HISTORY OF POLITICAL INSTITUTIONS:
Introductory course in Western constitutional history

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Whereas until recently economic problems seemed to dominate the public mind, the debate on the best way of organizing the state has now also come to the fore. Recent momentous developments in Europe have focused attention on such fundamental options as democracy versus autocracy, politics versus ideology, unitary versus federal organization, pluralism versus intolerance, centralism versus regionalism, national sovereignty versus European unity, the bureaucratic welfare state versus individual freedom and a market economy, and a Bill of Rights versus parliamentary omnipotence: in 1990-1 alone I counted six books or pamphlets on 'Britain's constitutional future' and a 'Bill of Rights for Britain'. Third World countries are also interested, as they realize that economic progress is hard to achieve in a backward political regime. Leading economic historians such as Douglass North, one of the 1993 Nobel Prize winners for economics, have shown that the free market alone does not ensure prosperity, but that a stable political and legal organization is also necessary; the role played by a liberal constitution in the industrial take-off in Europe some two hundred years ago was indeed conspicuous.

Today's constitutional debate would be shallow without a knowledge of the historical antecedents. It would be preposterous to imagine that we were the first to discern the fundamental options, and foolish not to try and learn from the experiences of the past. The question as to how the state ought to be constituted has led to fierce debates in lecture halls and violent clashes on the battlefield, and it is to these antecedents that this book is devoted: not the articles of arid treaties and constitutions, but the dreams and achievements of scholars and nations. It is hoped that placing the great constitutional debate of our time in an historical perspective may help to illuminate it.

The readers to whom this short book is addressed consist of law students in various countries who want to place their own constitution,
CHAPTER 2

Tribal kingship: from the fall of Rome to the end of the Merovingians

The dramatic disappearance of the Roman empire in the West left a great void: the political home in which millions of people had lived for centuries was no more. Finally it was unable to survive the twofold onslaught of the Germanic peoples in the north and the Arabs in the south. First the Pars Occidentis, with Rome herself, fell to the tribes from beyond the Rhine-Danube limes; afterwards much of the Pars Orientis, Byzantine 'new Rome', fell to Islam. From the storms that raged from the fifth to the seventh century three worlds emerged, three heirs of classical Antiquity. Greek Christendom in Byzantium was the direct, but much reduced continuation of the Roman empire in the east, ruled by a Roman emperor and living under Roman law. Latin Christendom lived under Germanic tribal kings, who had taken their religion from Rome, but little culture and even less law. The Arab world of Islam, stretching from Asia via northern Africa to Spain, had inherited not much law and even less religion from Antiquity, but a good deal of Greek science.

It is in the Latin Christian world of the early Middle Ages, from the fifth century onwards, that our narrative starts. The void which originated there was caused by the loss of some fundamental ideas and structures. The first victim was the centralized imperial state itself and with it the basic notion that its millions of multiracial inhabitants were subjected to one common domination, and that no other autonomous kernels of legitimate power existed beside it: all public authority had been vested in the emperor or descended from him. This emperor called dominus since Diocletian (d. 316) - was absolute, i.e. not bound by the law, as he was himself its supreme source. He was not accountable to the people or their chosen representatives. The Roman senate was no more than an ornament of politics and a distant memory of its previous importance. The daily life of this enormous empire rested on two pillars, a severe fiscal regime and an extensive bureaucracy. Both were so oppressive that many citizens came to prefer the 'barbarians' to the 'blessings of civilization'. The Roman state was viewed as a magistrature. It was not the personal patrimony of the emperor or his lineage, but an abstract and eternal entity, the respublica or res Romana, administered by magistrates for the Roman people. The emperor was the highest magistrate and as such was in the service of the empire, which he was expected to govern, preserve and even extend according to his own insight. This state was Roman, Hellenistic, and oriental. It owed to Rome its legal and administrative genius, to Greece its cultural language, its arts and science, and from the Orient came the absolute power of the divine dominus. As the empire encompassed the whole civilized world, it was deemed universal. In the fourth century the empire came first to tolerate Christianity and then to promote it as the sole protected and privileged religion of the state; conversely the Christian churches were placed under the imperial protection and control. From this imposing construction only the Christian Church survived in the West after the fifth century, and it had special links with the new rulers, the tribal kings. The latter did not dominate the Church, but accepted its moral authority, as became those humble recent converts.

In this new world of the 'barbarians' the late-Roman elements were replaced by the following. The division of the old Pars Occidentis into numerous tribal kingdoms betrayed the fundamental dispersion of power. Even within each of those often minuscule kingdoms the idea of centralism was absent. To the new mentality public authority could be exerted autonomously by many individuals in several places and at different levels over several groups of people, without any need for it to be derived from one central ruler. There was a king, but it was his function to hold the other rulers together and to mobilize them for endeavours of the whole ethnic group. Kingship was tribal in origin, in other words it was linked to a group of people, wherever they might be living. It was only later that it became territorial, after the Germanic nations, which had been wandering far afield, had settled down and become sedentary.

In these circumstances there was no question of universalism. Each kingdom was self-sufficient within its own tribe and land, and did not look beyond these limits, except to embark on conquest and plunder. This could lead to mega-kingdoms (see the conquests of Clovis), but these could be quickly divided among the king's heirs. One victim of
An historical introduction to western constitutional law

The loss of universalism was Roman law. The Germanic nations had their tribal laws, which had nothing in common with Roman law, but in writing. For their Romanic subjects compendiums of Roman law were written, which preserved some elements of the classical heritage, particularly in Mediterranean lands. Only private law was concerned, as in the new, tribal dispensation there was no room for Roman constitutional law. And it should be remembered that even in the Mediterranean zone Germanic kings - Visigoths, Ostrogoths and Lombards - held sway.

Initially the Germanic kings were temporary military leaders (Heerkönige) elected for the duration of a campaign. In normal times the ethnic group had no permanent ruler, and political decisions were taken in meetings of nobles, or elders or even all freemen. These Heerkönige developed at the time of the great migrations into permanent rulers, which is not surprising as the tribes were continuously at war, either against the Romans or among themselves. The kings enjoyed, however, no absolute power. Although they sometimes appeared to eliminate all opposition by a combination of terror and success in war, the fundamental idea was that the king had to respect the rights of his subjects and to live himself under the ancient and sacred tribal customs. These he could only explain or supplement, and even so only with the consent of the people.

Fiscal oppression and ubiquitous bureaucracy had disappeared. The Roman land tax could not be maintained for lack of expert personnel. The old state tax was replaced by the primitive custom of dona (‘gifts’), offered to the king by the notables, and the fodrum, an obligation on the local populace to provide the peripatetic kings with food, drink and shelter. Various ancient indirect taxes on the sale and transport of merchandise were maintained. The administration, however, collapsed. The registration of public and private charters diminished and finally disappeared altogether, at the central as well as the local level. Fewer people were capable of drafting documents - in decent Latin - and finally literacy among the laity was completely lost and became a clerical monopoly.

The abstract notion of the state and the magistrature was also gone and replaced by the patrimonial conception of the kingdom as family heirloom. The reigning dynasty disposed of the state as of a private estate. Public and private revenue and expenditure were not distinguished, hence the custom of dividing the realm among the sons upon the death of the king. This is the origin of a system which prevailed for many centuries: the kingdom, duchy or county was treated as a private estate and not only divided among the heirs, but pawned, parts of it given in dowry to a daughter or exchanged for other, more desirable bits of territory - all without the population being consulted.

That some elements from Antiquity survived in this strange new world was the work of the Church. The Germanic nations and their governments were all eventually converted to Catholicism and recognized the Church of Rome as their spiritual head. This led to close political links between kings and clergy, a situation which existed already in the late Roman empire, but the balance of power had changed in favour of the clergy. This was not unexpected, as the Church was in a much stronger position vis-a-vis the reges barbarorum than it ever dreamt of vis-a-vis the Roman emperor, the dominus mundi. It is in those early medieval times that the Church came to occupy a position which remained typical for many centuries, that of a great landowner, enjoying an enormous prestige as the teacher of the ‘barbarians’ and being the sole guardian of the Christian faith and classical culture. Hence the Church enjoyed many privileges, and was administered by its own government, lawgivers and judges.

It was the starting point of centuries of collaboration, but also of some dramatic conflicts.

The interpretation of these early medieval times has varied. Admittedly in Italy, Gaul and Spain Antiquity did not disappear overnight, suddenly giving way to illiterate barbarians who had never heard of the splendour of the Mediterranean (as was the case with the Anglo-Saxon invaders of the Roman province of Brittany). Consequently even after the fifth century numerous elements of Roman times survived in Western Europe, which has led some historians to stress these witnesses of continuity and to place the beginning of the Middle Ages not, as tradition, in the fifth century which witnessed a massive Germanic invasion and the deposition of the last Roman emperor in the West), but in the seventh, when the advance of Islam was reputed to have cut off from its classical Mediterranean roots, or even in the eighth century, when Charlemagne is said to have founded the first truly medieval empire. It seems to me that not too much importance should be attached to irrotund survivals or appearances: it is not because Clovis, the Diterate and recently converted war-lord of the Franks, put on the imperial diadem and purple cloak and received the minor title of

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consul from the real emperor in Constantinople that the Roman empire lived on in his person. The same can be said of the miserable attempts of the Frankish kings of the Merovingian dynasty to continue issuing imperial gold coins (solidi). Nor did Antiquity survive because Isidore of Seville compiled for readers who knew no Greek a small, elementary encyclopedia, salvaging some of the achievements of Greeks and Romans. It is undeniable that a fundamentally new situation was established in the fifth century, when rapacious tribes from Central and Northern Europe occupied the place of the old caput mundi (‘head of the world’), imperial Rome.¹

We shall now analyse the impact of these events on public law, limiting our remarks to the realm of the Franks, who played the most important role in the history of Western Europe. The question may, however, be posed whether and to what extent we are justified in speaking of public, as opposed to private law. For the Romans, as we have seen, this distinction was evident, but in Frankish times things were different, as will appear from the following considerations.

We shall look in vain for distinct chapters on constitutional law in the laws of the Germanic nations. The Salic law, for example, mentions the king only rarely and incidentally, nor do we find chapters on the army or popular assemblies. Criminal law, which we nowadays consider to be part of public law, was seen as concerned primordially with private interests. Not only were the damages (faidus) greater than the part of the fines that was paid into the royal treasury (fredus), but criminal law consisted really of tariffs of payments for damages suffered by private parties. If the latter failed to agree on such payments, they were at liberty to end their conflicts through private vendettas (faida). Also, criminal law was seen as concerned with financial transactions, such punishments as execution by fire for black magic being redeemable for money. The law courts, moreover, were not manned by professional and bureaucratic judges, as in the late Roman empire, but by notables and landowners who had received no professional education and were elected by the populace each time the mallus (local law court) met. Often they acted as arbitrators rather than judges, and were expected to propose a solution that pleased the public. Nor were their ‘judgments’ enforceable unless the parties had consented to stand by them. The initiative of criminal prosecution was also normally left to the interested parties, which again calls the public character of the judicature into question. Legal terminology is most revealing here. Thus the term publicus, which used to refer to the commonwealth or the state, as in res publica Romana and aerarium publicum (‘public treasury’), came simply to mean ‘royal’. Similarly no longer referred to the finances of the imperial government, but to the personal treasure of the ruler or some particular royal manor (manorial revenue being the Frankish kings’ main source of income). As the private moneys of the kings were not administered separately from the treasury of the state, there could hardly be a financial distinction between private and public law. The same applied to some extent to military organization. Military service admittedly was imposed on all freemen, and thus belonged to the domain of public law. However, kings and other lords also disposed of their Gefolgschaften (warrior-followers), who had entered their service through free agreements and were promised maintenance, military ventures and booty. These private militias, well known in Germanic Antiquity and adapted to the uncertainties of the early Middle Ages, operated outside the national armies.

Whatever the relevance of the ‘public’ and ‘private’ categories at that time, we shall now proceed to analyse some aspects of what in present-day parlance would be called the public law of the Merovingian era.

The territory was not yet the essential element of the state to which later centuries have attached so much importance. Although the Franks had ceased to be nomads and had settled in ancient Gaul and conquered lands of other Germanic tribes, the Merovingian king was still the king of a people - rex Francorum - and not of a country (Francia or Gallia, or whatever it might have been called). The personal link between the king and the members of his tribe (in ancient times his kinsmen) was still more important than the geographical criterion of the occupation of a precisely marked stretch of land.

The king was the permanent cornerstone of the political organization of the Franks. The monarchy was hereditary. The kings admittedly were traditionally elected, but the dynasty of the mythical King Meroveus had imposed itself to such an extent that the elective element was obscured, but not entirely eliminated, by the loyalty to the royal lineage, which was deemed to descend from Germanic deities: a dynasty that brought luck to the people deserved to be maintained. The Merovingian family was sacred, and its long hair

¹ For a survey of this controversy, which centred round the ‘Pirenne-thesis’, so called after the medievalist Henri Pirenne (d, 1936), see B. Lyon, The origins of the Middle Ages. Pirenne’s challenge to Gibbon (New York, 1972).
was the primitive symbol of this halo. Consequently when the last Merovingian king, Childeric III, was deposed in 751 and shut up in an abbey, his long hair was cut off.

In legal terms the central element of royal authority was the bannum, the right to command and to prohibit, i.e. domination. This bannum was not purely personal or unlimited, as the consent of the populus Francorum had to be obtained. The people owed allegiance not to the state and its Constitution, but to the person of their ruler. This was the all important duty of offiditas, and it meant that the most heinous crime was the infidelitas, personal disloyalty, leading to banishment and confiscation.

The king stood under the ancient customary law. It did not behave him to change it, as it was an eternal and fixed norm which no mortal could modify. The king was no real lawgiver, nor could he be. Nevertheless he played a role in the development of the law, as he assembled the populus Francorum in order to put the tribal laws in writing, and he was also empowered to clarify and supplement the nation's customs.

The king lived, as we have seen, mainly from the revenue of his manors, usually old Roman public land, obtained at the conquest of Gaul. This and the primitive, almost moneyless, economy of the period forced the king and his court to lead a peripatetic life, travelling from domain to domain and consuming the agricultural produce on the spot. This incidentally meant that there could be no real capital of the realm. One important attribute of the state that escaped from direct royal control was coinage. It became a private industry, in the hands of numerous entrepreneurs who turned it into a profitable business. The reliability of the coins rested no more in the imperial effigy, but in the name of the moneyer, the man who ran the mint. It was not until the Carolingians that coinage returned to royal hands.

The Franks lived in a class society, not only in the sense of social groups but in the sense of established categories with rights and duties recognised and imposed try law. The principal estates were the freemen (ingeni), the serfs (servi) and the mancipia, a description which is difficult to translate, as it concerned people who were unfree like the servi, but did not have their own farm. They were servants whose status resembled that of ancient slaves, although, unlike the latter, they enjoyed personal rights.

Most Germanic laws also mention nobiles, the estate of the nobility.

Tacitus refers to them in his de Germania, but it is noteworthy that the laws of the Franks, in contrast with the narrative sources, do not mention them. This creates a problem for the legal historian, particularly for the Merovingian era. It is on the one hand hard to believe that the Franks at that time would have been totally without nobles, but it is on the other hand very difficult to explain why their laws, foremost the Salic law, should completely ignore them. Some strange theories have been advanced to solve this dilemma, one being that the Merovingian kings liquidated their own old nobility (a notion that seems more familiar in our own time than in the so-called Dark Ages). This is not the place to enter into the details of this controversy, but it is a fact that a Carolingian nobility is documented as a warrior aristocracy which maintained that vast empire and whose descendants in post-Carolingian times provided numerous ruling families all over Western Europe. It is possible that this aristocracy of great landowners was to the Frankish mind endowed with leading functions, but not with such personal privileges that they formed a separate legal estate above the Frankish nation of free warriors. This might explain why they do not appear in the legal texts as a separate group. An indication in this sense may be found in the fiction of the Frankish popular assembly. Even in Carolingian times the meeting of the magnates - abbots, bishops, dukes, counts and direct vassals of the king - was still referred to as the convenitus populi Francorum, or even simply as the populus Francorum. However, what had in the past been a general meeting of all free warriors, equal in law, had developed into an assembly of the political top. Nevertheless it was still called the (meeting of the) people of the Franks, and not the assembly of the nobility. The aristocracy was replenished by the accession of new individuals, and the main lever of this upward nobility was personal service to the monarch, the entry into his comitatus, his circle of followers. ThaLi/Ji were a top group of big landowners in Merovingian times appearing even though the term 'noble' is not used, from laws stipulating that the comites of the pagi, the royal officials who were at the head of the local districts, had to be recruited from the ranks of the local lords and landowners.

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1 this is an old controversy, to which Paul Vinogradoff devoted an article entitled Wcr Geld und Stand in 1902 (Collected Papers, II. Oxford, 1928, 84-152). For some recent assessments, see H. Grabl-Hoek, Die Fränkische Oberschicht im 6. Jahrhundert: Studien zu ihrer rechtlichen und politischen Stellung (Stuttgart, 1974); J. Hanny, Concensus Fiditium. Frühfränkische Interpretationen des Verhältnisses von König und Adel am Beispiel des Vomkereich (Stuttgart, 1982); Studien zu den germanischen Volksrechten. Gedächtnisschrift für Wilhelm Ebel (Frankfurt, Berne, 1982).
incidentally indicates that the control of the monarchy over its own territorial agents was limited. They should in no way be seen as subjected creatures of the government, as they not only had to be local potentes, but also people who enjoyed a considerable measure of independence, based on their landed wealth and consequent economic independence.

Towards the end of this period, in the first half of the eighth century, Western Europe was in a bad way. In the British Isles Ireland and Wales were opposed to England, itself divided into several kingdoms. On the Continent Visigothic rule in Spain collapsed, leaving the largest part of the peninsula under Muslim rule. In northern Italy the kingdom of the Lombards was at daggers drawn with the papacy and the Franks, whereas some powerful Germanic tribes, such as the Saxons, were still heathen. The realm of the Franks, which was often divided in sub-kingdoms, not only lacked unity, but was 'ruled' by an outworn dynasty, which had lost the economic strength and moral influence it might ever have had. The Frankish Church also was in deep crisis. Many people in the West, such as Pope Gregory the Great (d. 604), had for a long time believed that the unnatural rule of the barbarians would not last and the world would return to normalcy, which meant that the Eastern Roman emperor would restore his authority and the empire would again extend from Hadrian's Wall to the Persian frontier. Slowly people came to realize, especially after the catastrophic blows suffered by Byzantium at the hands of the Arabs, that the old order was gone forever. So the Latin West had to take its fate into its own hands. This was done through an alliance between the papacy, which finally turned its back on the Greeks, and the Carolingian house, which launched a vast attempt to unite the peoples of the West in one great state. In that way the Roman empire would be restored after all, not the whole ancient Mediterranean state, but a part of it, based politically on the north-west of the Continent and ideologically on the city of the 'heir of St Peter'. We shall now proceed to the presentation of the consequences of this development for public law.

CHAPTER 3

The First Europe: the Carolingian empire

THE POLITICAL FRAMEWORK

In the second half of the eighth and the first half of the ninth century the Franks, under the Carolingian dynasty, founded an empire that united the greater part of western Christendom in one state. The Carolingians, a leading and wealthy family from the non-Romanized eastern part of the kingdom known as Austrasia, had played an important political and military role long before the middle of the eighth century, but it was through a coup d'etat, supported by the papacy, that in 751 they acceded to the royal dignity in the person of Pippin III. This date traditionally marks the start of the Carolingian era, whose climax came under Charlemagne (d. 814) and the earlier years of his son Louis the Pious (d. 840). At that time the Carolingian empire contained, in present-day terms, France, western Germany, Belgium, the Netherlands, Luxembourg, Switzerland, north-east Spain (called theMarca Hispanica) and northern Italy (the old kingdom of the Lombards), to which could be added the protectorate over the papal state in central Italy. Within Latin Christendom only the British Isles remained outside. The establishment of this vast complex was realized through the strengthening of royal authority inside the old Frankish lands - which was not always an easy process, as the events in Aquitaine showed - and through conquest and expansion: the Saxons (those that is who had stayed behind on the Continent) were subjected and forcibly converted, and the regnum iMngobardorum was conquered by Charlemagne, though it continued as a separate kingdom, united with the Frankish monarchy by a personal union. The disintegration of this empire - which had become an empire stricto sensu at the imperial coronation of harlemagne - had already begun under Louis the Pious, and the
quarrels among his sons led to the division of the Treaty of Verdun of 843 and eventually the rise of the kingdoms of France, Germany, Burgundy and Italy. Within the newly-established kingdom of France the political decomposition continued, and the country was divided into a number of 'territorial principalities' ruled by autonomous regional dynasties. French kingship survived, but the Carolingian dynasty was eliminated in the late tenth century; in Germany it had already disappeared three generations earlier.

**FUNDAMENTAL CHARACTERISTICS**

The Carolingian empire broke with the old tribal outlook of the Franks and built a vast supranational political home for the peoples of the Western-European Continent, which was not equalled until our own day. This 'First Europe' was for many centuries also the last; it is possible that the end of the twentieth century may see the rise of a United (Western) Europe that would be even larger than the realm of Charlemagne.

The Roman empire had disappeared in the West, but it was not forgotten. Learned circles continued to believe that empire was desirable and even natural for a large community of nations and it is in that light that the coronation of Charlemagne in Rome on Christmas Day 800 by Pope Leo III can best be understood. It meant the recognition of the supranational, even universal signification of the king of the Franks and the Lombards and the protector of the Latin Church, which had abandoned the Greeks and turned to the Franks. It expressed the feeling that the 'time of troubles' was over and the Latin West was the equal of the Greek East, where the continuity of the ancient empire was never lost. The Roman, or as we might more aptly call it, the neo-Roman empire of Charlemagne was in several respects different from its ancient model. Though it was Roman, it refused to be Byzantine, and Charlemagne had been displeased at the eastern ritual followed for his crowning. If his empire accepted to be Roman, it was because Rome was the holiest city in the West and her bishop the 'heir of St Peter'. The main source of inspiration for the new emperor was not the political traditions of the Roman empire or Roman law, but the Christian religion. Particularly the Old Testament and its anointed kings excited his imagination: it was no coincidence that in the inner circle of the court he was known as David. A Christian, rather than a Roman empire, is what he had in mind.¹

**THE PUBLIC LAW**

**The monarchy**

The monarchy was the cornerstone of the whole political edifice. Kingship was hereditary, even though in times of crisis election had a chance: Pippin III was 'chosen' as king by the Franks. The kings were sacred: from Pippin III onwards the rulers of the Franks, and even the crown princes, were anointed by the Church, which put them into a direct relationship with God and above the ordinary laymen.² The form of government was personal and the *hamman 'from the king's own mouth* was decisive. Important decisions were taken in consultation with the *populus Francorum*, but this was no popular assembly or parliament of elected representatives, as it contained only the leading members of the clergy and laity. Whereas their consent was important, it could hardly be withheld under leaders of Charlemagne's stature. The personal character of the regime was underlined by the importance of the oath of loyalty to the king, which was demanded from everyone. This usage may have originated in the conspiracy against Charlemagne in 785 and the king's desire to protect himself by this universal obligation of the oath of fealty (a practice which had existed in the past, but was abandoned in the seventh century). The capitulary which introduced it and placed it under the supervision of the royal envoys known as *missi dominici* is lost, but we know that its stipulations were carried out in 789, and the wording of the oath is preserved in a capitulary of that year. Two years after his imperial coronation, in 802, Charlemagne again and for the last time imposed the swearing of the oath. This oath of loyalty of the whole population should be distinguished from the oath of fealty of a vassal to his feudal lord: the royal vassals, who had sworn the vassalitic oath, were required to swear the general oath as well.³


The religious inspiration of the Carolingian dynasty went much deeper than under its predecessor: the expansion of the Christian faith and the protection of the Roman Church occupied a central place. The kings of that house also considered themselves as rulers by God’s grace and answerable to God. They attached importance to the protection of their weaker subjects, such as women, orphans and generally speaking all pauperes, the poor who were continually exposed to the pressure of the polentes, the powerful who threatened their land and their liberty.

In this light one also understands the Carolingian interest in legislation and the courts. Royal legislation was revived in the shape of the capitularies, which constituted a considerable body of laws and instructions on diverse temporal and spiritual topics. They became particularly abundant after Charlemagne’s imperial coronation, but disappeared before the end of the ninth century in the successor states of the Frankish empire. Plans were made to put the laws of the Germanic nations in writing, to improve the existing texts and even to bring about legal unification, but were crowned with little success. The administration of justice received a good deal of attention. It was one of the tasks of the missi dominici, whom we have just mentioned. They were sent by the king to local judges and administrators in order to supervise in the king’s name respect for the laws and to introduce and explain new instructions.

All these initiatives betray a heightened consciousness of the public role of the monarchy, a greater awareness of the role of public law in society. The introduction of royal coinage, after the private enterprise under the Merovingians, can also be seen in this light. The same can be said of attempts to improve the efficiency of the government, through the use of writing in administrative and judicial business. It was a difficult task in the prevailing primitive circumstances of massive illiteracy.

Also, only Latin and no Germanic or Romanic vernacular was used in writing, so that not only the barrier of the art of writing had to be conquered, but also of learning Latin. The use of writing made demonstrable progress under Charlemagne, particularly after the imperial coronation. Although he never learnt to write, he understood the importance of literacy. It will forever be impossible to quote statistical data on this subject, as written texts of a transient character, called indiculi (such as summonses, manorial accounts or mobilization orders), were not preserved, let alone copied on rolls or registers, as was the case with the charters containing title to land. Almost all these indiculi are understandably lost, and we know of their existence only through formularies containing model texts to be used in various circumstances. The extent to which the indiculi were used, as compared to verbal messages, much remain obscure. The very small number of officials employed in the royal writing office, where the official documents were drafted and sealed, is a warning not to overestimate the use of written documents.

The finances of the monarchy were based on its landed wealth. As no distinction was made between public and private revenue and expenditure, and the treasury of the state coincided with the private purse of the king, court as well as government expenses were all covered by the income from the royal manors. These were vast, the Carolingian family being the greatest landowner in the country, and better run and controlled than those of the Merovingians. Fewer lands were irrevocably given away than under the preceding dynasty who ended penniless), because the feudal system allowed the Carolingians to put land at the disposal of their vassals on a temporary basis and to retain ultimate control in their own hands. Nevertheless even the immense landed wealth of the Carolingians was dissipated in the course of the ninth century. Besides its manorial revenue the monarchy also drew income from fines, tolls, rents and booty, with occasional windfalls such as the treasure of the Avars who were conquered by Charlemagne in 795.

Church and state

The Carolingian monarchy had close links with the Church. The Franks supported the papacy against the Lombards, and in the winter of 800-1 Charlemagne supported Pope Leo III against various Roman factions. Also the conversion of the Saxons owed much to Frankish military intervention. Within the Frankish frontiers this collaboration was equally intense. The dynasty made the payment of ecclesiastical tithes compulsory, and Charlemagne made efforts for the diffusion and study of the standard text of the Bible, the

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\* See the survey in R. McKitterick, The Carolingians and the written word (Cambridge, 1989).

\* Fifteen carts, each drawn by four oxen, were necessary to transport all the gold and silver and fine textiles to the West; one of the sources of the treasure of the Avars was the yearly tribute of between 80,000 and 100,000 gold solidi which Byzantium had been paying them for almost a century. See H. Fichtenau, Das karolingische Imperium. Soziale und geistige problematik eines Grossreiches (Zurich, 1949), 90.
Roman liturgy and the Roman canonical collections. His efforts to improve the knowledge of classical Latin, the language of the Church, can also be seen in this light, even though the name of ‘Carolingian Renaissance’, given to this movement, is somewhat optimistic. The Church on the other hand was tireless in its support of the regime. This was the case not only in the religious and magical sphere, where the monarchy was given a metaphysical aura, but also in the practical field: the royal chancery was from Carolingian times onwards manned exclusively by members of the clergy.¹

**Feudalism**

The Carolingian monarchy created the system of fiefs and vassals which stamped the medieval world for many centuries. Although separate elements that went into its making can be traced to ancient, Germanic or Merovingian sources, their combination into a system and the latter’s introduction into the political constitution were realized under the Carolingians.

The starting point of feudalism was the vassalitic element, i.e. the personal bond between a lord (dominus, senior), who was a rich and leading personality, and a vassal (vassus, homo), a freeman of a more modest social standing. Their bond, entered into for life by a free contract, created mutual rights and obligations: the lord owed his man maintenance and protection, the man owed his lord loyal service, mainly military in character. Originally maintenance was provided by the lord by accepting his vassals into his hall, sheltering, clothing and feeding them, and providing them with booty. Subsequently the provision of the vassals’ material needs was done through the grant by the lord of part of his landed property to his vassals for the duration of their contract. This was the fief, called beneficium in Carolingian times, which was held by the vassal from his lord and whose revenue (as the peasants went with the land) was destined for his maintenance.

This technique of binding free warriors to their service and to provide them with the necessary revenue from land was used by the Carolingians on a large scale. It allowed them to raise an army of horsemen, without giving away royal manors irrevocably. It also made it possible to bind the leading figures throughout their vast multiracial country to the monarchy by taking them into the royal vassalage. The lay holders of office and, from Louis the Pious onwards, the prelates also became royal vassals, holding their offices in state and Church - and the land attached to them - in fief from the crown. The system was not elaborated through legislation, but by custom, and its later development was also due to changes in custom. Thus, originally fiefs were not heritable, and a lord who lost a vassal took his fief back and could, if he wanted, grant it to someone else of his choice. Although this was logical enough, the vassals, who wanted to ensure the position of their families, put so much pressure on the lords that fiefs became heritable. Similarly, vassals initially could only serve one lord and hold fiefs from him, but here again the land hung over of the feudal tenants led to a change, and a new custom - and customary law - arose, allowing men to become vassals of several lords and hold fiefs from them. The reader will look in vain for legislation or doctrinal works on this subject until well into the twelfth century; it all happened through custom and case law.

The spread of feudalism greatly affected the public law. It changed the constitutional position of the king, who came to assume a twofold, if not equivocal role. As king he was and remained a ruler by God’s grace, the leader, legislator and highest judge of his people; as feudal overlord he had a contractual relationship with his men based on a mutual expression of free will and entailing mutual rights and duties. The king/feudal suzerain had duties towards his vassals, and the neglect of those duties gave them a right of resistance and disobedience.

Another important consequence was that worldly public offices became heritable because they had become fiefs, and the fiefs had become heritable. This could easily lead to greater independence for the local office holders: an official whose position is hereditary is naturally more independent than his appointed and dismissible colleagues. Thus feudalism, conceived to enhance cohesion, contained the seeds of a weaker state. As the crown had assumed an equivocal role, feudalism also appeared to be a double-edged sword.²

The most recent edition of the classic work of F. L. Ganshof, Qu’est-ce que la JodalitP?’, is the fifth, and was published in Paris in 1982; the third edition of the English translation of the second French edition was published in London in 1964. See also the recent posthumous survey of a renowned specialist, W. Kienast, Die fränkische Vasallität von den Hausmeiern bis zu Ludwig dem Kind und Karl dem Kühnstigen, ed. by P. Herde (Frankfurt, 1990).

¹ See the following surveys or collections of articles. F. L. Ganshof, Frankish institutions under Charlemagne (Providence, R. I., 1968); W. Ullmann, The Carolingian renaissance and the idea of kingship (London, 1969); F. L. Ganshof, The Carolingians and the Frankish monarchy (London, ig71); J. L. Nelson, Politics and ritual in early medieval Europe (London, Ronceverte, 1986).
DECLINE OF THE FIRST EUROPE

In the eighth century the Frankish monarchy had attempted to weld together the old inhabitants of Roman descent and the Germanic newcomers into one large and stable state, but already in the ninth its reborn West Roman empire collapsed and gave way to new kingdoms and dynasties. One of those kingdoms carried the disintegration even further and fell apart into autonomous regional principalities. That Frankish unity was gone forever was not immediately evident, and both the French and the German kings went on for a long time calling themselves ‘kings of the Franks’. Finally people came to accept the new reality of a divided Europe and all this entailed: endless wars between large and small states and, at least in the short run, a loss of security for the whole area, threatened by Vikings, Magyars and Saracens. All this led to a profound militarization of the West and the rise of the typical aristocracy of knights, who dominated and even terrorized the land around their castles and its inhabitants. From the late eleventh century onwards, this society geared to war and led by warriors went onto the offensive, to north, east and south, and eventually established western hegemony in large new areas. There was an interesting chain reaction here. Internal and external insecurity had led to a defensive militarization. The resulting society, geared to feudal warfare, produced a political-military complex that was ready for conquest in the following, offensive stage. Its military base was the castle and the mail-fisted knight, the economic foundation was the manor and the seigniory, and the feudal monarchy was its political expression. The model was exportable: the Normans introduced it in England, and the Crusaders in the Holy Land.

The failure of the Carolingian efforts had such far-reaching consequences that the question of its causes deserves to be posed. The geographical extension, although considerable, does not seem to offer an explanation. History has known other empires which lasted for many centuries in spite of vast areas and slow, primitive communications. The Latin Church is also an example, at least from the Gregorian Reform onwards, of a centralized organization which operated efficiently in spite of slow and dangerous travel and an area much larger than the Carolingian empire. Other, more fundamental factors must have played a role, among which the following could be mentioned. The ethnic diversity and the Frankish domination kept alive a strong regional or tribal consciousness. The problem was solved to some extent by the formula of personal union which, as we have seen, preserved the Lombard kingdom as such, or by the appointment of members of the royal house as viceroys in particular areas, as happened with Louis the Pious in Aquitaine. Another obstacle was the ingrained patrimonial way of thinking of the Franks and their kings, which viewed the realm not as a res publica administered by magistrates, but as the patrimony of the ruling family. This implied that the kingdom was divided among the sons of the deceased king, as any other estate and as had happened time and again under the Merovingians. Remarkably enough, Charlemagne followed the old paths, even after his imperial coronation. In his divisio regnorum (‘division of the kingdoms’) of 806 he indicated in advance which parts of his empire would eventually be inherited by which of his three legitimate sons, Charles, Pippin and Louis. Fate decided otherwise, as the two oldest sons died before their father, leaving Louis the Pious as the sole heir in 814, but the division of 806 remains a significant proof of the strength of the customary ways. It is ironic that, in 817, Louis decided to abandon the traditional path, and to maintain the unity of the empire. His ordinatio imperii of that year stipulated that at his death the empire would pass in its entirety to his oldest son Lothair, and instituted him as co-emperor with immediate effect. Here again events decided otherwise, for Louis’ realm was in fact divided among his sons in 843, in spite of the ordinatio of 817. The latter document was not easily agreed upon, for there were two groups among the notables who had been specially summoned to Aachen. One pleaded for the continuation of the ancient practice of division, as this was the customary law of the Franks and had been recently confirmed by the example of Charlemagne himself. The other, where the clergy was most influential, pleaded for unity, as this was favourable for the imperial protection of the Church and also in unison with Roman imperial thinking, to which learned circles were more sensitive. In truly medieval fashion the decision on this difficult problem, where both sides meant well (as the document expressly states), was left to divine inspiration, which came after a triduum of fasting and prayer.6 Other centrifugal factors were no doubt the intellectual climate and the economic situation. Agriculture was primitive, productivity being so low and monetary circulation so small that centralizing royal revenue and central

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6 See P. Classen, ‘Karl der Grosse und die Thronfolge im Frankenreich’, Festschrift H. Heimpel, Ill (Gottingen, 1972), 109-34.
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payment of salaries were impossible. Also, political ideas stressed the role of the sacred figure of the king and personal loyalty rather than abstractions such as the state and civic duty.\(^9\)

All this does not mean that the Carolingian empire, an underdeveloped country in twentieth-century parlance, could not have survived, as there are examples of other mega-states which lasted for centuries or even millennia in spite of backward agriculture and, to our mind, primitive political institutions. There is, in any case, no doubt that the hesitant and easily influenced personality of Louis the Pious, whom older French authors called 'Louis the Debonair', because he was as weak as his father was forceful, must have influenced the chances of survival of his state in a negative way.\(^10\)

In spite of its undoubted failure the Carolingian experiment has left deep and lasting traces on the development of European public law. Anointed kingship has for centuries been the most important political institution on the Continent and, till this day, in Britain. Not only was kingship blessed with the enormous prestige of religion and towered above ordinary mortals, but the bonds between state and Church - the political and the ideological establishments - remained fundamental for many centuries. This osmosis of religion and politics, in a *do ut des* ('I give so that you shall give') relationship, is a phenomenon which outlasted the Middle Ages, for although its theory was questioned in the fourteenth century and it was to some extent discarded by the Calvinists, the first Constitution which rejected it on principle was, as will be discussed later, that of the United States of America.

The Holy Roman Empire was also a Carolingian legacy, even though it became a Germanic institution, as we shall see. Similarly, feudalism was a Carolingian system which outlasted its original breeding ground for many centuries and profoundly marked European public law. In later centuries one finds tiffs, feudal lords, vassals, homage, feudal castles and feudal courts in many countries, far from the Frankish heartland of their origin. Although the system often got out of control and went hand in hand with political division and discord, this was not linked to the system as such, which had been devised for the sake of cohesion. When feudalism 'went wrong', it was because the monarchy was so weakened that it could not control its own vassalage. The case of post-1066 England shows that where kingship was strong, feudalism could be an element of cohesion.

The legend of Charlemagne should not be left unmentioned. The great emperor of the West, whom so many ruling houses claimed as their ancestor, has fired the imagination of countless generations. To the German monarchy he was the archetype of the universal Christian emperor and a great legislator; to French kings he was the model of the fighter for the true faith and a national symbol.\(^1\)

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CHAPTER 4

Europe divided: the post-Carolingian era

THE DISINTEGRATION OF THE FRANKISH EMPIRE

The life of the first united Europe was significant but short. Decomposition started under Louis the Pious, whose quarrelling sons imposed the division of the Treaty of Verdun of 843. The disintegration of the empire of the Franks took place in two phases. There was, to begin with, the division into France (the western Franks), Germany (the eastern Franks) and Lotharingia, Lothair's long, drawn-out middle kingdom, which eventually became part of Germany. So the old Frankish mother country gave birth to two great kingdoms, France and Germany. For a long time they both considered themselves as Franks no more, but French and German, and that the realm of Charlemagne belonged to the past. The regnum Italiae, the old kingdom of the Lombards, enjoyed a phase of independence, but already under King Otto I (d. 973) it came under German hegemony.

The process of disintegration, started under Louis the Pious, did not, however, stop there. Even within the frontiers of the new kingdoms the weakening of unity continued, though not everywhere to the same extent. The German kings had to accept that several regions, where old ethnic feeling remained lively, achieved a good deal of autonomy under powerful ducal dynasties, the Stammesherzogtümer, or ethnic dukedoms. What happened in France went even further. Here royal authority came to be ignored altogether, because of the rise of separate states, which started in the late ninth century and led to the so-called principautes territoriales, the territorial principalities. They were large areas where local noble dynasties took over the reins of government, even, because of the weakness of the monarchy, assuming responsibility for external security. In some cases, in the duchy of Burgundy, for example, old tribal loyalties going back to the Burgundians of the time of the Germanic invasions can have played a role. In others, like the county of Flanders, this was clearly not the case. There had never been a tribe of that name in Germanic Antiquity and the bilingual principality was created because of the threat of the Vikings, its eccentric position in France and the leadership of an exceptional line of counts, who followed each other in direct succession from the ninth till the twelfth century. The kings, although in theory still the national rulers of the whole of France, were in fact reduced to the level of territorial leaders of the Isle de France. In the course of the tenth century that area, surrounding Paris, witnessed a power struggle between scions of the old Carolingian family and a new lineage of dukes of Francia', the Robertinians, who finally overcame their rivals and occupied the throne of France at the election of Hugh Capet at Senlis in 987. The disappearance of the Carolingians led to the total break between northern and southern France and inaugurated an era where the Midi, i.e. southern France, completely ignored the national monarchy. The accession of the Capetians did not stop the process of division. On the contrary, within some principalities a second wave of disintegration took place which finally left public authority in the hands of owners of land and castles who dominated their local areas without any checks and were supported by groups of knightly vassals; some of these areas were not larger than 5 km around the lords' strongholds. Thus legitimate power had passed into the hands of local leaders of gangs of armed men, the ultimate consequence of the demise of state power.

Where this situation arose, for example in the counties of Poitou and Macon (but not in the duchy of Normandy or the county of Flanders), one can speak without exaggeration of the disappearance of the state, a remarkable situation which every public lawyer will find interesting to analyse in some detail. Power was exercised by landowners who led a military life. They were leaders of small groups of warriors and recognized no higher authority, not even of the regional count, let alone the king in Paris. Public authority on such a small scale caused insecurity and was hardly compatible with even a minimum of public order. These local potentates managed to keep order within their own mini-territories and to impose their discipline on the peasantry, but there was no one to force them to respect each other's possessions or those of inhabitants or travellers. Invasions, attacks, acts of robbery and local wars were an everyday matter; warfare was a way of life for the dominant class. This iron age was the European equivalent of the Japanese samurai era and could in terms
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of public law best be described as a time of quasi-anarchy. 1 It was clear that society could not forever live in a state of permanent alarm and insecurity, but it was unclear how the situation could be overcome. Eventually the monarchy was to re-establish public law and order (as we will see later on), but for the contemporaries of the weak French kings Henry I (d. 1060) and Philip I (d. 1108) this was hard to foresee. They had therefore tried other ways and experimented with some strange creations of public law in order to protect goods and persons and to install a minimum of security. One such initiative was the proclamation of the Truce and the Peace of God, popular movements inspired by the Church which tended to fill the vacuum left by the state. They consisted in mass meetings directed by the clergy, where people swore to abstain from violence towards certain particularly vulnerable persons and goods and on specified holy days and liturgical periods. The sanctions were ecclesiastical (what else was there?), mainly excommunication. Religious sentiment, awareness of the invisible world and the fear of hell-fire to some extent made excommunication an adequate deterrent. Sculptures of this period have survived which, with obvious relish, depict wicked knights being carted off to hell by horrible demons. 2

FEUDALISM

The post-Carolingian era is the period of classic feudalism and therefore deserves some detailed analysis. This will be all the more useful since such phrases as 'feudal disintegration' and 'feudal dislocation' could easily create the impression that feudalism was responsible for political separatism. We shall concentrate our attention on three themes, the legal development of feudal institutions, the feudalization of public life and the relation between feudalism and monarchy. The rules of the feudal game, i.e. the norms that regulated the relations between lords and vassals and the legal nature of the fiefs, had changed since Carolingian times, even though the fundamental elements remained the same. The accents, however, were placed differently, for whereas initially the personal, vassalitic element was predominant, in later times the material aspect, the fief, came to occupy the forefront. Whereas at the start the fief had been the means, in the end it became the aim: previously one received a fief because one was a vassal, afterwards one became a vassal in order to obtain a fief. The following developments will serve to illustrate our point.

Fiefs eventually became hereditary. Initially the lord had taken back the fief upon the death of his vassal in order, if he wanted, to grant it to someone else of his choice. In the course of time the vassals' ambition to safeguard their fiefs for their descendants prevailed, allowing them to preserve the material foundation of their lineage. But the inheritance was transmitted undivided, usually going to the first-born son. This rule of primogeniture was to the advantage of the feudal lord, as only a complete fief could support his vassal and secure the desired service from the latter's heir, but it was also advantageous for the vassal, as only an undivided fief was a sufficient material base for the desirable social and economic position of a noble or knightly family. The principle of inheritance itself was, however, the object of a long tug of war between lords and vassals, the former detesting and the latter desiring it. The story of the eventual victory of the vassals is long and complicated. We already find a recognition of the heredity of fiefs in a capitulary of Charles the Bald of AD 877, but two centuries later it was still a bone of contention in Anglo-Norman England. And after it was finally recognized there in the twelfth century, lords and vassals went on quarrelling about the amount of the relief. This was a tax payable by the new vassal to the lord upon receiving the inherited fief from his hands. That eventually women also, who did not take part in warfare in medieval times, could become vassals was another indication that the original idea was getting lost and the desire to keep the fiefs within the family, even when male heirs were temporarily missing, was paramount.

The multiplicity of fiefs is another aspect of this 'realization' of the feudal relationship. Originally the bond between lord and man was exclusive, and the vassal could only serve one master and therefore hold fiefs from him alone. Subsequently the hunger for fiefs led to vassals offering their loyal services to several lords and receiving tenures from all of them. The situation was scandalous in the theological sense of the term, as it could easily lead to perjury if the lords of one vassal quarrelled, and all demanded his loyal service. The practice nevertheless became widespread and examples are known of important people who were vassals of several kings, counts and bishops, thus accumulating a considerable feudal patrimony. It may

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2 H. Hoffmann, Gottesfriede und Treuga Dei (Stuttgart, 1964).
be imagined what happened in those circumstances to their oaths of fealty. The land hunger of the aristocracy went so far that even kings of France did not deem it beneath their dignity to become vassals of their own vassals in order to get hold of fiefs and castles situated at strategic points; in the twelfth century, however, the rule was accepted that in such cases the kings were not supposed to do homage. What became in all that of the initial feudal concept of personal service and loyalty? It was degraded to a burden upon the fief: possession of feudal land entailed performing specific services - mainly military and judicial - to certain lords, a charge which did not rest on alodial land that was possessed in full, independent ownership.

The feudalization of public life made enormous progress during this period. Defence, the administration of justice, fiscal organization and to some extent even ecclesiastical administration were all stamped by feudalism. We may limit ourselves to some examples.

The nerve centre of political life was the *curia regis*, the king's feudal court. It was composed by the king and feudal overlord and his direct vassals, the tenants in chief, who were great clerical and lay landowners holding their lands and positions directly from him and owing him *consilium el auxilium* ('counsel and support'). The court dealt with all kinds of topics of public interest - military, dynastic, feudal, judicial, political or fiscal - without division of labour or specialization. It had no fixed abode and travelled with the king. As the kingdoms had their king's court, so the principalities had their duke's court or their count's court. Indeed, every lord on whom a number of vassals depended held a court, where topics of common interest were discussed, according to the feudal principle that the lord had to go about his business in consultation with his vassals instead of deciding autocratically. The ultimate logic was that if a feudal lord was in conflict with one of his men, the case was brought before his court and freely decided there - the judgment of the vassals possibly going against their own lord.

The feudalization of military service was a striking phenomenon. In Frankish times there had been an army of free peasants, who fought on foot during short campaigns in spring and summer, as everyone had to be back home in time for the harvest: defence was a general obligation. The feudal armies looked very different, as military duty was founded on the contract between lord and vassal. The former summoned the latter to the military service he owed: vassals in any case received their fiefs in order to enable them to fight as professional warriors. The political implications were far reaching. As the old peasant armies disappeared - in some areas the free peasantry itself disappeared and was reduced to serfdom - the knights became the absolute leaders of society.

The administration of justice was also profoundly affected. Charlemagne had instituted the *scabini* in the ordinary district courts; they were judgment finders appointed for life. They did not disappear in subsequent centuries, but witnessed the rise of a novel type, the feudal courts, composed of the vassals of the presiding lord and empowered to give judgment in conflicts between them. These new courts gave judgment on the legal character of fiefs and their possession and inheritance, but also on personal conflicts involving the disloyalty of a vassal or the illegal behaviour of a lord. As more lands and offices became feudal, these courts gained importance. Sometimes they were even given jurisdiction over non-feudal criminal cases, because the ruler found them more suitable.

Administration became feudalized in the sense that numerous offices were held in fief by particular families: as tenures became hereditary, so did feudally-held offices. This took place in the royal households, with their hereditary dignitaries, and also on the regional level. Thus the Flemish castellans, who headed the castellanies into which the county was subdivided, held their offices and the lands that went with them in fief from the count.

Public revenue was also affected by the impact of feudalism. The lord who was obliged to provide for his vassals could himself appeal to them if he needed their aid (*auxilium*). This feudal request for financial assistance was the starting point of the late medieval demands for grants addressed by kings and other princes to towns or rural districts and to the assemblies of estates or parliaments. What aid a lord could reasonably ask for and on what occasions he could do so - for his ransom, for the knighting of a son or the marriage of a daughter - was a hotly debated question, which often led to arrangements put in writing.

Feudalism was so all-pervading and so deeply affected kingship itself that historians speak of 'the feudal monarchy'. The term is appropriate as the monarchial form of government was maintained, but the latter was transformed by the feudal way of life, which turned the king into a Janus-faced figure. On the one hand he was and

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remained the ruler of his subjects, which created one-way traffic from the top to the base; on the other hand he was the feudal overlord of his vassals and sub-vassals, and this relationship was based on a contract involving both parties in mutual rights and duties; this created a two-way traffic, so that the king’s followers could call him to account and even defy him by renouncing their allegiance (defeodal) if he continued treating them badly.

It is striking what an adaptable, multi-purpose institution feudalism was, being adequate for the most diverse situations. Feudal relations were used for small-scale business such as holding a few acres of village land from a local lord (a transaction of private law in modern parlance). But feudal notions were also used for international relations - clearly a public-law concern. Thus ties between an autonomous duchy like Normandy or an autonomous county like Flanders and the French monarchy were feudal in nature - dukes and counts holding in fief from their royal lord. Nevertheless a legal category that was used both for the tenure of a few acres of agricultural land and the holding of a principality with hundreds of thousands of inhabitants which was called a regnum in the texts of the time had become an empty shell. Formally it was used in a similar way for legal relations which hardly had anything substantial in common.

Feudalism was a European phenomenon and few countries managed to avoid it altogether, even though in Friesland and Scandinavia its impact was minimal. The geography and chronology of its spread are still insufficiently studied. Maps for successive periods would be useful, but the main lines are discernible. The origins of classic feudalism are to be found in the Frankish heartland between the Loire and the Rhine. From there it spread to southern France and northern Italy, where the Franks had held sway. From southern France it entered the Christian kingdoms of Spain, developing some interesting characteristics of its own. It reached Germany early on, and was used as an element of cohesion by the Ottonian kings and emperors, particularly Frederick I Barbarossa, who introduced the Heerschlordnung, a formal feudal hierarchy. In the eleventh century the Western European feudal model was adopted wholesale in the papal state, where the popes used knightly vassals for supporting their authority as temporal rulers. Around the same time the Normans, who became acquainted with Frankish feudalism after they settled on the Lower Seine, exported fiefs and vassals to their two main conquests, southern Italy and England. From England feudalism entered Scotland. It entered Central and Eastern Europe in the wake of German cultural and political influence. Finally the system was implanted in the crusader states of the Near East, where its military element suited the situation in those Christian outposts in Muslim surroundings.

### THE SEIGNIORY

The seigniory or manorial lordship (seigneurie, Grundherrschaft) was the public-law framework which controlled the everyday life of millions of peasants in the Middle Ages and Modern Times. The seigniory could cover a village or parish, but some seigniories contained several villages, whereas others covered only a fraction of a parish. The seigniory normally coincided with a manor or agricultural domain, but the manorial is not identical with the seigniorial system. The manor was a way of organizing agriculture and the lives of the peasants in a collective exploitation under the supervision of the landowner. Such a large domain, with its demesne land, its farms and its commons, was a social and economic unit. However, when the landlord also exercised the rights of bannum, which we associate with public law, such as justice, police and taxation, the manor acquired a different character: it became a mini-state and the landowner became a lord or ruler, who governed the peasants, free and unfree, living on his land, to the exclusion of the normal bearers of public authority, kings, dukes and counts. In post-Carolingian times the seigniory became widespread, both in the sense that ever more peasants were drawn into its net and that the rights of the lords became greater. The rise of modern states and their growing

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4 The system goes back to the immunity, the exemption from the authority of royal officials, which was granted by the Carolingians to some landowners. See F. L. Ganshof, ‘L’immunite dans la monarchic franque’ in: Recueils de la Societe Jean Bodin, 1: Les tiens de vassalut et les immunites (2nd cdn, Brussels, 1958), 171-216. See also A. Verhulst (ed.), Le grand domaine aux e`poques merovingienne et carolingienne. Die Grundherrschaft imfrihen Mittelalter. Actes ... Colloque... 1983 (Ghent, 1985).
centralization reduced the role of the seigniories, and national
governments curtailed the power of the manorial lords, without
altogether abolishing it (which only occurred at the end of the
Ancient Regime). The seigniory was well established in feudalized
areas, where knights normally headed seigniories held in fief from
their suzerains; also their authority over a submissive peasantry must
have seemed natural in a society dominated by a class of landowners
and warriors, who were hardly kept in check by the remote and weak
kings of the period. This does not m e a n , however, that the manorial
regime and feudalism were identical and went necessarily hand in
hand. Indeed, one can easily conceive a society where dependent
peasants lived on large domains under the public authority of knights
and lords who did not hold their land in fief from anyone else. The
best proof that the two categories - fiefs and seigniories - are
conceptually distinct can be found in the Old English kingdom before
the Norman Conquest. The latter introduced feudalism into England,
but manors and lords exercising public authority over the peasantry-
mainly on the authority of royal grants of jurisdiction - had been
widespread there for a long time.7

The small scale of public life during this period appeals to modern
man. We are nowadays, more than in the nineteenth century,
appreciative of a world where local affairs were dealt with by local
lords and their staffs, and discussed by the whole village community
in manorial and other minor courts, without interference from
bureaucrats in some far away megalopolis. On the other hand those
agrarian mini-states were incapable of securing the external safety of
the inhabitants, who were also inadequately protected against
arbitrary and rapacious lords who did not know when to stop
imposing new burdens in the form of payments in kind or money or
labour services. These were the malae consuetudines ('bad customs')
from which the peasants could only escape through flight to the
towns, which offered personal freedom, or to new lands in Eastern
Europe or in Spain, where favourable conditions were offered to
attract new settlers. They 'protested with their feet', like some people
in our own time who flee their country in order to escape intolerable
fiscal oppression. It seems obvious that this peasant discontent was a
support for the reassertion of the monarchy as against the feudal
barons in the twelfth century.8

2 See R. Boutruche, Seigneuries etfeodalite (2 vols., Paris, 1968-70); Handwörterbuch zur deutschen

10 R. Buchner, 'Der Titel rex Romanorum in deutschen Konigsurkunden des 11. Jahrhunderts',
Deutsches Archiv 19 (1963), 327-38; H. Beumann, Der deutsche König als Romanorum Rex,
(Frankfurt, 1981).

Under Charlemagne all Latin Christendom except the British Isles
formed one West Roman empire, as Greek Christendom was politically
united under one East Roman emperor. The Byzantine state survived
for many centuries, but the Frankish-Roman empire was short-lived.
As early as the ninth century the imperial title fell into the hands of
nonentities, and in the early tenth it vanished altogether. However,
the memory of Charlemagne survived, and many people felt that the
West ought to have the Roman empire as its political superstructure.
Consequently it was reborn for the second time, when the German
king Otto I was crowned emperor. He was the most powerful ruler in
Europe, and his victory over the Magyars, who had penetrated deep
into Western Europe, gave him the prestige of the saviour of the
Continent. Following in Charlemagne's footsteps he had in 951
obtained, after the German crown, that of Italy as well9 and was
finally crowned emperor by the pope in Rome in 962. This was the
beginning of the most brilliant period of the German Middle Ages,
known as the Kaiserzeit ('the time of the emperors'). Germany then
played a leading role in Europe, well outside its national frontiers,
and this lasted until the decline of the House of Hohenstaufen
(Frederick II died in 1250). Thereafter the Roman empire, which
became known as the Holy Roman Empire of the German Nation,
led a shadowy life, until its final extinction in 1806, at the hands of
Napoleon. This Roman-German empire belongs to the oddest
creations public law has produced in the course of the centuries. It
deserves a brief analysis.

The dignity of Roman emperor was linked to that of German king.
From Otto I onwards the German king was entitled to his papal
coronation as Roman emperor, which was, until the sixteenth
century, performed in Italy and gave him the right to bear the title of
Roman emperor. During the period between his election as German
king and his imperial coronation he carried the transitional title of
king of the Romans.10 The German medieval empire was an

Rechtsgeschichte, i (Berlin, 1971), 1824-42; G. Fourquin, Seigneurie etfeodalite au moyen age (2nd
3 See on the political scene in Italy under the Ottomans R. Pauler, Das Regnum Italiae in
ottomanischer Zeit. Markgrafen, Grafen und Bischöfe als politische Kräfte (Tübingen, 1982).

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Europe divided: the post-Carolingian era 63

THE EMPIRE
artificial construction, a doomed attempt to resurrect - once again - a vanished universal state. The whole strange contraption can only be understood in light of the conviction of medieval man that his own epoch was a weak copy of the brilliance of Antiquity. This same sentiment inspired his awe for the great authoritative texts of the past, the Bible, the Church Fathers, Roman law and Aristotle: giants on whose shoulders the medieval dwarfs were sitting. Everything about this medio-Roman empire was unreal. There was no Roman nation, although there were Latin Christians full of veneration for the Holy City of Rome; there was no Roman country, and no Roman citizenship: people felt they were the subjects of their respective kings, dukes and counts. Even in Italy they did not consider themselves Roman citizens any more, but the subjects of the king in the north, the pope in the centre, and various Arab, Byzantine and later Norman rulers in the south. It is obvious that, in the absence of a Roman state, there was no question of a Roman administration carrying out imperial policy throughout Western Europe, nor of imperial legislation enforced throughout the West (only a few edicts of the medieval Roman emperors were incorporated into the Corpus Juris). A supreme imperial court of law for the whole of Europe was equally lacking, as was a neo-Roman senate, with representatives from various countries sitting with the emperor. Nor, finally, was there any trace of a separate imperial treasury or taxation: the revenues from the kingdoms of Germany and Italy had to pay for the imperial policies of the Saxon, Salic and Hohenstaufen rulers. The modern historian should see through all the nostalgic titles and rituals and not be carried away by letters as pompous as the one sent by Conrad III in 1142 to his Byzantine fellow-emperor John II Comnenos, pretending that all Europe, including France, Spain, England and Denmark, had made its submission to him and that the whole of Italy was impatiently expecting his arrival (to be crowned). The truth of the matter is that the national monarchies did not feel inferior and never showed any trace of submission to the German-Roman emperors. On the eastern flank of Germany there were, however, countries which did recognize to some extent imperial suzerainty: Bohemia, Poland and Hungary, Bohemia even becoming a kingdom within the empire and its king one of the German Electors. Elsewhere, and particularly in the kingdom of France, German ideas of hegemony were categorically rejected. The most the emperor could hope for there was a vague ceremonial precedence and the recognition of the title of imperial notary - a very modest achievement. What was the significance of the Roman empire at its heyday? It was, I believe, in the first place a sublimation of the German monarchy, which from the tenth to the thirteenth century headed a multinational complex of states without parallel in Europe. The empire was therefore condemned to follow the ups and downs of German kingship: the latter's failure in urbanized northern Italy and its concessions to the ambitious German princes, spiritual and temporal, at home, had weakened it so much that in the end even the illusion of a universal empire could not survive. So, by the end of the Middle Ages the Roman empire had become German and events had come full circle; having passed through a zenith as universal rulers, the German kings had returned to their national starting point. With hindsight it seems doubtful whether the northern Italians could ever have greeted the German kings as their 'natural lords of the land': there are eloquent indications that the Italian population, particularly the urban, non-feudal segment, saw its German rulers, who descended from the Alps upon Italy with their knights and foot soldiers for the imperial coronation, as a foreign occupation which they came to fight in numerous battles.

There was another dimension to the empire which could have provided a solid foundation for a universal monarchy, i.e. the imperial protectorate of the Roman Church. As the papacy was universally recognized, so its protector could have participated in that esteem: one universal pope and one universal emperor, both appointed by God to lead Western Christianity. This configuration made a deep impression on the faithful until well into the eleventh century, witness the ceremony in 1027 when Conrad II was crowned emperor by Pope John XIX in the basilica of St Peter and walked to his throne surrounded by two kings, Canute of Denmark and England and Rodolph III of Burgundy, under the acclamation of the

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11 John of Salisbury, a known critic of the empire, asked in 1160: 'who appointed the Germans to be the judges of the nations?' and he described Barbarossa as 'the German tyrant'; see R. L. Benson, Political renovatio: two models from Roman antiquity’ in R. L. Benson and G. Constable (eds.), Renaissance and renewal in the twelfth century (Oxford, 1982), 379.

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12 K. F. Werner, Vom Frankenreich zur Entfaltung Deutschlands und Frankreichs (Stuttgart, 1974-5); K. J. Leyser, Medieval Germany and its neighbours 900-1250 (London, 1983); K.F. Werner, Vom Frankenreich zur Entfaltung Deutschlands und Frankreichs (Sigmaringen, 1984).

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Romans. However, the Gregorian Reform and the Investiture Struggle put an end to this illusion: pope and emperor, the only two leaders with a universal appeal, were involved in a power struggle which cost the German monarchy dear. After the death of Frederick II the German kingdom itself went through a deep crisis - its Italian policies were in ruins - but two generations later the papacy, under Boniface VIII, also suffered a severe humiliation at the hands of the French. In the end neither of the two universal leaders was victorious and their exhausting conflict had prepared the way for the sovereign nation states.

It seems apt to conclude these pages on the medieval empire with the question as to what modern historiography has made of this puzzling phenomenon. The traditional view, which took shape in the nineteenth century, sees the imperial ambitions and the whole Italian policy of the German monarchy as a hopeless and chimerical endeavour. And as if this were not bad enough, the whole undertaking was blamed for the disintegration of the medieval German state: the kings not only wasted the energy they should have spent on building a strong and centralized Germany in chasing after cosmopolitan illusions, but they even made unacceptable concessions to the ecclesiastical and lay princes in Germany in order to have a free hand in Italy. As a result they ended up empty-handed and Germany entered upon a long period of internal division and external weakness (which led, for example, to loss of territory to the French monarchy at the time of Philip IV). There is a good deal of truth in that theory, but we should remember that nineteenth-century historiography was nationally inspired and believed that the unitary sovereign nation state was the ultimate achievement of European history. At present, however, we tend to see things differently: we do not accept the nation state unquestionably, and the supranational European dimension holds a greater appeal. Seen in this light, the attempts of medieval emperors and popes to create a public law that would encompass all European nations seem less Utopian. There is no reason why the nation state should be the absolute yardstick with which to judge the statesmen of the past. Besides, what is Utopian? Would we until recently not have dubbed Utopian any speculation on the peaceful reunification of Germany or on the collapse of the Soviet Union and its one-party, regime? Nevertheless, our greater sympathy for the medieval empire does not change the fact that its chances of success were hazardous, to say the least.
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under Otto I and extended to Italy; even the bishops of Rome were, until well into the eleventh century, appointed by the German kings/Roman emperors, who treated the Holy See as if it were part of the Reichskirche. The practice went back to a distant past, as the Christian emperors in late Antiquity had not only protected but even dominated the Church (as the Byzantine emperors continued to do) and Louis the Pious had begun investing Frankish bishops with their office. The advantages of the system were substantial, as the prince-bishops were selected from the only learned or even literate section of the population, the clergy, were recruited from the personnel of the royal chancery and, being unmarried, could not find regional, separatist dynasties. The device worked flawlessly until the Gregorian Reform, but even afterwards it was essentially maintained, even though it was adapted in various points. Right up to the end of the Ancient Regime numerous German principalities were governed by a bishop and his cathedral chapter or by an abbot. One of numerous examples is the prince-bishopric of Liege in present-day Belgium, which existed for some eight centuries as a prosperous regional state headed by the bishop of Liege and enjoyed great autonomy within the kingdom of Germany until its abolition and annexation by the French republic. Many splendid episcopal palaces in the old empire - in Wurzburg and Salzburg for example - remind the visitor of their occupants, who were not only prelates but rulers as well.

There was, however, one essential condition for the good functioning of the system: the undivided loyalty of the prince-bishops to their king and feudal lord, the highest leader in the country’s political and religious affairs. This element of cohesion was bound to become a factor of disruption as soon as the hierarchy of the Church decided to go its own way, independent from and, if need be, against the political establishment. As long as the papacy enjoyed a pre-eminent position in the West, was integrated in the Imperial Church and accepted the situation, all went well, but as soon as the popes freed themselves from imperial tutelage to follow a policy of their own - even against the emperor if need be - the German clergy was torn between two opposing loyalties. As heads of German provinces and royal vassals the bishops owed service to their king, the ‘anointed of the Lord’, but as churchmen they owed obedience to their spiritual leader, who occupied the See of St Peter and whose name was ‘unique in the world’ (as the Dictatus Papae of 1075 put it). If that ever happened, conflict was unavoidable, for the German king could not possibly give up his control of the bishops and abbots of the Imperial Church, as they belonged to the political leadership of the country and administered large parts of it. Similarly the pope could not renounce his religious guidance of all the churches in Latin Christendom: nobody could reasonably expect him to let the German bishoprics escape the spiritual authority to which all others were submitted. This conflict, known as the Investiture Struggle, arose as a consequence of a religious movement of emancipation, the Gregorian Reform (so called after its main leader, Pope Gregory VII), and its consequences for public law were far reaching. The Reformers attacked some inveterate customs which, according to them, had shackled the Church to worldly institutions, preventing it from carrying out its own religious mission with the necessary degree of independence. The conflict went very deep and pitted the national state against supranational ideology - a situation with which our own century has been well acquainted. The action of the Reformers was directed against the following abuses (as they saw them).

Clerical marriage, which was widespread among parish priests but exceptional among the bishops (the monks were all celibate), was considered too much of an involvement with secular life and condemned; compulsory celibacy was imposed in the course of the twelfth century and was the normal situation by the thirteenth. Many Church lands and tithes had passed into secular hands through violence, usurpation or illegal transactions concluded by bishops and abbots. This state of affairs was condemned and measures taken to remedy it. As a consequence the system of proprietary churches declined markedly, particularly in the twelfth century, and numerous tithes were transferred to religious owners. Simony was an abuse that was practised frequently and unashamedly. In this sense it is, for example, comparable to the control exerted by political parties over appointment to public office which exists in some countries in our own time: everybody deplores the abuse, but nobody has the courage to change it. Simony was the name given, after a personage in the New Testament, to the commercialization of spiritual goods and values, particularly the sale by kings and prelates of ecclesiastical offices; kings sold bishoprics to the highest bidders and the new bishops, who had borrowed money to pay for them, at once

The aim of the Reform was to eradicate this practice and to replace it with the election of the most competent candidate by an ecclesiastical body and without the corrupting influence of money. Possibly the most visually striking sign of the submission of prelates to the government was the ecclesiastical investiture performed by kings and other rulers, from whose hands the bishops received ring and staff, the symbols of their being wedded to their church and offering protection to their flock. This abuse was found to go against ancient canons and successfully condemned. Feudal homage, however, another sign of the dependence of the prelates on the crown, was maintained. The new practice which resulted - no investiture from royal hands, but homage to the king - was worked out in the early twelfth century. It was a compromise based on the distinction between spiritualia and temporalia in the function of the bishops, who were indeed spiritual leaders, but also played a temporal, political role. The distinction was applied for the first time in a governmental act at the London Concordat of 1107, concluded between King Henry I and Archbishop Anselm of Canterbury, and again in the Concordat of Worms of 1122, between Emperor Henry V and Pope Calixtus II: henceforth the bishops would no more receive the ecclesiastical investiture from the hands of the emperor and would be elected by clerical bodies, but the emperor was allowed to influence the elections and to accept feudal homage from the bishops. The concordat of 1122 was no more than a lull in the power struggle between the two universal leaders of the time. The conflict was resumed with great violence under the Hohenstaufen emperors, Frederick I Barbarossa and Frederick II.

The outcome of the European Investiture Struggle, by no means a peculiarly German problem, was advantageous to the Church. Authors such as Marsilius of Padua in the fourteenth century stressed the autonomy and legitimacy of the state as the organization responsible for the temporal well-being of its citizens, and not for some religious objective. The exclusive reservation of religious affairs to the organs of the Church restricted the state to its own specifically political mission.5 Among important recent publications see the following, R. Schieffer, Die Entstehung des päpstlichen Investiturverbots für den deutschen König (Stuttgart, 1981); IM cristianità dei secoli XI e XII in Occidente . . . Ali . . . Sellimana . . . Mendola (Milan, 1983); K. Pennington, Pope and bishops. The papal monarchy in the twelfth and thirteenth centuries (Philadelphia, 1984); B. Szabo-Bicstein, Liberlas ecclesiae: ein Schlüsselbegriff des Investiturstreites und seine Vorgeschichte, 4.-12. Jahrhundert (Rome, 1985); H. Fuhrmann, "Der wahre Kaiser ist der Papst": Von der irdischen Gewalt im Mittelalter in Das antike Rom in Europa 12 (Regensburg, 1986), 99—121; B. Tierney, The crisis of Church and state 1090-1180 (Toronto, 1988); C. Morris, The papal monarchy. The Western Church from 1050 to 1250 (Oxford, 1989); La riforma (tegoriana e I'Europa. Congresso . . . Salerno . . . . l'inf. r. Relazioni (Rome, 1989); J. S. Robinson, The papacy 1073-1198. Continuity and innovation (Cambridge, 1990). It is well known that a fundamental importance is attached to the Gregorian Reform in the renowned work of H.J. Berman, Law and revolution. The formation of the western legal tradition (Cambridge, Mass., 1983).
CHAPTER 5

The foundation of the modern state

GENERAL OUTLINE

The period from the twelfth to the fifteenth century, sometimes called the Second Middle Ages, witnessed the foundation of the political structures of modern Europe. In those years a new model originated in which we can easily recognize the nation state of our own time. Some elements of the older public law naturally survived, in the first place the monarchy itself, even though its character was transformed. Thus the period saw the end of the deeply religious rulers of the type of Louis the Pious (d. 840), who was constantly swayed by the clergy, Edward the Confessor (d. 1066), whose main concerns were his collection of saints’ relics and the construction of his beloved Westminster Abbey, or Henry II of Germany (d. 1024), who systematically pursued the organization of the Imperial Church and conceived his policy entirely in a clerical and even monastic perspective. The new kings by contrast found inspiration in Roman law rather than the Bible; they were hard, secular and realistic leaders such as Frederick II in Germany and Italy (d. 1250) or Philip IV the Fair in France (d. 1314). Not only the monarchy, but the state itself changed in character. Whereas previously public life was dominated by the opinionated knights, administration now passed into the hands of centrally appointed functionaries. The old undifferentiated feudal councils, which used to conduct the affairs of state in an amateurish fashion, gave way to established professionals, appointed to look after the financial, judicial and legislative tasks of the monarchy.

The geographical borders within which this structural transition took place differed widely and depended on the vagaries of politics, which need not detain us here in detail: a general outline should suffice. In the most straightforward case there was a unitary kingdom where the authority of the one national monarchy was generally recognized and effective. The kingdoms of England, Hungary and Denmark come to mind, where the modernization of political organization took place from the start within the national framework.

The French situation was more complicated, as the monarchy had lost effective control of the largest part of the realm and only began to regain the lost territory in the twelfth century, the start of a process of reunification that was completed at the end of the Middle Ages. Here the structural transformations initially took place within the borders of the territorial principalities, followed later on by the royal domaine direct. The principalities, which gradually came under Parisian rule, had embarked upon their modernization before the crown took them over and replaced the dukes and counts by royal bailiffs and seneschals.

In Spain also the internal transformation had started on the regional level and only reached the national dimension after the kingdom of Spain was established at the end of the fifteenth century. This was only natural, as there was in Spain, in contradistinction to France, not one single embryo of a national monarchy, which could have gradually absorbed all the provinces. Indeed, the national monarchy of Visigothic times had disappeared from Spanish history and been replaced by a number of minor, independent kingdoms, which, while they modernized their internal organization, gradually coalesced into one nation state.

The German situation was different again. Initially there was a national monarchy which avoided the sort of disintegration which France underwent, even though the dukedoms achieved a larger degree of autonomy than the English earldoms, for example, ever obtained. But in the thirteenth century, when the administrative transformation went ahead, the political situation had changed to such an extent that it was not in the nation state, but in the German princedoms, that the modern structures were being erected. This was also true of the Low Countries, which to a very large extent were situated in the kingdom of Germany, and which, before the nineteenth century, never constituted one kingdom themselves.

In Italy things were different again. In the south the Norman conquerors began in the eleventh century to erect a state which under the kings of the Houses of Hohenstaufen and Anjou grew into one of the most modern of the time. In the centre of Italy the papal state witnessed a rather slow administrative development, which is remarkable as the papal government of the Latin Church was at the forefront of the modernization of public law in Europe. In the north,
the situation of the old \textit{regnum Langobardorum}, which had become the \textit{regnum Italicum}, was legally unequivocal. The kingdom was indissolubly linked to the German monarchy, which exercised its legitimate authority there. It was supported by local officials, first of the feudal and later of the modern official type (podestà). Reality, however, began to look rather different from the late eleventh century onwards, and the main cities, united in leagues, managed to gain so much autonomy that they eventually were turned into independent city-states or urban republics. The constitutional consequence was obvious, particularly after the failure of attempts by the emperors to introduce a centralized state run by their officials (Frederick II being the last to make strenuous efforts in that sense). So the cities developed their own municipal Constitutions, in the midst of frequent struggles between oligarchy and democracy, resulting in most cases in the establishment of the monocracy of some leading urban family (so aptly described in Machiavelli’s \textit{Il Principe}). The triumph of the personal rule of these princes has led some observers to the depressing conclusion that democracy is doomed to end in failure and to lead to the rise of popular dictators. In all the cases we outlined the size of the national or regional states held the middle ground between the very large scale of the Roman empire and the very small scale of the seigniories and mini-counties of feudal times.

\section*{The New Structures}

Centralization was the most striking phenomenon, as public law developed from the Germanic dispersion of the centres of power to the Roman concentration of all authority in one hand, that of the ruler assisted by his council. Previously local authorities even when acting

as royal representatives enjoyed a high degree of independence. Their office was not only for life, it was even hereditary; also, they belonged to the nobility and enjoyed the status and influence of big landowners. From the twelfth century onwards they were replaced by a new type of official, who was no member of the nobility (often a knight and modest landowner), but a salaried appointee of the ruler, to whom he owed his whole position. Many of those modern-style bailiffs, seneschals, justiciars and provosts came from inconspicuous families and owed their role in society to their previous expert service in the administration of the royal manors. As agents of the central government in their respective areas they were responsible for judicial, fiscal and military tasks. In some countries, such as Flanders, an entirely new type of official was created, the comital bailiff, who in the twelfth century came to replace the old-style feudal castellan. In England, in the same century, the kings first tried to replace the traditional sheriff (\textit{shire gerefa, vicecomes}) by an official of a new type, the local justiciar, but this was a passing experiment, and the sheriff remained the local representative of the central government. The old office was, however, modernized through the appointment of people from less exalted origins and the imposition of stricter controls.

The central organs of state were themselves transformed. The feudal king’s court was split into specialized departments manned by full-time officials, who followed routine procedures. The oldest were the ‘chambers of accounts’ - in England called the Exchequer - where the accounts of the agents of the crown were kept and scrutinized and fiscal litigation settled. They were followed by central courts of law, such as the Court of Common Pleas at Westminster and the Parlement of Paris. Their professionalism led to bureaucratic methods, as the role of writing gained in importance and most decisions were taken by groups of councillors who bore no political responsibility but proceeded according to fixed norms and precedents, without personal intervention by the monarch. These officials and judges had been thoroughly trained, either - as in England - in practice or - as often on the Continent - through the study of Roman law in the universities. The social origins of this, to present-day standards, very small group of people could be found mostly among the gentry and prosperous townspeople; they were united by their expertise and loyalty to the crown. The cost of these state services was covered by the traditional income from crown lands and increasingly by grants from towns and parliaments. The Church was also made to
contribute, as many royal officials and judges, particularly in the earliest phase, were clerics who lived on prebends and in fact worked for the state while being paid by the Church. Careers in the service of the state opened new perspectives for the turbulent knighthood, but at the same time tended to tame it: its military way of life and its traditional dominant position were harnessed by the crown. Also, many knights found in the service of the state a solution for their financial problems, as they were caught between the pincers of rising costs (caused by inflation and conspicuous consumption) and unchanged revenue from ancient rents. One should, however, not imagine that the old feudal order was completely bureaucratized: as soon as a political crisis at home or abroad offered it a chance of showing its prowess on the battlefield and gaining booty and mercenary pay, it grasped it with enthusiasm - whether it was in the Wars of the Roses or in the English Wars of the Roses.

A last striking shift in the politics of the period concerns the basis itself of the monarchy. For centuries this had consisted of a group of people, rather than a fixed territory. The transformation which took place in this respect is most clearly expressed by the official titles of the rulers. Whereas they used to call themselves 'kings of the Franks' (or later, of the French) or of the English, or 'counts of the Flemings', around AD1200 the new style 'king of France', 'king of England', or 'count of Flanders' was introduced. This showed that the state had become a territorial instead of a personal unit, and within the fixed boundaries of this territory the crown constituted henceforth the sole government. Even where the direct organs and officials of the crown had to leave some room for the older institutions, such as feudal and manorial courts, the latter's jurisdiction was reduced: they lost the causae majores ('major cases') and what was left was placed under central control through the procedure of appeal (at least in civil matters).

HALF-WAY BETWEEN FEUDALISM AND THE MODERN STATE

The late medieval state was clearly positioned half-way between the old feudal constitution and the absolute monarchy of Modern Times. It clearly bore the marks of the previous phase and suffered various limitations, which were not discarded until the era of absolutism. The following elements deserve our attention.

The state was semi-feudal, in so far as the tenants in chief and main landholders still had ambitions to play a role in the national government, beside and sometimes against the royal entourage. The baronial revolts under the English king Henry III (d. 1272) illustrated the seriousness of this threat. Consequently the state was only semi-bureaucratic. The role of the learned officialdom was limited to routine tasks in administration and law: decision making was outside its field and bureaucratic ambitions led to clashes with the nobles, who firmly believed that the business of government ought to be left to them. To illustrate our point we can refer to the resistance offered by the Peers of France to the jurisdiction of the learned unaristocratic Parlement of Paris and their contention that they ought to appear exclusively before their fellow tenants in chief, i.e. in the cour despairs, as in the days of the old curia regis. Also, it is well known that in the Netherlands in the sixteenth century the objections of aristocratic members in the Council of State against the bureaucratic government of Philip II were instrumental in unleashing the Revolt of the Low Countries.

The distinction between the areas of public and private law was also still imperfect and the ancient patrimonial approach was still strong. Princes thought very much in dynastic terms and considered their countries as estates which had to be preserved and passed on to their descendants intact and, if possible, augmented. Admittedly the division of kingdoms among the heirs had disappeared, but there was no lack of obvious relics of the old attitudes. One example was the assignation of apanages, a system used to compensate the younger sons for the fact that the oldest inherited the whole kingdom, by appointing them at the head of certain provinces: the duchy of Burgundy, which was the starting point of the Burgundian Netherlands, was such an apanage, created in 1363 by the French king John the Good for his fourth son, Philip the Bold (d. 1404). Some rulers were still prepared to give away part of their principality if this could improve their daughter's chances of marrying royalty. This sort of deal annoyed the inhabitants, who were attached to their country and did not want it to be carved up. This is clear, for example, from the Joyeuse Entree, a charter granted by Joan and Wenceslas upon their accession to the duchy of Brabant in 1356, in which the promise was made that Joan's younger sisters would be suitably compensated, but without severing any part from the duchy. The force of the ancient patrimonial approach also appeared from the continuing
confusion between the public and the private finances of the princes. Expenditure for the maintenance of the royal family and its court was treated on an equal footing with that for the internal and external activities of the state and the revenue from the crown lands was not distinguished from the yields of tolls, fines and grants. It is only in Modern Times that the separation of these financial spheres was carried out, when the civil list was established and what was left of the old crown domain was liquidated. Nevertheless the late Middle Ages had gone some way in that direction. Thus in England the royal receipts in camera and for the wardrobe were distinguished from those paid into the treasury by the sheriffs and accounted for in the Pipe Rolls at the Exchequer.

Late medieval monarchy was not yet absolute, because it was subjected to certain internal and external restrictions. This is an aspect which deserves a detailed analysis.

THE LEGAL LIMITATIONS OF THE LATE MEDIEVAL MONARCHY
The limitations which restricted the monarchy were, as we have already indicated, both of an internal and an external nature. The internal ones were caused by urban autonomy, constitutionalism and parliamentarianism; the external ones were caused by the supernational role of the empire and the papacy. The movement for autonomy in larger cities was an important political factor in the constitutional development of numerous kingdoms and principalities: some crowned heads were obliged to share power with the towns or even to abandon it to them altogether. The situation varied from country to country and was, of course, linked to the balance of power prevailing in each one of them. The main factors were the degree of urbanization and the strength of the monarchy. It is obvious that the problem did not arise in backward, purely agricultural areas which contained only small towns with a modest market or garrison or offering minor administrative services. The situation was quite different in countries with powerful towns: here everything depended on the political evolution. In England, ruled by an ancient and forceful monarchy, towns never achieved political autonomy. This situation appears normal today, when mighty agglomerations like London and New York are subjected to the national government and only carry such political responsibility as the central authorities leave them. But the situation in northern Italy was the exact opposite. It was the most urbanized part of Western Europe, with large cities of 100,000 inhabitants, and it had an enfeebled royal government. Consequently the towns freed themselves from the crown and founded urban republics which followed their own policies, not infrequently entering into conflict with each other.

In Germany the decline of the monarchy allowed some cities to achieve political autonomy, the Reichsstadt or imperial cities, but others, situated in principalities with a strong government, remained subjected to the territorial state.

In France the communal movement followed the evolution of the monarchy. Initially the towns, which were numerous and important, achieved considerable freedom, as could be expected because of the weakness of the crown. But as the latter re-established itself and extended its power, thanks inter alia to the support of urban militias, the towns lost many of the privileges they had gained in a different political climate, and their autonomy was greatly restricted. The failed Parisian revolt under the leadership of Etienne Marcel (d. 1358) was a last reminder of their erstwhile political ambitions, but it had been evident since about 1300 that urban liberties were eroded by the state, and the urban magistrates reduced to the status of local cogs of the national machinery of government.

Flanders witnessed a specific development, because it combined exceptional urban growth with early modernization of the administration of the state. The chances of an Italian-style evolution were considerable, and under the captain of Ghent, James van Artevelde (d. 1345), it looked for a moment as if the county would be divided into three city-states, Ghent, Bruges and Ypres. However, the rulers of the House of Burgundy saved the monarchic principle and restored central government, even though the resistance of Ghent, after abortive revolts against Duke Philip the Good and Emperor Charles V, was not finally broken until the city capitulated to the armies of Philip II of Spain in 1584.

Late medieval constitutionalism was an important European creation, whose impact on public law is most notable in our own day: there is a direct continuity between the fundamental laws of the later Middle Ages and the Constitutions and Bills of Rights of our own world, especially as far as human rights and citizens’ freedoms are concerned. The word ‘constitution’ has several meanings. It can be applied to persons, who are said to have a weak or robust constitution. It can be applied to states, in the sense of the way they happen to be
Consequently 'constitutionalism' refers to a legal tradition based on the idea that the exercise of political power ought to be restricted by a fundamental pact between the governors and the governed, safeguarding the rights of the latter and defining the tasks and powers of the former.

The historic starting point of European constitutionalism was the increased impact of royal power on the persons and possessions of their subjects. As the latter resisted the threat of arbitrary rule, and political strife broke out, solemn charters were granted in which the rulers promised to eliminate specifically named abuses, and to treat their subjects according to the law. These types of texts, which were seen as basic pacts between the prince and his people and as guarantees of personal freedom and the rule of law, were widely known throughout Europe. The earliest appeared in northern Spain in the late twelfth century, but the most famous is the English Magna Carta of King John, issued in 1215. It deserves our special attention, not only as it is typical of the genre, but also because it played an important role in later centuries, influencing the constitutional development in England, the United States of America and the entire modern world.

King John's tyranny caused a revolt, led by the feudal barons and supported by the city of London and the Church. The king and his agents were accused of treating the subjects arbitrarily and illegally and causing damage to their persons and goods. The Magna Carta Libertatum ('Great Charter of Liberties') was granted and sealed by the king under the military pressure of the insurgents. It contained a number of precisely-worded royal promises that various recent abuses would in the future be avoided. They naturally concerned the feudal practice of the time and are therefore irrelevant in the modern world: most of them were abolished by the nineteenth-century Repeal Acts. The lasting message of the document is, however, as significant today as it was in 1215, i.e. the principle that governments are bound to operate under the law and that the subjects (in 1215 the 'freemen') are protected by the law in their persons and their goods. In other words it contains the famous common-law notion that 'nobody is above the law, be he ever so high' (with the exception, of course, of Parliament, which is not bound by any laws). It may be interesting to have a look at a few concerns of the Charter. There was, for example, an article on the feudal relief, a sort of death duty paid by the heir of a fief to the lord upon becoming his vassal and receiving the land from his hands: the Charter put an end to the arbitrary and exorbitant sums King John used to demand, and ordered the return to the traditional tariff. Other articles were aimed at arbitrary and ruinous fines and the forced remarriage - at the king's behest - of widows, who were sought after for their wealth and used to be 'sold' to the highest bidder. It is, however, Article 39 (of the 1215 version) that carried the greatest weight as one of the earliest milestones on the road to the rule of law, for it said that no free person could be punished (with imprisonment, loss of goods, banishment and so on) except by a lawful judgment of his equals or according to the law of the land: every free person was entitled to what later came to be called due process of law.

The great medieval charters of liberties were not always respected and were often merely the passing fruit of a truce in the conflict between government and opposition. Many were forgotten in the age of absolutism or regarded as medieval curiosities. This was, however, not invariably the case. Joan and Wenceslas' Joyeuse Entree was never forgotten in Brabant and when Joseph II annulled it in 1789, the result was a revolt known as the Brabantine Revolution. Moreover, the English Magna Carta was a precious source of inspiration for the parliamentary opposition against Stuart absolutism in the seventeenth century.

The rise of parliaments was roughly contemporaneous with that of Constitutions and was equally important. In general terms parliamentarianism can be defined as a form of government whereby the ruler acted in consultation with representatives of the country - some of whom at least were elected. Parliament has become a universal paradigm and very few governments operate nowadays without some contact with representatives of the people. However, if this fundamental model is universal, the variations in its actual operation are infinite.

See the considerations in L. Bastid, L'idée de constitution (Paris, 1985).


4 See the considerations in B. Lyon, 'Fact and fiction in English and Belgian constitutional law', Medievalia et Humanistica 10(1956), 82-101.
They veer between two extremes which could be defined as the watch-dog and lap-dog type. The former takes its task as freely elected representation of the people seriously and is independent and critical of the government. Members ask detailed and often annoying questions and may even withhold their confidence from a government supported by their own party, if they believe fundamental interests or rights are threatened ('backbench revolt'). The prime minister and other members of the cabinet will be questioned, and budgets ('appropriations') may be refused, thus forcing the government to give up unpopular policies. The lap-dog parliament, at the other end of the spectrum, is a sham and exists only to applaud a dictatorial government. It contains hand-picked members from the single party that is allowed. Meetings of these parliaments are few and far between and the proceedings are stage-managed, so that the question may be asked what all the fuss is about. It is nevertheless significant that the two main totalitarian regimes of the twentieth century, the Soviet Union and Nazi Germany, found it necessary to keep alive the semblance of a popular representation, respectively in the Supreme Soviet and the Reichstag. In between the two extreme types of parliament one can find various shades of subservience or independence. Even in western democracies there are parliamentary majorities which seem content to let the government get its way in all things and to pass all the laws it wants, even if they are of dubious legality and have been branded as such by courts of law. If the lists of candidates for the elections are drawn up by party headquarters, the danger is real that the resulting parliament will be largely composed of party hacks who will form a very imperfect expression of the will of the people.

The historic origins of present-day parliaments are to be found in the second half of the Middle Ages, when the old baronial *curia regis* was enlarged to include elected representatives of local - rural or urban - communities. These late medieval parliaments - also called estates, *cortes*, diet, Reichstag or *slamento* — were not only the direct precursors of the representative institutions of the present, in a few cases there exists an (almost) uninterrupted continuity between the Middle Ages and the present: the English (now British) Parliament goes directly back to the thirteenth century and the States General of the present kingdom of the Netherlands go back to the mid-fifteenth century, when Philip the Good assembled the representatives of the Burgundian Low Countries for the first time in Bruges in 1464. The matrix of those parliaments is to be found in the king's court of feudal times (hence *cortes* for parliament in Spain), where the king and feudal overlord consulted his top vassals, who owed him their *consilium*, on matters of state. Whereas these restricted meetings of the aristocracy may have been adequate and acceptable in feudal and agrarian Europe, this was no more the case when the revival of the towns and the economy in general had changed society: the *curia regis* was enlarged to include representatives of the landed gentry and the urban bourgeoisie. This extended representation was certainly not elected by the whole population: the peasant masses were almost invariably left out - but it spoke for a much broader social spectrum than the old tenants in chief. On the Continent the parliaments usually met in three chambers, the estates of the clergy, the nobility and the townspeople (third estate). In England the bicameral system prevailed. The House of Lords was the continuation of the old feudal *curia*, where the temporal and spiritual barons met, the lay and ecclesiastical great landowners. It was essentially a hereditary chamber of aristocrats, as the lay lords or peers were more numerous than the bishops and abbots. The other house was the House of Commons, where elected representatives of the gentry, i.e. the smaller landowners, and of the urban bourgeoisie sat together. There were other variations in various parts of Europe. In some countries there was a fourth estate, where representatives of the peasantry assembled. And the county of Flanders was so dominated by the main towns that the so-called Members of Flanders, containing representatives of Ghent, Bruges and Ypres (to which the Liberty of Bruges, i.e. the countryside round the town, came to be added), totally eclipsed the Estates of Flanders, who should have been the real representatives of the land.

The earliest medieval parliaments met in northern Spain in the late twelfth century, when the *curia regis* was extended to include urban representatives. All through the Middle Ages Spanish parliaments played an important role, so much so that fifteenth-century Spain was famous for the strength of its parliamentary institutions. The victory of absolutism in the sixteenth century has tended to obscure this fact and to create the false image of Spain as an essentially autocratic country. The English Parliament, which also went through an eclipse in the sixteenth century but reasserted itself in the seventeenth, goes back, as we have seen, to the middle of the thirteenth century. The first assembly of the French Estates General took place in 1302 in Paris.

Parliaments became a common European phenomenon, even
though there was some terminological confusion. Thus the same Latin root *parliamentum* produced the English word of parliament, referring essentially to a political meeting of representatives of the country, whereas in French it produced *parlement*, which referred to a higher court, composed of learned judges. The activity of the parliaments was supported by the authority of Roman law, as far as the legal theory of representation and full powers given to attorneys is concerned. Medieval lawyers had no hesitation in quoting from the *Corpus Juris Civilis* out of context. A famous example is afforded by the line from the Code (C. 5, 59, 5, 3) ‘Quod omnes tangit, ab omnibus approbetur’ (‘what concerns all should be approved by all’). The phrase seems to offer good Roman-law authority for democracy, which believes indeed that what concerns all the citizens should be approved by all of them, or at least by their spokesmen. However, upon closer inspection the passage from the Code appears not to refer to the organization of the state at all, but to tutelage, an institution of private law, and merely says that for certain acts of administration of the property of minors the consent of all the tutors is required.\(^5\)

The fate suffered by the medieval parliaments at the hands of absolute kings has varied. We have already seen what happened in Spain. In England the power of Parliament reached a provisional peak in the fifteenth century, when national legislation, for example, was in the hands of both king and Parliament. The latter continued to sit and play its old role in the sixteenth century, at least formally, but its independence and impact on political life were much reduced, as one docile parliament after another voted in laws demanded by the overpowering Tudors. Under the Stuarts it ended its relative impotence. They never forget that they were created by the crown as sounding boards and providers of funds. Their primary function was to listen to royal policy declarations, to agree to them and provide the required financial means. Slowly the parliaments broke out of this passive role and produced legal desiderata of their own, which led to their participation in legislation. They also had a judicial competence, relics of which can be detected in the judicial activity of the present House of Lords and the impeachment procedure in the Congress of the United States. It is through their control over the use of the grants they made that parliaments became actively engaged in political affairs: they discussed internal and external policies (even though kings for a long time believed that the latter were far above the understanding of the Commons and should be left to the government). They also took a lively interest in monetary problems, as these greatly affected trade. Nevertheless there was as yet no question of the modern dependence of governments on a parliamentary majority: ruling the country was the God-given task of the king, who reigned personally, and not of politicians whose authority was based on the popular will.\(^6\)

As was pointed out, the late medieval monarchy was also subjected to external limitations: it was not only not absolute, it was not sovereign either, as it recognized, at least in principle, an *auctoritas superior* (‘a higher authority’), which existed in the twofold shape of the empire and the papacy. National sovereignty became such a significant issue that it deserves more detailed scrutiny.

The western monarchies have never recognized the medieval empire as an effective supernational authority: to the French the Roman emperor was a German monarch and a neighbour whom they regarded with caution, and it was essential not to let him use his imperial title in order to interfere in France’s internal politics. Nobody denied that the imperial crown ranked above the royal, but...
the legal fiction that 'the king was an emperor in his own kingdom' effectively took the wind out of the imperial sails and prevented any patronizing attitude from the east. In northern Italy the situation was different, as the emperor was king of the regnum Italiae. His power there was admittedly to such an extent eroded by the towns that it became theoretical, but there was nevertheless a pro-imperial Ghibelline party and thinkers such as Dante in his _de Monarchia_ defended the universal monarchy. Also, the modern Italian principalities, which issued from the medieval urban republics, were held by their dukes and counts as imperial fiefs. It is in Central Europe that the empire has really enjoyed political authority even outside Germany's frontiers. Poland at times recognized German suzerainty and the kingdom of Bohemia not only became part of the empire, but its king was even one of the seven German Electors.

Papal claims to universal leadership were taken more seriously. The bishop of Rome and 'heir of St Peter' was the undisputed head of Latin Christendom. As a widely accepted and supernational authority in the Catholic world, he was, in an age of religious fervour, the obvious figure-head to satisfy the desire for western unity. This became particularly manifest after the Gregorian papacy had freed itself from imperial control and Pope Gregory VII had shown his supernational ambition by condemning and deposing Emperor Henry IV. The rise of papal theocracy from Gregory VII (_d. 1085_) to Boniface V_III_ (_d. 1303_) shows how close the Roman curia has been to the establishment of a European government above all governments. Popes launched and co-ordinated international military expeditions and called for crusades against the infidel; they acted as arbiters between the Christian kingdoms, but occasionally called one ruler to war against another who had displeased the Holy See. They also intervened in the internal politics of European nations, as when Innocent III annulled King John's Magna Carta as having been granted under duress. Several princes went so far as to transfer their countries to the Holy See and to receive them back as papal fiefs, thus becoming papal vassals. This universal leadership was based, among other things, on the theory of the two swords, which held that God had given a temporal sword, involving physical constraint, to emperors and kings, and a spiritual sword to the pope: as the heavenly sphere was higher than the earthly, so ecclesiastical was superior to worldly authority, whose mission it was to use the lay arm in order to enforce spiritual values.

The vision of a Christendom guided by the Roman curia and of crowned heads listening to the Holy Father as obedient sons was ruined in the early fourteenth century. It straddled on the growing national pride of European nations, first among them France, which was at the time of Philip IV by far the mightiest kingdom. King Philip, who rejected the universal claims of Emperor Henry VII (crowned in 1312 after an imperial vacancy of sixty years) by referring to France's special position, had previously rejected similar pretensions by Pope Boniface VIII, whom he even ordered to be arrested and against whom he prepared an indictment for heresy. If a united Europe was to be established, it had to be under French leadership and with Paris, not Rome, as its capital. King Philip radically rejected the thesis which Henry VII had defended in a circular letter addressed to the kings and rulers of the world, that all kingdoms and provinces were subjected to the Roman emperor and monarch, as in religious matters they owed obedience to God's representative on earth. Philip IV had already incurred the pope's wrath by emphasizing French sovereignty in the face of imperial claims, and provoked the pope into condemning the _superbia Gallica_ (French pride), which 'pretended to recognize no higher authority'.

French hegemony found its expression in the humiliation of Boniface VIII and the so-called 'Babylonian captivity', when the popes left Rome and resided in Avignon, then on the French border and under French influence (1309-76). In England also national feeling became more pronounced in the late Middle Ages, resulting in the rejection of the influence of the Roman curia, which was felt to constitute foreign interference and was of course finally eliminated by Henry VIII. Just as in Gregory V_II_I's day the Church had freed itself from the state the same now happened in the other direction. The emancipation of the nation states received ideological support from the writings of authors such as Marsilius of Padua (_d. 1343_), who stressed the legitimacy of the temporal order and maintained that the

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7 Similarly the English Act in Restraint of Appeals of 1533 contained the striking phrase 'This Realm of England is an Empire'. See on rex imperator in regno suo and its uses in various centuries and countries: W. Ullmann, "This Realm of England is an Empire", _Journal of Ecclesiastical History_ 30 (1979), 175-203.

6 Quotation from a speech made by Boniface VIII to a consistory in 1303: see C. N. S. Wood, _Bartolus on Saxo erralo: his position in the history of medieval political thought_ (Cambridge, 1913), 333-5.

state ought to decide freely what its aims were and how society was to be organized, without being subjected to religious considerations, which belonged to another order.\(^{10}\)

All this, however, did not change the fact that the late medieval monarchy was still deeply attached to religion. It considered the protection of the true faith as an important responsibility and never forgot the unique position anointing conferred on crowned heads. It still on the whole respected the ancient judicial and fiscal privileges of the clergy, as bishops and other clerics were still conspicuous in the councils of state.

**AN OPPRESSIVE OR A DEMOCRATIC STATE?**

Has late medieval public law produced a friendly state, governments with a human face, or tyrannical regimes which oppressed the subjects and weighed heavily upon them? It is clear in our own century that some regimes can be described as internally oppressive and externally imperialistic, whereas others are welfare-oriented and democratic on the internal level and living in peace with their neighbours. They can be described as democratic because they exist for the people and belong to them and they are dedicated to the principle of the Rechtsstaat, because their governments are under the law. Although this dichotomy may look Manichean to some readers, it is real enough and goes back a long way in European history. In fact its origin can be detected in the period under review.

Under King Philip IV of France, for example, the state showed its ugly face. Its oppressive and iniquitous character revealed itself by the prosecution — or rather persecution — of the Templars, the confiscation of their estates and the judicial murder of their leaders, who were, in a style all too familiar from certain ‘purges’ in our own century, accused of a grotesque series of religious and sexual crimes and subjected to torture. The aggressive nature of King Philip’s regime was demonstrated by his invasion of the county of Flanders, the annexation of German provinces and the brutal treatment of Pope Boniface VIII. Its basic idea was that of an almighty autocracy, ‘not bound by the laws’. This famous expression occurs in Justinian’s *Corpus Juris*: ‘princeps legibus solutus est’ (‘the prince is not bound by the laws’) (Dig. i, 3, 31). It justified the tyranny that would later invoke the *raison d’etat*. It meant that the government was not accountable to the people and was responsible to God alone. The ancient Christian idea that the state was a repressive organization unfortunately necessitated by human wickedness strengthened this attitude and accentuated its negative image, and the inhuman criminal law of the period, with its torture and horrible executions, could only worsen it. And yet, there existed in the same broad period a monarchy with a human face: that of Louis IX of France, for example, who administered justice to ordinary people under the legendary oak tree of Vincennes and, establishing an unusual truce in an age-old chain of French-English strife, reached a peaceful modus vivendi with King Henry III at the Treaty of Paris of 1259.

Leading jurists of the common law, such as Henry de Bracton (d. 1268), expressly placed the king ‘*sub Deo et sub lege*’ (‘under God and the law’). Accursius (d. 1263), a leading glossator of the *Corpus Juris Civilis*, clearly had strong reservations about the *legibus solutus* idea and suggested that the emperor was indeed obliged to obey the law, even though there was in the ancient Roman empire no person or institution empowered to sanction imperial misbehaviour. Furthermore, feudal law was based on a free contract between lord and vassal which created mutual rights and duties. This meant that every feudal lord, even of royal rank, had to fulfi l his duties, that in cases of conflict the king’s claim was submitted to a feudal court and if he went on neglecting his duties and injuring his tenants, the latter were free to denounce their allegiance. The notion that the ruler stood under the law and the jurisdiction of the courts and that he was accountable to his subjects is, for example, clearly expressed in the twelfth-century county of Flanders. Thus, Article 1 of the borough charter of Saint-Omer, granted in 1127 by Count William Clito, stipulated that the count would see to it that the judgments of the municipal law court were enforced against all men, including the count himself.” And the diary of Galbert of Bruges, containing the narrative of the *drama* events caused by the murder in 1127 of Count Charles the Good, extensively reports a speech made in Ghent in 1128 by I wain of Aalst, one of the leaders of the opposition against Count William. The speaker reproached the count for treating his subjects illegally and tyrannically and suggested that he should appear before a court of law, composed of

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\(^{10}\) See the survey by J. J. Wilks, *The problem of sovereignty in the later Middle Ages* (Cambridge, 1963).
the Peers of Flanders and responsible members of the clergy and the people, to hear their judgment; if it should appear that Count William had acted illegally, he would be deprived of his office and the people would look for a suitable successor. The idea of popular sovereignty, i.e. that the government exists for the people and not the other way round, is unmistakable. Two centuries later scholars like the aforementioned Marsilius of Padua would, with a considerable display of learning and references to Aristotle, expound the doctrine of popular sovereignty, and of royal government as the organ of the nation.

Late medieval constitutionalism shows that people had grasped the fundamental idea of the rule of law, and the same applies to the notion of democracy, at least in its indirect, parliamentary form. A word should be added about direct democracy, a typically urban fruit, and about the related notion of the urban rule of law. It is indeed within the walls of his cities and boroughs that medieval man became acquainted with direct political democracy. In the fourteenth and fifteenth centuries in particular many decisions were left to - often unruly - mass meetings instead of urban magistrates. These popular masses were often structured, in guilds and crafts for example, and were led, in Italy, by the latter's priors and the capitani del popolo. The self-ruling communes had at an early date grasped the principle that everything in public life, including acts of administration, had to follow the law, so that we could call them 'cities of law' by analogy with the 'state of law'. An early expression of this awareness can be found in the borough charter of the aforementioned town of Saint-Omer, granted by Count Thierry of Alsace in 1128, and whose Article 25 specified that, in the context of the feudal right of resistance, the Flemish barons had sworn that, if the count infringed the town customs and damaged the burghers, disregarding the judgment of their court, they would break with him and side with the townspeople until the count restored the law and accepted the pronouncement of the aldermen. The message was clear: in the town the law had to be respected even by the government of the land, and in case of conflict it was for the aldermen's court to decide, even if their judgment went against the count, whose aldermen they were.


CHAPTER 6

The classic absolutism of the Ancient Regime

GENERAL CHARACTERISTICS

In the sixteenth century Europe entered the era of classic absolutism, which for most countries lasted until the second half of the eighteenth century. The Furstenstaat ('state of the prince') of the Ancient Regime, which lasted for three centuries, was characterized by the unbridled rule of kings who were not bound by national laws, and by the sovereignty of the nation states, which were not subjected to any supranational jurisdiction. These liberated states, which chose their political course arbitrarily and in function of their own interest, became more and more menacing as their economic and military strength grew. In the twentieth century the European and world wars caused by this unfettered behaviour led at long last to the realization that unlimited sovereignty was a recipe for disaster.

On the internal level royal absolutism meant that the will of the monarch was law: he could not be bound by laws, as otherwise he would bind himself. The Roman expression princeps legibus solutus or absolutus, which we have already encountered, is the etymological origin of the term 'absolutism'. This basic principle of autocracy (from the Greek autos, self, and kratin, to dominate) was widely recognized in the sixteenth century and was supported by Roman public law and the writings of Roman-inspired political thinkers such as Jean Bodin, author of the Six livres de la republique (1576). Here republique did not stand for the republican form of government, but for the state, and the book was in fact an apology for strong monarchy.

That absolute monocracy gained the upper hand depended, however, not on the influence of scholars but on vast political changes, which temporarily eliminated its competitors or kept them in the shade.
Magna Charta Libertatum - Magna Carta
"The Great Charter"

John, by the grace of God, King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to the archbishop, bishops, abbeys, earls, barons, justiciaries, foresters, sheriffs, stewards, servants, and to all his bailiffs and liege subjects, greetings. Know that, having regard to God and for the salvation of our soul, and those of all our ancestors and heirs, and unto the honour of God and the advancement of his holy Church and for the rectifying of our realm, we have granted as underwritten by advice of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church, Henry, archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops; of Master Pandulf, subdeacon and member of the household of our lord the Pope, of brother Aymeric (master of the Knights of the Temple in England), and of the illustrious men William Marshal, earl of Pembroke, William, earl of Salisbury, William, earl of Warenne, William, earl of Arundel, Alan of Galloway (constable of Scotland), Waren Fitz Gerold, Peter Fitz Herbert, Hubert De Burgh (seneschal of Poitou), Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip d'Aubigny, Robert of Roppesley, John Marshal, John Fitz Hugh, and others, our liegemen.

1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English Church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

2. If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be full of age and owe "relief", he shall have his inheritance by the old relief, to wit, the heir or heirs of an earl, for the whole barony of an earl by £100; the heir or heirs of a baron, £100 for a whole barony; the heir or heirs of a knight, 100 shillings, at most, and whoever owes less let him give less, according to the ancient custom of fees.

3. If, however, the heir of any one of the aforesaid has been under age and in wardship, let him have his inheritance without relief and without fine when he comes of age.
4. The guardian of the land of an heir who is thus under age, shall take from the land of the heir nothing but reasonable produce, reasonable customs, and reasonable services, and that without destruction or waste of men or goods; and if we have committed the wardship of the lands of any such minor to the sheriff, or to any other who is responsible to us for its issues, and he has made destruction or waster of what he holds in wardship, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall be responsible for the issues to us or to him to whom we shall assign them; and if we have given or sold the wardship of any such land to anyone and he has therein made destruction or waste, he shall lose that wardship, and it shall be transferred to two lawful and discreet men of that fief, who shall be responsible to us in like manner as aforesaid.

5. The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, fishponds, stanks, mills, and other things pertaining to the land, out of the issues of the same land; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and wainage, according as the season of husbandry shall require, and the issues of the land can reasonable bear.

6. Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.

7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

9. Neither we nor our bailiffs will seize any land or rent for any debt, as long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.

10. If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond.
11. And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessaries shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews.

12. Neither scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

13. And the city of London shall have all its ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

14. And for obtaining the common counsel of the kingdom and the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moveover cause to be summoned generally, through our sheriffs and bailiffs, and others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, even if not all who were summoned have come.

15. We will not for the future grant to anyone license to take an aid from his own free tenants, except to ransom his person, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

16. No one shall be distrained for performance of greater service for a knight's fee, or for any other free tenement, than is due therefrom.

17. Common pleas shall not follow our court, but shall be held in some fixed place.

18. Inquests of novel disseisin, of mort d'ancestor, and of darrein presentment shall not be held elsewhere than in their own county courts, and that in manner following: We, or, if we should be out of the realm, our chief justiciar, will send two justiciaries through every county four times a year, who shall alone with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.

19. And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders, who were present at the county court on that
day, as many as may be required for the efficient making of judgments, according as the business be more or less.

20. A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contentment"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.

21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offense.

22. A clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.

23. No village or individual shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.

24. No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown.

25. All counties, hundred, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.

26. If anyone holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed us, it shall be lawful for our sheriff or bailiff to attach and enroll the chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of law worthy men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfill the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.

27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the Church, saving to every one the debts which the deceased owed to him.

28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

29. No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.
30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

32. We will not retain beyond one year and one day, the lands those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.

33. All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore.

34. The writ which is called praecipe shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court.

35. Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ells within the selvedges; of weights also let it be as of measures.

36. Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied.

37. If anyone holds of us by fee-farm, either by socage or by burgage, or of any other land by knight's service, we will not (by reason of that fee-farm, socage, or burgage), have the wardship of the heir, or of such land of his as if of the fief of that other; nor shall we have wardship of that fee-farm, socage, or burgage, unless such fee-farm owes knight's service. We will not by reason of any small serjeancy which anyone may hold of us by the service of rendering to us knives, arrows, or the like, have wardship of his heir or of the land which he holds of another lord by knight's service.

38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law" without credible witnesses brought for this purposes.

39. No freeman shall be taken captive or imprisoned, or deprived of his lands, or outlawed, or exiled, or in any way destroyed, nor will we go with force against him nor send forces against him, except by the lawful judgment of his peers or by the law of the land.

40. We will not sell, nor will we deny or delay, right or justice.

41. All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies.
or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

42. It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as if above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy- reserving always the allegiance due to us.

43. If anyone holding of some escheat (such as the honor of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall give no other relief, and perform no other service to us than he would have done to the baron if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it.

44. Men who dwell without the forest need not henceforth come before our justiciaries of the forest upon a general summons, unless they are in plea, or sureties of one or more, who are attached for the forest.

45. We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.

46. All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long continued possession, shall have the wardship of them, when vacant, as they ought to have.

47. All forests that have been made such in our time shall forthwith be disafforsted; and a similar course shall be followed with regard to river banks that have been placed "in defense" by us in our time.

48. All evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river banks and their wardens, shall immediately be inquired into in each county by twelve sworn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, be utterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

49. We will immediately restore all hostages and charters delivered to us by Englishmen, as sureties of the peace of faithful service.

50. We will entirely remove from their bailiwicks, the relations of Gerard of Athee (so that in future they shall have no bailiwick in England); namely, Engelard of Cigogne, Peter, Guy, and Andrew of Chanceaux, Guy of Cigogne, Geoffrey of Martigny with his brothers, Philip Mark with his brothers and his nephew Geoffrey, and the whole brood of the same.
51. As soon as peace is restored, we will banish from the kingdom all foreign born knights, crossbowmen, serjeants, and mercenary soldiers who have come with horses and arms to the kingdom’s hurt.

52. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five and twenty barons of whom mention is made below in the clause for securing the peace. Moreover, for all those possessions, from which anyone has, without the lawful judgment of his peers, been disseised or removed, by our father, King Henry, or by our brother, King Richard, and which we retain in our hand (or which as possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from the expedition, we will immediately grant full justice therein.

53. We shall have, moreover, the same respite and in the same manner in rendering justice concerning the disafforestation or retention of those forests which Henry our father and Richard our brother afforested, and concerning the wardship of lands which are of the fief of another (namely, such wardships as we have hitherto had by reason of a fief which anyone held of us by knight's service), and concerning abbeys founded on other fiefs than our own, in which the lord of the fee claims to have right; and when we have returned, or if we desist from our expedition, we will immediately grant full justice to all who complain of such things.

54. No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.

55. All fines made with us unjustly and against the law of the land, and all amercements, imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall be done concerning them according to the decision of the five and twenty barons whom mention is made below in the clause for securing the peace, or according to the judgment of the majority of the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and such others as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him, provided always that if any one or more of the aforesaid five and twenty barons are in a similar suit, they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by the rest of the same five and twenty for this purpose only, and after having been sworn.

56. If we have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers; for the tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for
tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

57. Further, for all those possessions from which any Welshman has, without the lawful judgment of his peers, been disseised or removed by King Henry our father, or King Richard our brother, and which we retain in our hand (or which are possessed by others, and which we ought to warrant), we will have respite until the usual term of crusaders; excepting those things about which a plea has been raised or an inquest made by our order before we took the cross; but as soon as we return (or if perchance we desist from our expedition), we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the foresaid regions.

58. We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

59. We will do towards Alexander, king of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our owher barons of England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly king of Scots; and this shall be according to the judgment of his peers in our court.

60. Moreover, all these aforesaid customs and liberties, the observances of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five and twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offense be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five and twenty barons, and those five and twenty barons shall, together with the community of the whole realm, distract and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they
can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us. And let whoever in the country desires it, swear to obey the orders of the said five and twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to everyone who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid. And if any one of the five and twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is entrusted, to these twenty five barons, if perchance these twenty five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty five had concurred in this; and the said twenty five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such things has been procured, let it be void and null, and we shall never use it personally or by another.

62. And all the will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone. Moreover, all trespasses occasioned by the said quarrel, from Easter in the sixteenth year of our reign till the restoration of peace, we have fully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And on this head, we have caused to be made for them letters testimonial patent of the lord Stephen, archbishop of Canterbury, of the lord Henry, archbishop of Dublin, of the bishops aforesaid, and of Master Pandulf as touching this security and the concessions aforesaid.

63. Wherefore we will and firmly order that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places forever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent. Given under our hand - the above named and many others being witnesses - in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.
NOTES

NOTE ON EFFECTIVENESS OF CLAUSES

Please see the notes on the source and the acknowledgements after the text. This version has been entirely repealed, but clauses 1, 13, and 39 still survive in the 1297 reissue.

SOURCE OF TEXT

Retrieved from "http://en.wikisource.org/wiki/Magna_Carta"

NOTES FROM TRANSLATOR

Source for this Translation

This is but one of three different translations I found of the Magna Carta; it was originally done in Latin, probably by the Archbishop, Stephen Langton. It was in force for only a few months, when it was violated by the king. Just over a year later, with no resolution to the war, the king died, being succeeded by his 9-year old son, Henry III. The Charter (Carta) was reissued again, with some revisions, in 1216, 1217 and 1225. As near as I can tell, the version presented here is the one that preceded all of the others; nearly all of its provisions were soon superseded by other laws, and none of it is effective today. The two other versions I found each professed to be the original, as well. The basic intent of each is the same.

Gerald Murphy (The Cleveland Free-Net - aa300)

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