowed up local differences; the reification of rights and obligations increasingly overcame the personal aspects of the lord's domination of the vassal and also gave the vassal more and more economic autonomy in managing the fief; reciprocity of rights and obligations became more and more important, as did adjudication of disputes; and the degree of integration increased. In other words, all these characteristic features of feudal law became also tendencies of feudal law, characteristics of its autonomous growth in time.

Thus feudal law shared with the new canon law of the late eleventh and twelfth centuries many of the basic qualities of legality that marked the Western legal tradition in its formative era. It was an autonomous legal system in the distinctive Western sense, characterized, on the one hand, by a conscious integration of legal values, legal institutions, and legal concepts and rules and, on the other hand, by a conscious tendency and capacity to develop in time, to grow over generations and centuries. The new feudal legal system was also characterized by a strong emphasis on the generality and objectivity of rights and obligations, on the autonomy of persons as holders of rights and obligations, on reciprocity of rights and obligations among persons of unequal social and economic status, and on wide participation of holders of rights and obligations in the proceedings in which such rights and obligations were declared. In these respects, too, feudal law resembled canon law.

Yet once this has been said, it must immediately be added that in comparison with canon law feudal law was much less systematic, much less integrated on the conscious level, much less professional, much less scientific. It was largely customary law and as such was treated more

critically and more skeptically than the laws enacted by popes and kings, not to mention the learned law of Gratian's *Decretum* and glosses on Justinian's Digest. Moreover, feudal law was secular law, the law of a world still in slow and painful process of being redeemed. It was not the spiritual law of the church. True, canon law was also subject to interpretation in the light of reason and conscience, but feudal law was much more open to correction, and even repudiation, when it was found to work injustice.

Finally, canon law, in contrast to feudal law, was considered to be a complete system of law, governing every kind of legal question that might arise. Technically, of course, canon law covered only those questions that were within the ecclesiastical jurisdiction; but in fact that jurisdiction was limited only by the concept of sin, which, in turn, was defined partly in terms of the interests of the church. Thus even the rights and duties of a king toward his barons might fall within the jurisdiction of the church—as, for example, in the case of King John of England at Runnymede in 1215. Feudal law, on the other hand, was much more narrowly conceived. It was the law of fiefs, the law of lord-vassal relations. It was not only secular law, as contrasted with the spiritual law of the church, but it was only one among several competing systems of secular law.

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## 10 | Manorial Law

**L**IKE THE FEUDAL LAW of lord-vassal relations and dependent land tenure, so the manorial law of lord-peasant relations and agricultural production came to form a legal system. Of course, the two systems were closely related to each other. Both were also related (though much less closely) to the systems of mercantile law, urban law, and royal (common) law which developed contemporaneously—just as all these secular law systems were closely related to the system of canon law. All were integral parts of an overarching structural process, the Western legal tradition.

The manorial economy did not become predominant in Europe until the eleventh century. In the preceding era, after the Germanic tribes had settled down in western Europe, no one type of agricultural economic relations had prevailed. On the one hand, within the tribal and village structure there were large numbers of peasant family households that were free, in the sense that they were not tilling the soil of a superior (except sometimes as hired laborers) and were not bound in personal service to a superior. On the other hand, slavery also abounded in European agriculture of that period. Many of these slaves were either descendants of persons captured in battle and reduced to slavery by the Germanic tribes, or they had themselves been captured in the more or less continual warfare that was waged in Europe prior to the eleventh century. Others were descendants of persons who had been slaves in the late Roman Empire. In addition, there seems to have been an upsurge of slavery in Europe in the eighth, ninth, and tenth centuries when many Slavs were captured and enslaved by the Frankish armies in the East; indeed, the Western word "slave" (in German, *Sklave*) derives from this historical experience. (The name "Frank," in contrast, came to mean "free.") Many slaves served in their masters' households, but most worked in the fields.

With the emergence of lordship units, and especially with the linkage

of vassalage and fiefs in the eighth, ninth, and tenth centuries, a third class of peasant—neither free nor slave—became increasingly important. These peasants, often called serfs, were distinguished by several characteristics: (1) unlike slaves, they were not owned by a master and could not be bought and sold; (2) unlike slaves, they could contract legal marriages; (3) unlike most slaves, they provided their own food and clothing; (4) unlike most slaves, they had certain rights in house and land and goods; (5) unlike free peasants, they were bound to the land—that is, they could not leave without the lord's permission and they went with the land when it was transferred; (6) unlike most free peasants, they were required to perform heavy labor services on the lord's demesne; (7) unlike most free peasants, they were required to pay the lord various dues in kind and in money for the land which they held; and (8) unlike most free peasants, they were severely restricted in their rights of use and disposition of the land, and their property remained with the lord upon their death.

In some respects, the serfs were like another class which had survived from the late Empire, the *coloni*, who were not slaves but who performed labor services on the lord's demesne. There were also other kinds of peasants in varying degrees of dependency.

In the eighth, ninth, and tenth centuries, peasants of all kinds—free peasants, slaves, *coloni*, and others—were involuntarily or voluntarily or semivoluntarily drawn, in increasing numbers, into the estates of the lords as serfs. The *mansi* (landholdings) of the serfs were divided from the *mansus indominicatus*, or dominant estate ("demesne") of the lord. Yet the serfs performed labor services and other duties on the lord's demesne, and the lord exercised economic, fiscal, police, and judicial rights over the serfs on the tenements held by them. In addition to the serfs, many freemen also lived on the manors as tenants—in effect, subjects—of their lords. It is doubtful whether the number of serfs in Europe ever exceeded one-half to two-thirds of the total peasant population.<sup>1</sup> At the same time, however, there were many degrees of freedom among free peasants.

From the point of view of its internal relations, the fief took the form of an autonomous community, and in most parts of Europe it was given the name "manor" (*manerium*).<sup>2</sup> One important characteristic of the manor, viewed as an autonomous community, was the exalted position of the lord of the manor and the menial position of the serfs. Another important characteristic was the economic and political interdependence of all members of the manor, including the lord's household, the serfs, and the intermediate classes of knights, manorial officials, and other freemen (including free peasants) who lived there. A certain tension existed between these two characteristics.

With regard to the menial position of the serfs, Philippe de Beaumanoir wrote in the thirteenth century that of "the third estate of

men," that is, of "such as are not free," "some are so subject to their lord that he may take all they have, alive or dead, and imprison them, whenever he pleases, being accountable to none but God." Beaumanoir contrasted this position of some of the serfs with that of the others, who in his time were the vast majority.<sup>3</sup> Prior to the eleventh century, however, his statement would have applied to almost all serfs. In the earlier period, manorial custom, even more than the feudal custom of that time, had substantially lacked objectivity and universality (as defined in chapter 9) and was therefore subject to far greater arbitrariness and abuse than at a later period; it also substantially lacked the other qualities of the later Western systems of law—reciprocity of legal relations between superior and inferior, participatory adjudication, systematic integrity, and organic growth.

Nevertheless, the interdependence between the peasants and the lord of the manor tended to overcome, to some extent, the hardships of their legal insecurity. Typically, the lord was not an absentee landlord or a mere tax collector, as in many non-Western lordship regimes. Instead, he lived on the estate and supervised its management. Even when he managed his manor (or manors) through an agent (or agents), he was entirely dependent on its economic profitability for the satisfaction of his own military and economic obligations to his superior lord (whether it was the king or an intermediate lord). Equally important, he was the political ruler of the entire manorial community, responsible for maintaining order within it, for protecting it against outside attack, and for appointing officials to administer it and preside over its assemblies. Once again, these aspects of manorial life were far more loosely ordered and far more subject to local and individual eccentricities in the period prior to the eleventh century than in the period thereafter.

Just as feudal custom was transformed into a system of feudal law in the eleventh and twelfth centuries, and especially between 1050 and 1150, so manorial custom was transformed into a system of manorial law in roughly the same period. As in the case of feudal law, so in the case of manorial law there was in that period a substantial increase in the objectivity and universality of its norms. An element of reciprocity also developed in the legal relations between peasants and lord, although it was less apparent than in feudal law since homage and fealty were absent from lord-peasant relations, and there was no concept of a lord-peasant contract to enter into a lifelong relationship; nevertheless, the peasants brought group pressure to bear upon lords in order to exact more favorable conditions of labor, which had the force of concessions reciprocally granted on condition of loyalty. In addition, manorial law was administered by an assembly of members of the manor, including the serfs, who participated in adjudication of disputes under the presidency of the lord's official, the steward. Finally, manorial law in the

eleventh and twelfth centuries, like feudal law though to a lesser extent, acquired the quality of an integrated system of concepts and procedures as well as the quality of a developing system with the capacity for incremental growth over generations and centuries.

In contrast with feudal law, however, the emergence of a new system of manorial law in the eleventh and twelfth centuries was directly connected with economic class struggle. Whereas feudal law chiefly regulated relations among persons belonging to a single economic class, the feudal aristocracy, manorial law chiefly regulated relations between rich and poor, rulers and ruled, "management" and "labor." This does not mean that manorial law was simply imposed on the peasants; on the contrary, they were not without substantial leverage to protect their class interests. Especially in the eleventh and twelfth centuries, improvements in economic conditions made it economically feasible for them to insist on substantial improvements in their conditions of servitude. However, the development of a new body of law to secure those improvements was dependent not only on changes in economic conditions but also on changes in legal conditions. New legal concepts and institutions, and new attitudes toward law, had emerged or were emerging, to which both lords and peasants resorted in the effort to resolve the conflicts between their economic interests.

A crucial aspect of the enormous growth in prosperity that occurred during the late eleventh and early twelfth centuries was the final cessation of military attacks from the north, east, and south. Indeed, by the end of the eleventh century the West had achieved sufficient economic strength to launch its own military invasion of the Middle East (the First Crusade, 1095-1099). Another aspect of the growth of prosperity was the movement for land reclamation and colonization: in the eleventh and twelfth centuries, Europeans cleared forests and encroached on waste lands, drained marshes, and reclaimed land from the sea—in England, Germany, Flanders, and elsewhere. Many migrated to Slav and Magyar lands. These activities were connected with population growth: after centuries of either stable or declining population, the population of France leaped from approximately seven million to over twenty million between the mid-eleventh and early fourteenth centuries, and the population of England from approximately two million to approximately three and one-half million in the same period. In addition, there were substantial technological improvements which resulted in a substantial increase of agricultural production in the eleventh century and thereafter; commerce grew; new cities and towns sprang up all over western Europe.

These factors substantially strengthened the economic position of the peasants. It might be thought that the increase of population would have lessened the value of their individual labor, but any such tendency was

counteracted by the economic factors which had helped to produce the increase: the availability of land, the possibility of movement to the expanding cities and towns, and the beginnings of a money economy. There was, in fact, a great shortage of labor for the work to be done. Moreover, the increase of population contributed to the rise of peasant class consciousness, which was itself an important factor in the struggle for better working and living conditions.

The church, too, in carrying out the Papal Revolution, pursued policies that were favorable to the peasants. It offered serfs an opportunity for emancipation through entry into holy orders.<sup>4</sup> In launching the First Crusade, it offered them an opportunity for emancipation through enlistment in the Holy War.<sup>5</sup> In addition, the church, which was by far the largest proprietor in Europe, holding perhaps one-fourth or more of all the land, often attracted peasants from other estates by offering more favorable conditions of life and work. Escape to church manors, whether legal or illegal, encouraged escape to other more congenial manors as well, or to the cities, thereby putting pressure on lords to yield to peasant grievances.

In addition, the church generally emancipated the slaves on its own domains and thereby, as well as through other means, contributed to the virtual elimination of peasant slavery throughout most of Europe in the eleventh, twelfth, and thirteenth centuries. (Household slavery survived in some places.) This had the secondary effect of relieving serfs from the pressure of competition from an even more downtrodden class. Here again, economic and ideological factors were joined. Christian leaders had previously accepted slavery as a fact of life, while teaching that slaves should be treated with humanity and that the freeing of a slave was a pious and meritorious act. As a result of the Papal Revolution the church for the first time gave a systematic legal formulation of its views on slavery. It took the position that slavery itself was not illegal but that it was a sin for a Christian to hold a Christian as a slave.<sup>6</sup> In England, for example, almost 10 percent of the population recorded in Domesday Book just after the Norman Conquest were slaves. These were mostly herdsmen and ploughmen. In the succeeding two or three generations most of them were given small holdings as serfs, and slavery in England virtually disappeared.<sup>7</sup>

European serfs in the eleventh and twelfth centuries were for the first time in a strong enough position to take the risk of illegal escape from their lords to other lords who offered better working conditions. The age of widespread peasant rebellions and large-scale manumissions of serfs in France, Germany, and England did not come until the late thirteenth and fourteenth centuries. In Italy, however, and occasionally in France, Germany, and England, there were spasmodic peasant rebellions and grants of peasant charters of liberties in the twelfth and early thirteenth

centuries. Apart from these more dramatic events, between about 1050 and 1250 the economic position of the serf gradually improved and, even more to the point, his basic legal rights were gradually established. In fact, it was in the name of the basic legal rights of serfs that rebellions and manumissions took place.

The transformation of manorial custom into a system of manorial law in the eleventh and twelfth centuries may best be considered in terms of the six categories that have already been used in describing the transformation of feudal custom into a system of feudal law: (1) objectivity, (2) universality, (3) reciprocity, (4) participatory adjudication, (5) integration, and (6) growth.

### Objectivity and Universality

In the earlier centuries the services and other obligations of serfs and other peasants were of the most varied kind, with relatively few limitations imposed by norms of customary law. The most important labor services included plowing on the lord's demesne (which might involve the duty of the peasant to provide the seed), week work (that is, a duty to work a number of days per week on the lord's demesne), boon work (extra services, theoretically voluntary, usually associated with haymaking and harvesting), carrying services (carrying supplies to and from the lord's household), felling of timber, carrying of manure, and repairing of roads. The lord was free to assign other tasks as well.

In addition to labor services, there were various financial and other obligations. The so-called headtax (*capitagium*; in French, *chevage*), though only a small fee, was an important symbol of the peasant's inferior status. A customary fixed farm rent, or *cens*, was generally charged as well. The lord also imposed various regular and occasional taxes under the generic name "tallage" (from the French *taille*, a cut or notch in a piece of wood, made to record payment of the tax). Upon the death of a serf, the lord was to be given his best beast and other goods (*heriot*). There were a host of other charges, burdens, and obligations, which varied widely in their incidence from place to place and from time to time, but which were always a reminder of servility. A serf could not marry without the lord's permission; and he could not voluntarily depart the manor. If he died without heirs, the land which he occupied reverted to the lord.

In the eleventh and twelfth centuries these various types of services and obligations became subject to substantially more precise regulation. It came to be widely accepted that definite limits should be set to the kinds of services that the lord could require and also to the amounts of services of each kind. For example, week work was limited to a maximum number of days' work per week or commuted to a monetary payment. Also such limits came to be established on a general basis, that is,

not merely for individual manors or individual localities but for all manors within a given region or even a given country, and in some cases for all manors within (Western) Christendom as a whole. Thus the requirement that a serf receive the lord's permission in order to marry was commuted everywhere to the payment of a tax (*forismaritagium*) when the serf married outside the lord's domain, and of a composition (*mercheta mulierum*, "marketing of women") when he married within the lord's domain; and Pope Hadrian IV, himself of humble birth, declared that the marriage of a serf, with or without his lord's consent, was valid and indissoluble.

The commutation of services and other obligations of peasants into fixed money payments in the eleventh and twelfth centuries, which was a widespread phenomenon throughout Europe, reflected not only the percolation of money into the manorial economy but also the tendencies of manorial law in that period toward objectivity and universality. Nevertheless, manorial law did not achieve nearly so high a degree of objectivity or universality as feudal law, mercantile law, urban law, and royal law, not to mention canon law. One reason may have been the sharpness of class conflict on the manor; yet domination by the lord could have taken the form of imposition of his will through objective and universal norms of law. A more plausible reason is that by its very nature manorial life required informal, intimate, and diffuse regulation rather than a set of precise, specific, generally applicable, and non-discriminatory norms. The manor was in many ways like a small clan or village, or a large household. What is surprising, therefore, is not the extent to which manorial law responded to the will and interests of the head of the household—the lord and his immediate entourage—but rather the fact that it acquired any objectivity and generality whatsoever. The lord or his agent (bailiff, reeve, "mayor") was present, with his servants, to exercise his will, by law or by other means. The peasants, however, needed to legalize their relationships with the lord, if only to curb the arbitrary exercise of his power. The strengthening of manorial law was thus an index of the balance of power between the sharply conflicting interests of the lord and his immediate entourage, on the one hand, and those of the peasant households of the manor taken as a whole, on the other. It was also an index of the extent to which the manorial system received its character from the larger social, economic, and political context of the time, a context in which legality played a central role.

### Reciprocity of Rights of Lords and Peasants

By the twelfth century, all peasants in Western Christendom, including serfs, had legally protected rights. Among these were the right to hold land of their lords on certain terms and conditions and the right to receive his protection and patronage. Also, all peasants had customary

rights to use the communal village lands, including pastures, meadows, and forests. In addition, in most parts of Europe many peasants continued to have virtual rights of ownership in free peasant land (alod or alodium), which had survived from earlier times.

The right, even of a serf, to hold land of a lord was of great importance. The manor was divided into two parts: the lord's demesne, managed by his stewards and worked by his peasants, and the peasants' own holdings, which they worked on those days when they were not required to work on the lord's demesne. As Perry Anderson has pointed out, this "dual agrarian statute within the manor" was one of the "structural specificities of Western feudalism"; and it had the important economic consequence that it left a "margin for the results of improved productivity to accrue to the direct producer."<sup>8</sup> More than that, it gave a legal foundation to the peasants' inclination to distinguish their own economic interests from those of their lords—and to pursue them.

In addition to rights of land tenure, peasants also had rights with respect to the rent, taxes, services, and other obligations due their lords. As a general rule, these obligations could not be increased; they were considered to have been fixed by custom. Disputes over their character and extent were supposed to be resolved by law. In contrast to the lord-vassal relationship, reciprocity of rights and duties of lords and peasants (including serfs) was not achieved through individual pledges of faith or other forms of contractual arrangement; nevertheless, it was understood that the loyalty of the peasants was given reciprocally for the willingness of the lord to abide by concessions previously granted by him or his predecessors, to grant new concessions when required, and in general to deal justly with them.

When peasants' rights were infringed by their lords, those who were freemen could sometimes carry their grievances over the heads of the immediate manorial lord to his feudal superior or to royal authority. Rodney Hilton tells of a dispute that raged for thirty-five years (from 1272 to 1307) between free tenants and a lord in Staffordshire, England. Because the land had formerly been part of the royal demesne, the tenants appealed to the crown, relying on custom from the time of Henry II, a century earlier. They claimed that they were obliged only to pay a fixed rent of five shillings a year plus certain tallages, while the lord claimed that they owed a large variety of labor services, taxes in kind, a heavy death duty (heriot), "merchet" on the marriage of a daughter and "leywrite" if she was found to be unchaste, as well as other obligations.<sup>9</sup>

The legal remedies of serfs were more limited, in that they were not entitled, as a matter of right, to resort to any court except that of the manorial lord. Yet they were not without protection in the manorial court. Moreover, they had still other means of exerting pressure upon their lord in order to maintain and advance favorable conditions of

labor. They could make collective demands upon him, including the demand that he emancipate them; such manumission became more and more frequent, although the peasant often had to pay a high price for it. Also, the peasants could sometimes back up their demands by a strike. As a last resort, they could run away to another manor.

A dramatic early example of such group pressure was the desertion en masse of the inhabitants of the Île de Ré in France in the twelfth century, owing to their lord's severity. The lord was thereby induced to make substantial concessions in order to retain any labor force at all. To combat such pressures, lords often resorted to mutual assistance agreements to capture fugitive serfs. Perhaps equally often, however, they competed with one another to entice serfs away from neighboring domains.<sup>10</sup>

An even more remarkable example of reciprocity achieved through class conflict and its resolution is that of charters of liberties granted by Italian city communes to serfs as early as the twelfth century, after peasant uprisings. Such charters contained not only guarantees of fixed rents and services but also safeguards against imprisonment without due process of law.

Eventually, the disloyalty of the serfs came to be a retaliation against the unwillingness—or inability—of the lord to grant concessions or to abide by concessions previously granted. This was an informal, unofficial analogue to the vassal's right of *diffidatio*. In the fourteenth and fifteenth centuries, flights of peasants from the manors assumed catastrophic proportions.<sup>11</sup> As a result, laws were passed imposing imprisonment, branding on the forehead, and other severe penalties for abandoning feudal service. It was forbidden by English law in the fifteenth century for persons attached to a manor to learn a handicraft or for any man holding land of less than twenty pounds' annual value to apprentice his son to a trade. However, these measures were futile; the manorial system was defeated in England, as in many other parts of Europe, by the peasants' desertion of the manor.<sup>12</sup> The earlier reciprocity had broken down.

### Participatory Adjudication

Within a manor, as in other political units of the West during the formative era of the Western legal tradition, formal government was closely associated with adjudication: that is, legislative and executive activities were to a considerable extent merged with judicial activities and were conducted by an institution called a court. The use of the word "court" rather than "legislature" or "executive" for this institution did not signify that the making and enforcement of laws were not regarded as important functions of government. In fact, the manorial courts, like the papal court and the royal, seignorial, urban, and mercantile courts, had wide legislative and executive powers within their respective jurisdic-

tions. Perry Anderson is correct in stating that "justice was the *central* modality of political power," but he is incorrect in supposing that this was necessitated by the "parcellization of sovereignty" under feudalism, which "excluded any 'executive' at all, in the modern sense of a permanent administrative apparatus of the State for the enforcement of the law," and also left "no room for an orthodox 'legislature' of the later type either, since the feudal order possessed no general concept of political innovation by the creation of *new* laws."<sup>13</sup> In fact, a centralized state apparatus existed in the church, which was nevertheless governed by the papal curia; and the church, both through the papal curia and through church councils, did innovate by creating new laws. There were parallel developments in royal government. Indeed, the manorial courts themselves not only heard and decided disputes but also enforced law through a developed administrative apparatus and from time to time made new laws as well. The difference between twelfth-century and twentieth-century conceptions of government does not lie in the absence then, and the presence now, of the legislative and executive functions, but rather, first, in the fusion then and the separation now of those functions, and second, in the subsumption then of the legislative and executive under the adjudicative. Then, lawmaking itself was regarded as a process of deliberation and discovery. Laws were considered to be either true or false, either just or unjust, and therefore the making and administering of them were not sharply distinguished from their application in cases of dispute.

Manorial justice was the prerogative of the lord of the manor, just as royal justice was the prerogative of the king and ecclesiastical justice the prerogative of the pope. "Each baron is sovereign in his barony," wrote Beaumanoir, while "the king is sovereign everywhere and by his law [*droit*, "right"] guards his realm."<sup>14</sup> Beaumanoir also wrote: "Every lord has all justices—high and low—in his fief . . . Fief and justice—it is all one."<sup>15</sup> This was, to be sure, an exaggeration, applicable only to great lords. Most lords of manors had only "low" justice. Yet the justice of the lord of the manor authorized him to exercise a wide variety of powers over the staff of manorial officers who in effect constituted his household, and over the peasants who constituted the basic population of the manor. At the same time, the justice of the lord of the manor was a substantial restriction upon the arbitrary exercise of the lord's power and a substantial means of maintaining the reciprocity of rights of lords and peasants.

The steward of the manor, who commonly served as the lord's deputy in all matters affecting manorial government, usually presided over the manorial court. Other manorial officials—the reeve (who acted as general overseer), the hayward (who watched over the lord's crops), the woodward (who guarded his woods), the rent collector, and various

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others—also participated in the proceedings of the manorial court, often as prosecutors of persons who had offended against the lord's prerogatives.

The court itself consisted of all the members of the manor, from the lord and his steward down to the lowliest serf. All were judges. They were called "suitors," and were said to "pay suit of court"; indeed, it was an obligation to attend court and to judge, and, as part of the obligation, a fee had to be paid to the lord. Little is known about the methods of voting in the manorial court; the extant reports of manorial cases occasionally show a division of opinion, but generally the decision is presented as that of the court as a whole. No distinction was made between freemen and serfs either with respect to the right and duty to judge or with respect to the procedure applied to them when they were parties to disputes.

A high degree of cooperation among all members of the manor was required for manorial justice to work. But such cooperation was required also by the whole system of agriculture in Europe during the late eleventh and twelfth centuries. Here many historians, in concentrating on the inequality of status and of privilege between lords and peasants, have neglected other aspects of the mode and relations of production that were equally important. Under the open-field system, the arable land was usually divided into long, narrow strips, which were widely scattered among the various peasant families. In order to make rational use of animals for plowing adjacent strips belonging to different tenants, and in order to time the sowing and harvesting so as to avoid conflict, it was necessary for the peasants to agree on work methods. Also, the common ownership of pasture, meadows, and woodland required agreement concerning their utilization. In addition, the system of crop rotation allowed for arable land to be converted periodically into pasture, to be grazed over and fertilized by all the animals of the manor.<sup>16</sup> Thus the open-field system itself required a very high degree of cooperation among all members of the manor. As Hilton writes, the fact that the village (or the manor) was often called a "community" and the members "neighbors" was "not a matter of sentiment but of fact. Open-field cultivation meant that one man's injury was everybody's, even the lord's." Hilton cites a case in which seven persons were accused of failing to keep up their fences, with the result that the corn (wheat) of the abbot and of "other neighbors" had been damaged. "These were the fences which every tenant who had parcels on the perimeter of the open fields had to keep up when the corn was growing, to prevent the animals getting in, not merely to his own corn, but, since the fields were open, into the corn of all who had parcels in that field."<sup>17</sup>

The rules and procedures for maintaining cooperation in these and other matters were considered to constitute the custom of the manor. If

plow oxen were damaged, if arable land was not fertilized, if a person failed to help in bringing in the harvest, then the custom of the manor might be invoked against the offender in the manorial court. Similarly, if one person struck or defamed another, or failed to pay for goods which he had bought, or broke his promise to build a shed for another, or slandered another, the victim could complain in the manorial court.<sup>18</sup>

Thus the very complexity of communal serf-regulation of the manorial economy gave rise to a large variety of types of civil and criminal matters to be settled by manorial justice. In addition, fines were imposed for violation of the lord's rights—as by trespassing on his land, stealing his crops, of failing to perform labor services or pay taxes due to him.

All these matters were decided by the manorial court, by vote of all the suitors. One may suppose that the power of the lord and his officials was such as to influence the outcome in his favor. Yet cases are reported in which his interests were not protected. For example, it happened sometimes that peasants would successfully sue for land which the lord had rented to others. In one case the lord of the manor had sought to deprive a serf of certain land on the ground that the serf's holdings exceeded that to which he was entitled; the serf argued that he and other tenants in a comparable situation "for all time theretofore were accustomed to hold several tenements without fine or license or complaint," and that he was "prepared to verify this by the homage [that is, by all the tenants of the manor] or other lawful means as may be necessary." The report of this case concludes: "The matter is put in respite until there can be a fuller consultation etc."<sup>19</sup> In addition to cases in which the lord's property rights were directly involved, there were many cases in which the manorial court, whether by judgment of the whole community of tenants or by judgment of an inquest or jury, gave remedies against the lord's bailiff and other officials.<sup>20</sup>

The manorial court not only gave judgment in disputed matters and imposed fines for offenses but also issued regulations and rules for administering the manorial economy. In the eleventh and twelfth centuries these regulations and rules were apparently unwritten; in England no written records of them have been found prior to the second quarter of the thirteenth century. From that time on, however, there are abundant records of "by-laws" and "ordinances," which regulated the use of common fields and pasture, the gathering of grain and other crops (including gleaning by paupers), the keeping of fences and gates, the tethering of horses and beasts, the seasonal transition from one type of land use to another, and other matters affecting the communal economy. These regulations were issued periodically by all members of the manor collectively acting as suitors to the manorial court. Characteristically such regulations were introduced by the phrase: "Ordered by the assent of the

whole homage," or "Ordered by all the tenants both free and servile," or "Ordered by the lord and the tenants." Strong emphasis was laid on protection of the property rights of the lord; but the main emphasis was on the organization of the work of the manor, and this included protection of the rights of all tenants, serf as well as free, against unwarranted interference by others.<sup>21</sup>

### Integration and Growth

Although there were many interrelated features of manorial law which helped to give it the character of an integrated system of rules and procedures, yet it lacked the high degree of logical coherence and the consciously principled character of canon law, and certainly of the Roman law taught in the universities. Manorial law, indeed, was customary law, that is, it was largely unwritten (or more precisely, unenacted). Even compared with feudal law, however, which was also largely customary law, manorial law was much less consciously integrated, much more particularistic and diffuse. This was reflected in the absence of contemporary scholarly writings on manorial law. It appears that few professional jurists were concerned with its development.

The relative lack of sophistication of manorial law was also connected with the fact that it took part of its character from the other systems of law which impinged on it. When the manorial court decided cases of slander, for example, it was usually applying—perhaps in a very crude and unlearned manner—the canon law; when it decided cases of assault or theft or trespass to land or to chattels, it was usually imitating the tort law and criminal law of the locality or dukedom or principality in which it was situated; when it laid down rules concerning rights and duties attached to peasant land holding it borrowed many concepts from feudal (that is, lord-vassal) law. In addition, the procedure of manorial courts was strongly influenced by the local law. In short, one would not expect to find in the manorial courts innovations in branches of law that were being developed concurrently by other legal systems.

Yet there were certain distinctive elements of manorial law that did receive conscious legal formulation in terms of principles and concepts. In the eleventh and twelfth centuries the legal concept of serfdom was formulated for the first time. Serfs were called *glebae adscriptae* ("[persons] attached to the soil"). This meant that they could not leave except under certain conditions. It also meant that they could not be evicted—again, except under certain conditions. Perry Anderson has written that the first use of the term *glebae adscriptae* in the eleventh and twelfth centuries reflected a characteristic "lag" in the "juridical codification of economic and social relationships" that had been in existence for centuries.<sup>22</sup> But the new legal term actually changed the preexisting situation, if only by giving it a new legal character. Henceforth the bondage

of serfs was legally defined, which meant that serfdom became a matter of rights and duties and not merely a matter of habit and will and bargaining power. On the one hand, the lord had a right to many things that had previously been subject to challenge. On the other hand, the serf's duties, legally classified in terms of specific labor services, rents in kind, and customary dues, became fixed and could not legally be increased or varied by the lord.

Moreover, the serf was given the possibility of buying off his bondage; he could become a free man through the legal process of manumission. This typically involved a symbolic ceremony or written charter granted on condition of immediate payment of a sum of money or of a perpetual commitment, binding upon heirs, to pay certain charges or perform certain services.

This is not to say that the serf did not remain poor and oppressed. It is only to say that he had acquired rights under a system of law. He was henceforth a person, a member of the manorial community, part of "the whole homage."<sup>23</sup> He coexisted on the manor with free peasants, with other freemen holding under various forms of tenure involving only honorable services, with manorial officials, knights, the lord of the manor and his household—all being members of a community divided according to status but united as suitors in the manorial court, that is, as citizens of the manor. This unity was the foundation of manorial law. It was linked with the very mode of production, the open-field system of agriculture.

The unity of the manor was reflected in the capacity of its inhabitants, sometimes collectively and sometimes individually, to lease the manor from the lord and to dispose of it at their will. Between the late eleventh and the fourteenth and fifteenth centuries such leases became more and more common. They were a way out for lords who were being increasingly pressured by peasant demands, peasant uprisings, and peasant desertions.

The legal definitions of peasant obligation also had important economic consequences, since they contributed to the tendency to substitute fixed cash payments for labor services and rents in kind. Since a similar tendency to commute services into monetary obligations characterized feudal legal relations between vassals and lords, the lord of the manor had an interest in collecting from his tenants a sufficient cash income to enable him to meet his obligations to his superior lord. As early as the thirteenth century in many if not most parts of Europe, manors came to be considered income-producing enterprises, and persons were appointed to manage them, with the duty to collect and pay over the required income, called *firma* or *feorm*, from which is derived the word "farm." In addition "farmers" responsible for fixed returns were often replaced by professional managers who were expected to maximize



manorial cash profits and to render annual accounts. Thus the gradual conversion of peasants into lessees (or alternatively, hired laborers) was connected with the gradual transformation of the manor itself from a community into a business; and these two processes were linked with the increasing reification of both feudal (lord-vassal) rights and obligations and manorial (lord-peasant) rights and obligations.

These developments did not, of course, take place uniformly throughout Europe, although everywhere there was a general process of absorption of the manor by the peasants. In France and western Germany, however, the nobility succeeded in maintaining quasi-manorial domination over all classes living within their private jurisdictions, whether or not they were tenants. This was accomplished chiefly through numerous small taxes and services (*banalités*, *corvées*, and others), no one of which, taken alone, was excessively onerous, but all of which, taken together, were extremely oppressive. These included: payments for crushing grapes at the lord's wine press, baking bread in the lord's oven, and grinding corn at the lord's mill, over all of which the landlords maintained a monopoly; labor services in repairing roads, constructing bridges, and the like; and tolls on roads, fairs, and markets, fines for transfers of land and goods, and other assorted aids and taxes.

Despite these and many other variations in different regions and different countries, manorial law underwent the same general pattern of development throughout the West during the period from the eleventh to the fifteenth centuries. This remarkable fact bears witness to the Western concept of manorial law as an integrated body of concepts and procedures. It also bears witness to the related concept of manorial law as a system capable of incremental growth. As in feudal law, so in manorial law the characteristics attributed to the system became tendencies of the system, and the tendencies were self-fulfilling. Growth, once believed in, became inevitable. Manorial legal concepts and institutions had a certain life of their own, which was just as "basic" and just as much a part of the infrastructure as the economics of production and distribution of goods. Even so, it is striking that despite extreme diversity of local conditions manorial law underwent the same general movements from stage to stage virtually everywhere in western Europe.

Perhaps the most significant stage in this development was the widespread emancipation of the serfs in the thirteenth, fourteenth, and fifteenth centuries, which must be seen in part as a culmination of the greater legalization of lord-peasant relations introduced in the late eleventh and twelfth centuries. Here manorial law was in tension with feudal law, for under feudal law, emancipation of a serf by his lord could only be accomplished with the consent of the lord's superior; without that consent, a serf whose lord had emancipated him simply escheated to the superior, and the lord who had granted the emancipation was estopped from

claiming him again.<sup>24</sup> Thus for a serf to buy his freedom required that he pay off both his immediate lord and all superiors in the feudal chain. Nevertheless, in the long run both the economic and the legal circumstances favored emancipation. In many places the resistance of superior lords to the freeing of serfs was counteracted by a strong movement for collective emancipation. In Italy the initiative came from urban communes, whose motive was partly to increase the number of free taxpayers and partly to attract workers from the countryside; as early as 1256-57, Bologna enfranchised all serfs within its jurisdiction. In France the initiative came from the crown itself, whose motive was partly to derive revenue from redemption payments and partly to appease peasant unrest and forestall the peasant revolts that were endemic in France as well as in England, Italy, Spain, and elsewhere. Thus in 1290 and again after 1310 French kings offered freedom to serfs on various crown lands—for a price. By 1450 serfdom had been abolished in almost all of the western parts of Europe, though not in the central and eastern parts.

It would be a profound mistake to discount the moral and legal aspects of enfranchisement, for it was not only the economic hardships of serfdom which caused European peasants to rebel in the thirteenth, fourteenth, and fifteenth centuries but also the gross injustices of their servitude. In the era after the Papal Revolution, which was fought in the name of the freedom of the church, and especially of the clergy, it is not surprising that demands for freedom were raised by other polities and other classes as well. One revolutionary cry for freedom in the twelfth and thirteenth centuries was for freedom of the cities. Concurrently came the cry for freedom of the peasantry, which grew much louder in the fourteenth century; and in that connection freedom was said to be the natural condition of all men. Thus in declaring the enfranchisement of the serfs of Bologna in 1256-57, the city authorities declared that serfdom was a consequence of the fall of man, that man's natural condition was freedom. Similarly, in proclaiming the enfranchisement of serfs on certain crown lands in 1315 and 1318, the kings Louis X and Philip the Long of France declared, in language that would be echoed in succeeding centuries:

As according to the law of nature everyone should be born free, but by certain usages and customs of great age preserved in our kingdom . . . and also perhaps because of the misdeeds of their predecessors, many persons of our common people have fallen into the bonds of servitude and into various conditions, which much displeased us, considering that our kingdom is called the Kingdom of the Franks . . . we have ordered . . . that these servitudes shall be brought to freedom and to those who by birth or long standing or recently through marriage or residence have fallen into servile condition, or could so fall, freedom shall be given on good and convenient terms.<sup>25</sup>

Even if one assumes that the French kings were hypocrites, they were nevertheless appealing to ideals and values that were widely shared. The peasants, surely, would have agreed that serfdom was against the law of nature, that by the law of nature "everyone should be born free," and that freedom was man's natural condition. The peasants also hoped, no doubt, that the abolition of serfdom would lead to a better economic life; but even if that hope proved ill-founded, emancipation was required. It was required by the moral order of the universe.

This conviction was not, however, simply a product of a theory of natural law. It was much more the product of historical experience, and especially the experience of the development of manorial law during the late eleventh, twelfth, and early thirteenth centuries. The grant of legal personality to serfs within the manor, that is, the recognition of them as "citizens" of the manorial community, with the duty and right of suit of court, was itself an implicit challenge to serfdom long before any movement arose to abolish it. The challenge was nurtured, in turn, by the belief in and the experience of the integrity and growth of legal systems, including the system of manorial law. The belief in and experience of the *integrity* of manorial law required that serfs be treated on an equal basis with free peasants. The belief in and experience of the *growth* of manorial law required that in the course of time such equality be given full legal expression.

Thus it was the consciousness of the injustice of serfdom in a legal sense, its fundamental illegality, coupled with the belief in the capacity to correct that injustice by law, that changed the mere fact of the economic exploitation of serfs into a social and political cause in which members of all classes could eventually unite.

